
**COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE**

January 4, 2024

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2024 | Austin, TX**

AGENDA

1. Opening Business

- A. Welcome and Opening Remarks – Judge John D. Bates, Chair
- B. **ACTION:** The Committee will be asked to approve the minutes of the June 2023 Committee meeting.
- C. Status of Rules Amendments
 - Report on proposed rules amendments approved by the Judicial Conference and transmitted to the Supreme Court on October 23, 2023 (potential effective date of December 1, 2024).
- D. Federal Judicial Center Research Projects

2. Joint Committee Business

- A. Information Items
 - Report from joint subcommittee on attorney admission.
 - Report on pro se electronic filing project.
 - Report on the presumptive deadline for electronic filing.
 - Report on redaction of social-security numbers.
 - Update on 2024 report to Congress on the adequacy of the privacy rules.

3. Report of the Advisory Committee on Appellate Rules – Judge Jay S. Bybee, Chair

- A. Information Items
 - Report on consideration of possible amendment to Rule 29 (Brief of an Amicus Curiae) regarding amicus disclosures.
 - Report on consideration of possible amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).
 - Report on consideration of suggestions regarding intervention on appeal.
 - Report on suggestions regarding third-party litigation funding.
 - Report on suggestion regarding social security numbers in court filings.
 - Report on items removed from the Advisory Committee’s agenda.

**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2024 | Austin, TX**

4. Report of the Advisory Committee on Bankruptcy Rules – Judge Rebecca B. Connelly, Chair

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

- Proposed amendment to Rule 1007(h) (Lists, Schedules, Statements, and Other Documents; Time Limits) regarding acquisition of property after the petition date.
- Proposed amendment to Rule 3018(c) (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) regarding the method of voting in Chapter 9 and 11 cases.
- Proposed amendment to Official Form 410S1 (Proof of Claim, Supplement 1).

B. Information Items

- Report on reconsideration of proposed Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor’s Principal Residence) sanctions provision.
- Report on suggestion to require complete redaction of social-security numbers in filed documents.
- Report on suggestion to eliminate the requirement that all notices given under Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee) comply with the caption requirements in Rule 1005 (Caption of Petition).
- Report on suggestion from the National Bankruptcy Conference concerning remote testimony in Contested Matters.
- Report on consideration of proposed amendments to Director’s Form 1340 (Application for Payment of Unclaimed Funds).
- Report on suggestion regarding contempt proceedings.

5. Report of the Advisory Committee on Civil Rules – Judge Robin L. Rosenberg, Chair

A. Information Items

- Report on consideration of possible amendment to Rule 41 (Dismissal of Actions).
- Report on work of the Discovery Subcommittee, including proposals to amend Rule 45 (Subpoena), to address filing under seal, and to address cross-border discovery.
- Report on consideration of suggestions to amend Rule 7.1 (Disclosure Statement).

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

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- Report on discussion of Bankruptcy Rules Committee’s consideration of a suggestion to permit remote testimony in contested matters.
- Report on other items considered and retained on the Advisory Committee’s agenda, including a suggestion regarding random case assignment and suggestions to amend Rule 81(c) (Applicability of the Rules in General; Removed Actions), Rule 62(b) (Stay of Proceedings to Enforce a Judgment), and Rule 54(d)(2)(B) (Judgment; Costs).
- Report on items considered and removed from the Advisory Committee’s agenda, including suggestions to amend Rule 26(a)(1) (Duty to Disclose; General Provisions Governing Discovery), Rule 60(b)(1) (Relief from a Judgment or Order), Rule 30(b)(6) (Depositions by Oral Examination), Rule 11 (Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions), Rule 53 (Masters), Rule 10 (Form of Pleadings), and a proposed new rule on contempt.

6. Report of the Advisory Committee on Criminal Rules – Judge James C. Dever III, Chair

A. Information Items

- Report on consideration of possible amendment to Rule 17 (Subpoena).
- Report on consideration of possible amendment to Rule 23 (Jury or Nonjury Trial) and decision to take no action.
- Report on consideration of possible amendment to Rule 53 (Courtroom Photographing and Broadcasting Prohibited).

7. Report of the Advisory Committee on Evidence Rules – Judge Patrick J. Schiltz, Chair

A. Information Items

- Report on presentations by law professors on suggestions for changes to the Evidence Rules.
- Report on presentation by Judge Paul Grimm and Professor Maura Grossman on artificial intelligence and deepfakes.
- Report on consideration of possible amendments to Rule 801(d)(1) (Definitions That Apply to This Article; Exclusions from Hearsay) regarding prior statements of testifying witnesses as hearsay.
- Report on consideration of possible amendments to Rule 803(4) (Exception to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness) regarding statements made to doctors for purposes of litigation.

**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2024 | Austin, TX**

8. Other Committee Business

- A. Legislative Update.
- B. **ACTION:** Strategic Planning. This agenda item invites committees to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs.
- C. Next Meeting – June 4, 2024.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure (Standing Committee)

Chair

Honorable John D. Bates
United States District Court
Washington, DC

Reporter

Professor Catherine T. Struve
University of Pennsylvania Law School
Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Washington, DC

Advisory Committee on Appellate Rules

Chair

Honorable Jay S. Bybee
United States Court of Appeals
Las Vegas, NV

Reporter

Professor Edward Hartnett
Seton Hall University School of Law
Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair

Honorable Rebecca B. Connelly
United States Bankruptcy Court
Harrisonburg, VA

Reporter

Professor S. Elizabeth Gibson
University of North Carolina at Chapel Hill
Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Civil Rules

Chair

Honorable Robin L. Rosenberg
United States District Court
West Palm Beach, FL

Reporter

Professor Richard L. Marcus
University of California
Hastings College of the Law
San Francisco, CA

Associate Reporter

Professor Andrew Bradt
University of California, Berkeley
Berkeley, CA

Advisory Committee on Criminal Rules

Chair

Honorable James C. Dever III
United States District Court
Raleigh, NC

Reporter

Professor Sara Sun Beale
Duke University School of Law
Durham, NC

Associate Reporter

Professor Nancy J. King
Vanderbilt University Law School
Nashville, TN

Advisory Committee on Evidence Rules

Chair

Honorable Patrick J. Schiltz
United States District Court
Minneapolis, MN

Reporter

Professor Daniel J. Capra
Fordham University School of Law
New York, NY

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)**

Chair	Reporter
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Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA
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Members	
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Honorable Paul J. Barbadoro United States District Court Concord, NH	Elizabeth J. Cabraser, Esq. Lief Cabraser Heimann & Bernstein, LLP San Francisco, CA
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Louis A. Chaiten, Esq. Jones Day Cleveland, OH	Honorable William J. Kayatta, Jr. United States Court of Appeals Portland, ME
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Honorable Edward M. Mansfield Iowa Supreme Court Des Moines, IA	Dean Troy A. McKenzie New York University School of Law New York, NY
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Honorable Patricia A. Millett United States Court of Appeals Washington, DC	Honorable Lisa O. Monaco Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
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Andrew J. Pincus, Esq. Mayer Brown LLP Washington, DC	Honorable Gene E.K. Pratter United States District Court Philadelphia, PA
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Honorable D. Brooks Smith United States Court of Appeals Duncansville, PA	Kosta Stojilkovic, Esq. Wilkinson Stekloff LLP Washington, DC
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Honorable Jennifer G. Zipp United States District Court Tucson, AZ	
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Consultants	
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Professor Daniel R. Coquillette Boston College Law School Newton Centre, MA	Professor Bryan A. Garner LawProse, Inc. Dallas, TX
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**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)**

Consultants (continued)

Professor Joseph Kimble
Thomas M. Cooley Law School
Lansing, MI

Joseph F. Spaniol, Jr., Esq.
Bethesda, MD

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Washington, DC

Committee on Rules of Practice and Procedure

Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D	District of Columbia	Member: 2020 Chair: 2020	---- 2024
Paul Barbadoro	D	New Hampshire	2023	2025
Elizabeth J. Cabraser	ESQ	California	2021	2024
Louis A. Chaiten	ESQ	Ohio	2023	2026
William J. Kayatta, Jr.	C	First Circuit	2018	2024
Edward M. Mansfield	JUST	Iowa	2023	2026
Troy A. McKenzie	ACAD	New York	2021	2024
Patricia Ann Millett	C	DC Circuit	2020	2025
Lisa O. Monaco*	DOJ	Washington, DC	----	Open
Andrew J. Pincus	ESQ	Washington, DC	2022	2025
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2019	2025
D. Brooks Smith	C	Third Circuit	2022	2025
Kosta Stojilkovic	ESQ	Washington, DC	2019	2025
Jennifer G. Zipp	D	Arizona	2019	2025
Catherine T. Struve Reporter	ACAD	Pennsylvania	2019	2026

Secretary and Principal Staff: H. Thomas Byron III, 202-502-1820

* Ex-officio - Deputy Attorney General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	<p>Andrew J. Pincus, Esq. <i>(Standing)</i></p> <p>Hon. Daniel A. Bress <i>(Bankruptcy)</i></p>
Liaison for the Advisory Committee on Bankruptcy Rules	<p>Hon. William J. Kayatta, Jr. <i>(Standing)</i></p>
Liaisons for the Advisory Committee on Civil Rules	<p>Hon. D. Brooks Smith <i>(Standing)</i></p> <p>Hon. Catherine P. McEwen <i>(Bankruptcy)</i></p>
Liaison for the Advisory Committee on Criminal Rules	<p>Hon. Paul J. Barbadoro <i>(Standing)</i></p>
Liaisons for the Advisory Committee on Evidence Rules	<p>Hon. Robert J. Conrad, Jr. <i>(Criminal)</i></p> <p>Hon. Edward M. Mansfield <i>(Standing)</i></p> <p>Hon. M. Hannah Lauck <i>(Civil)</i></p>

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Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

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Senior Research Associate
(Standing)

TAB 1

TAB 1A

Welcome and Opening Remarks

Item 1A will be an oral report.

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 6, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) met in a hybrid in-person and virtual session in Washington, D.C., on June 6, 2023. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie

Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Judge D. Brooks Smith
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 Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate
Reporter

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

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

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

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee’s Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Demetrius Apostolis, Rules Committee Staff Intern; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director, Federal Judicial Center (“FJC”); and Dr. Tim Reagan, Senior Research Associate, FJC.

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

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed members of the public who were attending in person. He also welcomed new Standing Committee member Judge Paul Barbadoro and bade farewell to two members soon to depart the committee, Robert Giuffra and Judge Carolyn Kuhl. Judge Kuhl and Mr. Giuffra gave brief departing comments, and Judge Bates thanked them for their service.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2023, meeting.**

Judge Bates remarked that a chart tracking the status of rules amendments commenced on page 52 of the agenda book. Mr. Thomas Byron, Secretary of the Standing Committee, noted that the latest set of proposed rule amendments had been transmitted from the Supreme Court to Congress in April.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Catherine Struve reported on this item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Professor Struve recalled that this project had benefited from discussions in the advisory committees, from which important questions arose about the practical logistics of electronic access to the courts. Armed with those questions, she and Dr. Tim Reagan of the FJC held conversations with 17 court personnel in nine districts that had broadened electronic access for self-represented litigants. Professor Struve expressed appreciation for Dr. Reagan's expert guidance concerning these inquiries.

One of their primary areas of inquiry was whether there is any reason to require traditional service by a self-represented litigant on other litigants who already receive notices of electronic filing ("NEFs"). Among the districts whose personnel they interviewed, seven districts exempt self-represented litigants from making such traditional service on CM/ECF participants: the District of Arizona, the Northern District of Illinois, the Western District of Missouri, the Southern District of New York, the Western District of Pennsylvania, the District of South Carolina, and the District of Utah.

In those districts, exempting self-represented litigants from paper service added no burden on the courts' clerk's offices. When self-represented litigants file non-electronically, the clerk's offices already scan those paper filings and upload them to CM/ECF. There are some exceptions to the exemption from making traditional service; notably, filings under seal that are not available to other litigants via CM/ECF must be served on the other litigants by traditional means, but in those circumstances the courts require paper service by anyone making such a sealed filing. That would be true for either a self-represented litigant or a CM/ECF participant.

Professor Struve observed that the exemption from making traditional service exists only when the recipient is receiving NEFs (because they are enrolled either in CM/ECF or in a court-

provided electronic-noticing system). A self-represented litigant who does not receive NEFs will need to be served by traditional means. A filer who is receiving NEFs will learn from the NEF who, if anyone, must be served by traditional means. But if a paper filer is not receiving NEFs, one must ask how that filer will know whether any other litigants in the case are also not receiving NEFs. The universal answer from court personnel was that it just is not an issue.

She thought that this question would likely be an issue only in a vanishingly small number of cases—in part because there would need to be multiple self-represented litigants in the case. She also believes there are ways to craft an exemption from the traditional service requirement to take care of that situation and to ensure that anybody who needs traditional service does get it without burdening non-CM/ECF-filing self-represented litigants with superfluous paper service. She plans to convene a Zoom working-group meeting over the summer to discuss a potential amendment about an exemption from service.

Interviewees were also asked whether and how self-represented litigants obtain access to CM/ECF. About six or seven of the districts covered in the interviews offer some degree of access to CM/ECF for self-represented litigants. At least two of those districts do not require any special permission from the court, and the other districts allow it with court permission. Interviewees from those districts identified a number of benefits from providing that access. It decreased the number of paper filings, saved the court time from scanning documents, avoided the need to have the court serve orders in paper, and averted disputes about what was actually filed and whether a filing had all its pages. There were some reports of burdens as well as notes about the need to make sure there is adequate staffing for technical support and training. There were also some interesting anecdotes about how the courts deal with inappropriate filings. But overall, the report from these districts was positive. As one respondent put it, the benefits outweigh the risks.

Professor Struve further reported that courts are experimenting with increasing electronic access by disaggregating the elements of access via CM/ECF and providing them “à la carte.” For example, some courts permit other means of electronic submission through upload or through email, and interviewees from those courts listed a number of benefits from those programs. One prominent benefit was not having to scan paper filings. She noted that many of the respondent districts also provided their own electronic-noticing systems, which benefited the courts because the recipients of NEFs no longer need to receive paper copies of court orders.

Electronic-Filing Deadline

Judge Bates reported on this item.

Judge Michael Chagares, currently the Chief Judge of the Third Circuit, first raised this suggestion some years ago in his capacity as Chair of the Appellate Rules Committee. The suggestion was to change the presumptive electronic-filing deadline set by the time-counting rules to a time earlier than midnight. The objective was to promote a positive work environment for young associates who were working until midnight to get court filings done. A joint subcommittee considered this suggestion, but it did not take any action at the time.

Recently, the Third Circuit adopted a local rule making the filing deadline earlier in the day. The Standing Committee has therefore referred the matter back to the joint subcommittee,

which needs to be recomposed. The joint committee will re-examine the issue and decide whether to propose a rules amendment or perhaps whether it might be better to let the experiment in the Third Circuit run its course for a couple of years to see how things go.

A judge member noted that the Third Circuit's new local rule has elicited an almost entirely negative reaction from members of the bar. A practitioner member argued that this rule change, though well-intentioned, would not make people's lives better. Moving the deadline earlier will simply ruin the night before. Setting the deadline at five o'clock will really wreak havoc for many practitioners. Moreover, even if this deadline is not so bad for appellate lawyers—whose briefing schedule is more predictable and who are not engaged in fact development—it would play out differently in the district courts.

District-Court Bar Admission Rules

Judge Bates reported on this item. Several of the advisory committees received a proposal from Alan Morrison and others on a unified bar-admission rule. The proposal would make admission to one federal district court good for all federal district courts. It would also centralize the disciplinary process that goes along with court admissions.

A joint subcommittee has been formed with representatives from the Advisory Committees on Civil, Criminal, and Bankruptcy Rules to review the proposal over the course of the next year or two. That review may also require some work by the FJC. Professors Struve and Andrew Bradt will be the reporters for the joint subcommittee. Judge Bates thanked them and the members of the joint subcommittee for their work.

An academic member commented that a similar proposal had come up in the past and had a very fraught life. A consultant agreed with the academic member's remarks. A previous proposal had managed to unify all the local and state bar associations in America against it.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Jay Bybee and Professor Edward Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in West Palm Beach, Florida, on March 29, 2023. The advisory committee presented three action items and two information items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 70.

Action Items

Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) and Conforming Changes to Rule 32 (Form of Briefs, Appendices, and Other Papers) and the Appendix of Length Limits. Judge Bybee introduced this item. The advisory committee sought final approval of these proposed amendments, which appeared starting on page 103 of the agenda book.

The advisory committee had received a handful of public comments, which were listed in pages 72–75 of the agenda book. The advisory committee did not recommend any changes in response to those comments.

The proposal consolidates Rule 35 into Rule 40. It does not make any substantive changes to the basis for seeking rehearing from the panel or rehearing en banc. The proposal tries to simplify and clarify the rules, particularly in response to several comments received about the multitude of pro se filings.

A judge member agreed with the rule’s statement that rehearing en banc is disfavored. The member asked for additional background on that language. Judge Bybee noted that the language was already in the rule; the proposal did not add it. The judge member observed that some of the public comments had disagreed with that language. Professor Hartnett responded that the advisory committee had been unmoved by those comments because they were at such odds with the usual, uncontroversial practice in the courts of appeals.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 32, 35, and 40 and the Appendix of Length Limits.**

Amendment to Rule 39 (Costs). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 149 of the agenda book.

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court invited the advisory committee to clarify what costs are recoverable on appeal and who has the responsibility for allocating those costs. This proposed amendment does so. It makes a change in nomenclature by clarifying the distinction between “allocating” costs and “taxing” costs. “Allocating” means deciding who is going to pay, and “taxing” means deciding how much is going to be paid. The responsibility for taxing is divided, under the rules, between the district courts and the courts of appeals. The proposed amendment also clarifies the procedure for asking the court of appeals to reconsider the question of allocation.

A question not addressed by the proposed rule is what to do about requiring disclosure of the costs associated with a supersedeas bond, which was the context for *Hotels.com*. In that case, there was a very large bond, whose costs were shifted from one party to the other after the case was over. It was possible that the party that had not sought the bond was going to end up with significant costs that it may not have anticipated.

As the advisory committee considered this rule, it could not come up with a good mechanism within the appellate rules for ensuring that disclosure, so the proposed amendment does not address it. It is fairly rare, but when it does come up, it can be a serious problem, so the advisory committee recommended that the Civil Rules Committee consider whether an amendment to Civil Rule 62 might address disclosure.

An academic member asked whether any thought had been given to whether the change in terminology (“allocating” versus “taxing”) might cause confusion. Judge Bybee reported that the advisory committee had carefully considered potential transition costs and had concluded that clarifying the terminology is worthwhile.

A judge member expressed concern that the phrasing “allocated against” (e.g., “if an appeal is dismissed, costs are allocated against the appellant”) did not sound right. A style consultant

agreed, saying that the usual expression would be “allocated to.” Professor Hartnett responded that “against” is in the existing language (e.g., “costs are taxed against the appellant”), and he explained that the advisory committee wanted to make clear who is on the hook to pay. Allocating something “to” someone might suggest that that person is receiving money rather than having to pay it. Judge Bybee agreed, and he suggested that if the public comments push back against the phrasing, the advisory committee could look for an alternative.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 39 for public comment.**

Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 128 of the agenda book.

Judge Bybee explained that appeals from the bankruptcy court generally go either to the district court or to the bankruptcy appellate panel (“BAP”) in those circuits that have established one. But under 28 U.S.C. § 158(d)(2), a party may instead petition for direct review by the court of appeals.

Judge Bybee turned first to the proposed amendment to Rule 6(a), governing direct appeals from a district court exercising original jurisdiction in a bankruptcy matter. He drew attention to an important difference between bankruptcy appeals practice and ordinary civil appeals practice – namely, that the bankruptcy rules set a markedly shorter deadline (14 days instead of 28 days) for certain postjudgment motions that reset the appeal time. The proposed amendment to Rule 6(a) provides fair warning that the bankruptcy rules govern. The proposed committee note also provides a chart setting out relevant Bankruptcy Rules and applicable motion deadlines.

Judge Bybee next highlighted the proposed amendment to Rule 6(c), which governs permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Alluding to the fact that current Rule 6(c)(1) renders most of Rule 5 applicable to such appeals, Judge Bybee stated that Rule 5 did not fit this context very well. Instead, the advisory committee proposes amending Rule 6(c) to address petitions for review in the court of appeals. The changes are fairly extensive. The advisory committee had a subcommittee with specialists in bankruptcy appellate work who have carefully reviewed the proposal.

The representatives of the Bankruptcy Rules Committee said that they supported the proposal.

Professor Struve thought the proposal would helpfully address some real difficulties and complexities. She thanked the Appellate Rules Committee chair and reporter and also their colleagues on the Bankruptcy Rules Committee for their superb work. Judge Bates echoed that sentiment.

Judge Bates asked why the proposed amendments would change “bankruptcy case” to “bankruptcy case or proceeding” and whether that change should be explained in the committee note. Professor Hartnett responded that the advisory committee wanted to ensure that the rule would cover appeals from both bankruptcy cases and adversary proceedings within those cases.

He suggested that the proposed committee note’s reference to “clarifying changes” encompassed this feature of the proposed amendments.

Judge Bates then asked whether the phrase “motions under the applicable Federal Rule of Bankruptcy Procedure” in proposed Rule 6(a) should say “Rules” because motions may be made under more than one rule. Professor Hartnett deferred to the style consultants on that, and the change was made.

An academic member asked whether the advisory committee had discussed and decided to endorse the First Circuit’s position in *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 83 (1st Cir. 2021) (holding that “the Bankruptcy Rules”—including their shorter postjudgment motion deadlines and the implications of those deadlines for resetting appeal time—“apply to non-core, ‘related to’ cases adjudicated in federal district courts under section 1334(b)’s ‘related to’ jurisdiction”). Professor Hartnett responded that, leaving aside whether that case was correctly decided under the current rules, the advisory committee had been informed by bankruptcy specialists that the First Circuit reached the right outcome, so the advisory committee wanted to make that position explicit in the rule going forward.

Professor Hartnett noted one edit: in the committee note to subdivision (b), removing “(D)” in the sentence “Stylistic changes are made to subdivision (b)(2)(D),” on page 90, line 209, of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 6 for public comment with the above-noted changes to the text of subdivision (a) (“Rules”) and the committee note to subdivision (b).**

Information Items

Amicus Disclosures. Judge Bybee reported on this item. The advisory committee again sought advice from the Standing Committee. The feedback received at the Standing Committee’s January 2023 meeting was helpful. The proposal was still a working draft and not yet ready for the Standing Committee’s full consideration.

On behalf of the advisory committee, Judge Bybee posed two questions for the Standing Committee. The first question related to draft Rule 29(b)(4) on page 99 of the agenda book. The draft rule required disclosure of any party, counsel, or combination of parties and counsel who contributed 25% or more of the gross annual revenue of an amicus filer in the prior 12-month period. At the January discussion, the Standing Committee asked whether the advisory committee should use a lookback period of the last 12-month period or the prior calendar year. Contrary to what appeared to be the Standing Committee’s sentiments in January, the advisory committee believed that the prior 12-month lookback period works better because, although using the calendar year would be easier, disclosure could also be more easily avoided using a calendar year.

The second question related to draft Rule 29(d), governing disclosure of relationships between *nonparties* and an amicus filer. The advisory committee drafted two alternatives, labeled alpha and beta. Option alpha would require an amicus to disclose a contribution by anyone, including a member of an amicus organization, of over \$10,000 that was earmarked for the

preparation of an amicus brief. Option beta would carry forward the existing rule, which requires disclosure of a contribution of earmarked funds but exempts contributions by members of the amicus. The thinking behind option alpha is that option beta makes it too easy to evade disclosure—someone who wants to fund an amicus brief need only become a member of the amicus group. In exchange, the floor for requiring disclosure of a contribution is increased to \$10,000 under option alpha. That amount avoids requiring disclosure for a brief crowdfunded by many small contributions.

A practitioner member supported the advisory committee’s rationale for the 12-month lookback period. The member also suggested that another option might be to require disclosure of contributions made *either* in the year the brief is filed or the year immediately prior. That way, the amicus could look at annual figures instead of having to create a new lookback window for each brief. Judge Bates asked whether that proposal would make the process of checking and making disclosures overly complicated. Professors Beale and Hartnett raised the question of what the right denominator for calculating the fraction of revenue contributed would be. Professor Bartell suggested using the entire period beginning January 1 of the calendar year before the date of filing.

A judge member preferred option alpha because option beta allowed someone to join an amicus and make a substantial contribution without disclosure being required.

Another judge member wondered whether trade associations keep clear demarcations of funds that are going to amicus work as opposed to general activities and how a donor would know to which of those uses its donations were directed. The member also thought that \$10,000 in option alpha was a very high number. The member could understand not wanting to capture small amounts from crowdfunding, but why not a \$5,000 or \$7,500 floor?

On the first point, Professor Hartnett responded that the subdivision (b)(4) exception hinged more on the phrase “received in the form of investments or in commercial transactions in the ordinary course of business” than on the phrase “unrelated to the amicus curiae’s amicus activities.” A trade association’s members’ contributions are not generally thought of as investments or commercial transactions in the ordinary course of business.

As to the second point, the advisory committee had not settled on \$10,000—that amount was set forth in brackets, along with \$1,000 as another bracketed alternative. Advisory committee members who supported using \$10,000 argued that, once the contribution reaches that number, the contributor is very likely to be driving the effort or at least to have a significant hand in it. Instead of funding coming from a broad membership base, it is coming from a small number of people who may not be representative of the entire membership. Some alternatives, such as a percentage of the cost of the brief, were also considered, but they were considered too difficult to implement.

The judge member again indicated a preference for a lower floor, something like \$5,000 or \$7,500, in case a small number of entities are pooling resources to be a collective driving force behind the brief. The member was also unsure what counted as a commercial transaction in the ordinary course of business. Funds could go into an entity, on a routine basis, to fund all of its activities, including the activities of its general counsel. The member was concerned that there would not be an administrable distinction between money to fund an amicus brief and money to fund the amicus’s legal office.

Judge Bates remarked that the goal should be a rule that is clear to those subject to it. If it is unclear what funds do or do not trigger disclosure, the advisory committee should continue to talk about that.

A practitioner member thought that over-regulation of this area would be a big mistake. The committee seemed to be bringing into the realm of amicus briefs concepts that applied instead to lobbying a legislature. The best form of amicus-brief regulation is the discretion of Article III judges to read them or not read them. The advisory committee also ought to talk with at least the big trade associations to see whether the proposed requirements are feasible and how complicated it would be to implement them. And the proposed requirements will hurt smaller organizations.

The member asserted that proposed Rules 29(d) and (e) were a mistake. For example, lawyers who write amicus briefs for big trade associations do so for free or for a discounted amount—say, \$5,000, \$10,000, or maybe \$20,000. They work on these briefs to be able to say that their work influenced a Supreme Court decision.

Judge Bybee asked the member to clarify whether the member was opposed to the beta alternative version of Rule 29(d), which tracked what is already in the current rule. The member responded that it was fine if it was already there, but the member would not try to set dollar or percentage thresholds.

Another practitioner member argued that proposed (b)(4) addressed a real concern—that is, situations in which big players in an amicus control its filings. As to the exception in proposed (b)(4), the member read it to exclude ordinary commercial transactions between the trade association and its members, such as renting space. If that reading is wrong, the member would view that as a problem.

As to (d), the practitioner member thought option alpha was both over- and underinclusive. A big problem with alpha was that it permitted nonmembers to contribute anything below \$10,000 without triggering disclosure. The member thought that the concern was about background players who orchestrate large amicus campaigns by donating to many different organizations. The key control existing today (and in option beta) is that the organization can be seen as credibly speaking for its members—if a nonmember makes a contribution, the nonmember has to be disclosed.

The practitioner member said, though, that he is skeptical of tying disclosure requirements to contributions that are earmarked for a particular brief. Large organizations with large budgets will allocate a portion of annual dues to amicus briefs in general; no funds will ever be targeted to a single brief, so no disclosure will need to be made. Smaller groups or groups that do not regularly file amicus briefs probably will not have an allocation for those briefs in their budgets. If a case comes along that is important to them, they will have to “pass the hat” among their members, and they will have to disclose. So the rule’s burden then falls disproportionately on different amicus groups. For many companies, disclosure will mean they will not contribute because they will not want to be singled out; and amici will be less willing to file if they will have to make a disclosure because they will believe disclosure will make the brief seem less credible. If the concern is with those who join just before or after contributing, perhaps the rule should expressly target that behavior.

Judge Bybee asked what contribution floor this practitioner member favored for option alpha. The member did not think crowdfunding was such a big issue, so the member suggested perhaps a \$10 floor. Amicus briefs are not big profit centers, so they often do not cost that much. If the limit is \$7,500, then four contributors who give \$7,400 each can provide close to what the brief will cost without triggering disclosure. The contributors need not have anything to do at all with the amici, and that seems to be a problem. This member preferred option beta over option alpha.

A judge member remarked that the underlying concern is the opportunistic arrival of somebody who wants to control or have a voice in a particular case. Although having a set dollar amount might be attractive because it's arguably objective, the member did not know that it would address the concern.

Another judge member stressed the need for clarity, expressed doubt about how to apply a disclosure standard that hinges on the intent behind a contribution, and stated that requiring disclosure of an amicus's membership raises First Amendment issues. This member favored option beta.

Another judge member noted that in the courts of appeals, where amicus briefs are less common, those briefs may be more influential than they are in the Supreme Court. Anecdotally, amici can be very important and influential; this member reads amicus briefs. The member stressed once again that the committee should consider a lower dollar-amount threshold in option alpha. Another important reason to know about who is behind the brief is for recusal reasons—to ensure that a party for whom a judge should not decide cases does not come to the court through a third party instead. Asked for a preference between options alpha and beta, the member preferred option alpha because there needs to be an understanding of who is really driving amicus briefs; the member acknowledged the need for careful drafting of option alpha given, inter alia, potential First Amendment concerns. The member separately reiterated doubts about the meaning of the exception in proposed paragraph (b)(4).

Another judge member agreed that it was not clear what the exception in (b)(4) meant or how it would be calculated. That member also did not think that the courts of appeals were expressing a need for a change to Rule 29. The member has not sensed any problem with amicus briefs. Some members of Congress appear to be concerned about undisclosed backers funding multiple amicus briefs. By contrast, the problem that the member, as a judge, would be worried about is whether an amicus was merely another voice for a party in the case. The portion of the existing rule that would become proposed paragraph (b)(1) is aimed at the latter problem. Subdivision (d) instead tries to get at the concern voiced by the members of Congress. To solve that problem (and this member was not sure it was a problem in the courts of appeals), the existing language may be inadequate because it is limited to those who contribute or pledge money intended to fund the particular brief, as opposed to amicus briefs generally. Someone could set up arrangements so as not to pay for any particular brief; instead, they could just fund several organizations that file amicus briefs in dozens of cases. The member was not sure how best to address the concern voiced by the legislators.

Judge Bybee thanked the Standing Committee for its helpful input on these difficult problems.

Intervention on Appeal. Judge Bybee reported that the advisory committee will consider whether to add a new rule governing intervention on appeal. There currently is no rule, but the issue has come up several times in the courts of appeals. The issue was also recently briefed in the Supreme Court in a case that later became moot.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Rebecca Connelly and Professors Elizabeth Gibson and Laura Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in West Palm Beach, Florida, on March 30, 2023. The advisory committee presented eight action items and four information items. The advisory committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 179.

Action Items

The Restyled Bankruptcy Rules. Judge Connelly introduced this item, and Professor Bartell reported on it. The advisory committee sought final approval of the fully restyled bankruptcy rules, which appeared starting on page 190 of the agenda book.

The restyling project had been an immense effort by the Restyling Subcommittee (chaired by Judge Marcia Krieger), the style consultants, and Rules Committee Staff. The total number of bankruptcy rules exceeded that of all the civil, appellate, criminal, and part of the evidence rules, combined. It was a major project.

Parts VII through IX of the restyled bankruptcy rules were published for public comment in August 2022. There were five sets of comments. The comments and any changes made since publication were shown in the agenda book starting on page 429.

The advisory committee was also asking for approval of Parts I through VI of the restyled rules. The Standing Committee had approved them already over the past two years with the understanding that the rules would return for approval after the entire restyling was completed.

There have been some modifications to the restyled Parts I through VI since those approvals were given. Some of the bankruptcy rules have been substantively amended since then, and the restyled rules now reflect those amendments. The style consultants also did a “top-to-bottom” review of all the rules, making additional stylistic and conforming changes. And the Restyling Committee also made corrections and minor changes.

The advisory committee did not believe that any of these updates to the proposed restyled Parts I through VI were substantive enough to warrant republication for public comment.

Judge Bates commented that the restyling project reflected a monumental collaborative effort by past and present members of the advisory committee, the leadership of the advisory committee and its Restyling Subcommittee, and the reporters and the style consultants on a sometimes-thankless yet important task.

Professor Kimble added that this is the fifth set of restyled rules over 30 years. The rules committees are done with comprehensive restyling, and that is cause for celebration.

Professor Garner noted that this is probably the most ambitious project in law reform and legal drafting that a rulemaking body like the Standing Committee had undertaken in the past 30 years. He noted that the late Judge Robert E. Keeton should be remembered for starting the restyling project in 1991–92. This could be the culmination of his ambition to see simpler, more straightforward rules.

An academic member commented that, as a prior reporter to the Bankruptcy Rules Committee, he participated in a minor restyling of the Part VIII rules. On account of that experience, he had dreaded the prospect of a complete restyling of the rules, and he wanted to congratulate everyone involved with this process. It went more smoothly than anyone could reasonably have hoped, so it really is a cause for celebration.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the restyled bankruptcy rules.**

Amendment to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), Conforming Amendments to Rules 4004, 5009, and 9006, and Abrogation of Form 423. Judge Connelly reported on this item. The advisory committee sought final approval of these proposed amendments, which appeared on pages 687–95 and 703–05 of the agenda book, and the accompanying form abrogation.

Rule 1007 sets deadlines for filing items in bankruptcy court. The change pertains to a requirement for individual debtors in Chapter 7 and Chapter 13 cases. To receive a discharge, a debtor must complete a course in personal financial management. The current Rule 1007 provides a deadline for the debtor to file a statement on an official form (Form 423) that describes the completion of the course. The proposed amendment would instead require that the course provider’s certificate of course completion be filed.

Rules 4004, 5009, and 9006 would all need to be changed because they refer to a “statement” of completion, and they would need to refer to a “certificate” of completion. Further, Official Form 423 would be abrogated because it would no longer serve a purpose.

Professor Bartell noted that the provider of the course furnishes the certificate of course completion. Many of the course providers actually file the certificates directly with the court. But if a provider does not, then the debtor would have to file it instead. The advisory committee received no public comments on this set of proposed amendments.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 1007, 4004, 5009, and 9006, and the abrogation of Official Form 423.**

Amendment to Rule 7001 (Types of Adversary Proceedings). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 696 of the agenda book.

Rule 7001 lists the types of proceedings that count as adversary proceedings in a bankruptcy case. The amendment would exclude from the list of adversary proceedings actions

filed by individual debtors to recover tangible personal property under section 542(a) of the Bankruptcy Code.

This amendment responds to a suggestion by Justice Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021). In that case, the Court decided that the automatic stay set by 11 U.S.C. § 362(a)(3) did not prohibit the city's retention of the motor vehicle of a consumer in a Chapter 13 bankruptcy case. Justice Sotomayor noted that a debtor could use a turnover action to recover such property, and opined that if the problem with bringing a turnover action is the delay and cumbersome nature of doing it as an adversary proceeding under Rule 7001, the rules committee could consider amending the bankruptcy rules. *Id.* at 594–95 (Sotomayor, J., concurring).

The amendment was published for comment this past year. The advisory committee received only one comment, which supported the amendment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 7001.**

New Rule 8023.1 (Substitution of Parties). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed new rule, which appeared starting on page 698 of the agenda book.

Rule 8023.1 would govern the substitution of parties when a bankruptcy case is on appeal to a district court or BAP. It had not been addressed previously in the rules. The rule is modeled after Federal Rule of Appellate Procedure 43.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved proposed new Rule 8023.1.**

Amendment to Official Form 410A (Mortgage Proof of Claim Attachment). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 706 of the agenda book.

This proposal amends a provision of the attachment for mortgage proofs of claim. The change would require that the principal amount be itemized separately from interest. Currently the form allows them to be combined on one line item, and the amended form would require separate lines. The advisory committee received one comment on the proposed amended form; it made no change to the proposed amendment after considering that comment.

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

Amendment to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting on page 709 of the agenda book.

Rule 3002.1 pertains to cases involving individuals who have filed for Chapter 13 bankruptcy. Because of the structure of Chapter 13, mortgage debt is generally not discharged; but Chapter 13 debtors can cure mortgage defaults during the case. Even though a default can be cured, there can be confusion about the accounting of payments during a case and the status of the mortgage claim at the end of the case. That was the impetus behind the rule—to provide more information to the borrower and the lender about the status of mortgage claims in these cases.

Judge Connelly reminded the committee about the proposed amendments to Rule 3002.1 that had been published for comment in 2021. Those proposed amendments would have provided for a mandatory midcase notice issued by the Chapter 13 trustee and would have set a motion procedure for assessing a mortgage's status at the end of a Chapter 13 case. The advisory committee received numerous public comments, and the committee further revised the proposed amendments in response to those comments.

Although the revisions respond to comments submitted during the public-comment process, the advisory committee determined that the changes are significant enough to warrant republication. This is partly because the advisory committee has switched from a mandatory-notice scheme by one party, the Chapter 13 trustee, to optional motion practice throughout the case, by either the debtor or the trustee.

The end-of-case procedure is also changed to address concerns about the consequences for either failing to respond or failing to comply. The consequences are different enough that the committee thought it would benefit from additional public comments and also thought it was important to provide notice of the proposed changes.

Professor Gibson added that the advisory committee's years-long experience with this rule illustrates the value of notice and publication. Two organizations had suggested significant amendments to Rule 3002.1: the National Association of Chapter 13 Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy. Both organizations advocated a midcase assessment of the mortgage's status—the thought being that, if the debtor and the trustee found out then that, according to the creditor, the debtor had fallen behind in mortgage payments, there would be time to cure that before the case was over.

But the comment process revealed a lot of concern with that idea, especially from Chapter 13 trustees. A midcase review may not always be needed; there are other ways to get the information. And different districts handle postfiling mortgage payments differently—the debtor might continue to pay them directly to the mortgagee, or the trustee might make those mortgage payments. In districts with the former procedure, the trustee would not have information about payments made by the debtor. The biggest change is therefore that the midcase review is not mandatory anymore. It can occur at any time during the case, and either the debtor or the trustee can ask for it by motion. The subcommittee feels that these changes have improved the proposed amendments.

A judge member observed that the revised proposal adds a provision for noncompensatory sanctions. When the claim holder does not comply, there were already remedies making the other party whole, including attorney's fees, which would come at a cost to the claim holder. It is not clear why there should also be noncompensatory sanctions. The member also said that, if

something more like punitive sanctions were meant, a notice requirement should be considered, as is usually provided by the rules in such situations.

Judge Connelly said that the proposal for noncompensatory damages was in part a response to *In re Gravel*, 6 F.4th 503 (2d Cir. 2021), which held that current Rule 3002.1 does not authorize punitive sanctions. The new language was intended to clarify that the bankruptcy court could in appropriate circumstances assess noncompensatory damages. Public comment on this provision would be useful.

Professor Gibson added that these are cases where the mortgagees are repeat players and that the failure to comply with the rule in multiple cases might create a need for declaratory, injunctive, and punitive relief to address the problem. Another judge member stated, however, that punitive relief seems qualitatively different from declaratory and injunctive relief. Notice should be required before imposing punitive relief, and consideration should be given to the scope and framework for such relief. Judge Connelly responded that the rule reflects the approach taken in Civil Rule 37, and stressed the need for judges to be able to address willful noncompliance with court orders. The judge member suggested the value of seeking comment specifically on whether notice should be required before an award of punitive fines.

On the issue of prior notice, Professor Gibson raised the possibility of prefacing the provision with “if, after notice and a reasonable opportunity to respond,” which Rule 11 uses. Although this would not spell out all the procedure, Professor Gibson did not think the rule needed to do so. Professor Struve quoted Rule 3002.1(h)—“If the claim holder fails to provide any information as required by this rule, the court may, after notice and a hearing, do one or more of the following:”—which is followed by paragraph (h)(2). She wondered if this provision addressed the concern with notice.

A judge member thought it did address the notice issue but that it did not explain the need for the punitive sanction. If a mortgage holder was noncompliant, couldn't it end up not only paying attorney fees but also taking a haircut on its claim? Judge Connelly responded that there would not be a haircut on the claim, because the mortgage would survive the discharge. The member rejoined that proposed (h)(1) authorizes precluding the claim holder from presenting information that should have been produced, and argued that this could affect the claim. Judge Connelly responded that the rule would prevent the claim holder from presenting the omitted information as a form of evidence in a contested matter or an adversary proceeding in the bankruptcy case, but that is different from making the debt unenforceable after the case ends. Although the claim holder might not be able to present the evidence in the bankruptcy case the rule would not prevent use of the evidence in state-court foreclosure proceedings.

A judge member stressed that adequate notice would require specific mention of punitive relief if that was under contemplation. “Noncompensatory sanctions,” this member suggested, was unduly vague. Judge Bates asked what was contemplated by “noncompensatory sanctions” beyond declaratory and injunctive relief. Professor Gibson and Judge Connelly responded that it would include punitive damages payable to a party.

As to rules that authorize noncompensatory sanctions, Professor Gibson suggested, for example, that under Civil Rule 11 a lawyer could be required to attend continuing legal education.

A practitioner member read the text of Civil Rule 11(c)(4) and pointed out that payments to a party under that rule seemed to be limited to reasonable attorney’s fees and other expenses; the potential “penalty” contemplated by that rule is paid to the court. The practitioner member further agreed with previous comments that nobody would read “noncompensatory sanctions” to mean equitable relief. If there is a desire that equitable relief be available, it should be spelled out and, as under Civil Rule 11(c)(2), there should be an opportunity to cure.

An academic member offered background about why courts occasionally need “baseball bats” in these cases. This rule goes back to the mortgage crisis in 2007–08. Many people filed for Chapter 13 bankruptcy in large part to save their homes by curing a default on a mortgage in Chapter 13, while also maintaining their ongoing monthly payments. But it was a huge problem to figure out the exact amount owed on the mortgage, and it was extremely difficult to get mortgagees to give that information in a way that could be processed by trustees, debtors, and the courts. Ongoing compliance was also often an issue because there were not deep-pocketed lawyers on the debtor’s side. The Chapter 13 trustee is often, but not always, in the mix, and the court has a huge flow of information that it has to track. The amounts of money in these cases are just not enough, even if clawed back, to get a mortgagee’s attention, so a stronger measure is necessary to get that attention.

A judge member questioned whether, if there is no precedent under Rule 11 for imposing punitive damages payable to another party, there were any authority for a bankruptcy court to impose such a sanction. Does that need to be authorized by Congress? Is it implicit in the statute? Such an award, this member suggested, was not a traditional kind of ancillary relief used to enforce court powers, unlike a fine to the court or contempt.

Another judge member suggested that Rule 11 could provide a model for potential language—perhaps “reasonable expenses and attorney’s fees caused by the failure, nonmonetary directives, and, in appropriate circumstances, an order to pay a penalty into court.” (A practitioner member later made a similar suggestion.)

Judge Bates remarked that there is nothing in the committee note that explains what “noncompensatory sanctions” means or how declaratory or injunctive relief fits into the scheme. After looking at Rule 11, which is much more elaborate in terms of certain requirements than this rule would be, he wondered whether more thought needed to be given to it.

Judge Connelly explained that the proposed amendment responded to the *Gravel* opinion. The idea was to allow the bankruptcy court to award something beyond attorney’s fees. The advisory committee did not specify what that would be—the language “noncompensatory sanctions” was meant to be general. Judge Connelly agreed that there should be something in the committee note about that language.

After further discussion, Judge Connelly asked whether, if the language “in appropriate circumstances, noncompensatory sanctions” were removed, the Standing Committee would give approval to publish the rest of the rule. Professor Gibson said she would prefer to go forward without the change to (h)(2) because the rest of this amendment is important. Deferring a vote on the rest of the rule would delay those changes for another year.

Professor Capra remarked that the approval is only for public comment. He further suggested that, in the future, the advisory committee say “award other appropriate relief,” period, and then add all the explanation in the committee note. The Standing Committee even has the authority to put the language in brackets and then invite comments on it.

A judge member expressed support for shortening the provision to “award other appropriate relief.” Professor Bartell expressed concern that if the “including” clause is removed, an unintended negative inference is created that other appropriate relief no longer includes an award of expenses and attorney’s fees. Judge Bates expressed concern about whether this suggestion could increase the likelihood of needing to republish again later.

A practitioner member thought it seemed riskier to take out (h)(2) and not make it an issue if the Standing Committee would still have to discuss it again in six months. Having public comment helps the committees improve the rule. Also, in approving something for publication, the Standing Committee does not necessarily give that same language approval. It is worth seeing what the reaction to it would be. A judge member demurred to that suggestion, arguing that a proposal should not be sent out for comment if the committee knows it could not accept that proposal as drafted.

Professor Hartnett asked whether, if the advisory committee had in mind Civil Rule 37, the rule could cross-reference Bankruptcy Rule 7037. For example, “any of the sanctions permissible under Rule 7037.” Professor Gibson responded that some of the sanctions under Rule 37 would not be applicable here; she would be reluctant to have only a general reference to Rule 7037. Professor Hartnett said that he thought “appropriate circumstances” might cover that problem.

Professor Cooper asked whether it would work to publish the rule as proposed and specifically invite comment on the issue. Judge Bates asked what risks would be involved with that approach and whether it would lessen the risk of having to do any republication. Professor Gibson thought it would lessen the likelihood of coming back with another amendment. Judge Bates thought that that approach would give the impression the Standing Committee has approved that language, and he did not have the sense that the Standing Committee is prepared to give approval to that language.

Professor Coquillette noted that, in the past, there has been concern when the Standing Committee permits publication of something that it really would not ultimately approve. The harm is that people might wonder about the rules process. Simply putting something out to attract comment when the committee really will not do it is not a good idea. It is different if there is a real possibility that reading the comments during the comment period could convince the committee to approve the proposal.

Professor Struve agreed with Professor Gibson that, leaving aside (h), the rest of the rule seemed likely to provide significant benefit to a population that is a concern for the whole bankruptcy structure. That benefit has already been delayed past one publication cycle. She also agreed with those who said it would be peculiar to send something out for comment that the Standing Committee could not see a way to approve. She also saw the point about flagging that a piece of the rule may be subject to change in the future; but she was not sure that sending out the proposal currently in the agenda book could avoid the need for republication in the event that the

process ends up putting forward some very different proposal. It might be cleaner, if the Standing Committee agrees that there is a strong normative case for doing so, to publish the rest of the rule without (h).

An academic member remarked that, although the Standing Committee is historically reluctant to change a rule and then immediately afterward publish an additional change, doing so in this case may not pose a serious problem because the sanctions piece is separable. And it would show that the rules process takes seriously concerns about authority, notice, and operation.

Professor Gibson noted that there was relatively little discussion by the advisory committee of (h)(2) as opposed to the rest of this rule. So the advisory committee would likely be satisfied with that outcome.

Judge Bates asked whether a change to the committee note would be needed as well because the note refers to (h)(2). Professor Gibson answered in the affirmative. A judge member asked whether it is typical or permissible to issue a committee note on a provision without amending the provision's text. The judge member wondered if the advisory committee could issue a committee note that "other appropriate relief" should be interpreted broadly to include more than just attorney's fees, instead of adding "noncompensatory sanctions" to the text. Professor Gibson responded that a change to a committee note cannot be made by itself.

A style consultant suggested adding the word "any" before "other appropriate relief" and deleting "and, in appropriate circumstances, noncompensatory sanctions." The committee note would then state that "any" was added to show that the advisory committee did not intend to limit the recovery to reasonable expenses and attorney's fees—a diplomatic way of saying that the amendment was intended to address the Second Circuit's erroneous decision.

Professor Marcus observed that the 2015 committee note to the amendment of Civil Rule 37(e) stated that the amendment rejected certain Second Circuit caselaw.

Judge Bates asked the advisory committee's representatives whether that kind of change would be consistent with what the Bankruptcy Rules Committee decided to do here and whether it would simply ignore the issues raised with respect to what the further relief is, instead letting the courts deal with that. Professor Bartell responded that it would be consistent with the advisory committee's decision and that it would also be consistent with other bankruptcy rules that also call for other appropriate relief upon a violation. Those rules do not say what procedural mechanisms must be adopted to impose that other relief, but that is consistent with how the phrase is treated in other bankruptcy rules. Judge Bates then asked whether there had been discussion of whether punitive damages fell within "other appropriate relief." Professor Bartell said that she had not researched the question, and Judge Connelly said that the advisory committee had not discussed it.

Professor Struve admired the elegance of the proposal to add "any" and a change to the committee note. But she did wonder, if there are instances of "other appropriate relief" sprinkled throughout the bankruptcy rules, whether adding "any" to this one would create an unwanted negative inference. The style consultant responded that the committee note's express statement about why "any" was added would be the reason for the difference. Judge Bates noted that some

judges look at only the text of the rules to determine what they mean, not the committee notes—would that lead to a possible view that they have two different meanings?

A judge member commented that, if the committee note only disapproves of the *In re Gravel* decision, it is not clear what the note actually does. If the note is going to say that certain actions are authorized, the member would want to know what those actions are. Judge Bates agreed that a vague committee note that does not say expressly what the amendment authorizes would lead to divergent comments that the advisory committee would ultimately have to resolve.

A judge member was leery of making any substantive changes or hints right now. Normally in the rules process, this would have been a proposal, and then the Standing Committee would give feedback to the advisory committee. People would have talked about Civil Rules 11 and 37. If there is a Rules Enabling Act obstacle to creating a punitive damage remedy, that would have been discussed. But all of that was skipped because of how this issue, through no one's fault, has arisen. The member would rather hold off six months or a year and then deal with this issue separately rather than today without any preparation.

Another judge member agreed and added that, depending on what the scope of the relief under paragraph (h)(2) is, there may be a need to change the procedural protections. Just changing a word is not going to deal with the problem.

Judge Connelly thanked the Standing Committee for the helpful discussion. The proposed changes to Rule 3002.1 apart from proposed subdivision (h)(2) create a new, necessary, and beneficial mechanism, one in which there has been an interest for a while. Seeking republication of those provisions, excepting those in paragraph (h)(2), is warranted now. Given the comments today, it would be more appropriate to return to the advisory committee for more robust, thorough evaluation of Rule 3002.1(h)(2). It is unclear whether that will result in a proposed amendment at some point. An amendment may even be premature in light of the developing caselaw.

A member moved to approve the proposed amendment, without the proposed changes to paragraph (h)(2), for publication, and another member seconded the motion. Judge Bates opened the floor to further discussion.

Professor Struve asked whether, despite omitting the proposed changes to paragraph (h)(2), the semicolon and word “and” at the end of paragraph (h)(2) would remain. Judge Connelly answered that, yes, the semicolon and “and” would remain.

An academic member encouraged the committee members to read the Second Circuit's *In re Gravel* case, both the majority opinion and the dissent (with which the member agreed). As far as the member knew, that is the first appellate decision with that particular holding. The member also thought the committee members should congratulate themselves because the rules process was working well. The *Gravel* decision was driven in part by *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), which potentially destabilized a bankruptcy court's ability to enter sanctions. It would be appropriate to give greater and deeper thought to *Taggart's* implications when considering a potential sanctions regime.

After further discussion it was clarified that the committee note would be modified by deleting the third sentence in the last paragraph—“It also expressly states that noncompensatory sanctions may be awarded in appropriate circumstances.”

Upon a show of hands, with no members voting in the negative: **The Standing Committee gave approval to republish the proposed amendment to Rule 3002.1 for public comment with the following changes: No amendments to (h)(2) were retained, except for adding a semicolon and the word “and” at the end; and the third sentence in the last paragraph of the committee note was struck.**

Amendment to Rule 8006(g) (Request for Leave to Take a Direct Appeal to a Court of Appeals After Certification). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared on page 728 of the agenda book.

The proposed amendment would amend subdivision (g) so as to dovetail with the proposed amendments to Appellate Rule 6(c) approved for publication for public comment earlier in the meeting.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 8006(g) for public comment.**

Official Forms Related to Rule 3002.1. Judge Connelly reported on this item. The advisory committee sought approval to publish these proposed official forms for public comment. The proposed official forms appeared starting on page 729 of the agenda book.

Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R are the companion official forms to proposed amended Rule 3002.1. None of these forms was affected by the decision (described above) to withdraw the request to publish the Rule 3002.1(h)(2) proposal.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R for public comment.**

Information Items

Suggestion to Require Complete Redaction of Social Security Numbers from Filed Documents. Professor Bartell reported on this item.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal-court filings should be scrubbed of personal information before they are publicly available. Portions of the letter suggested that the rules committees reconsider a proposal to redact entire Social Security numbers from court filings.

The Bankruptcy Code requires that Social Security numbers be included on certain documents either in whole or only partially redacted. *See* §§ 110, 342(c)(1). The advisory

committee cannot change those requirements because they are statutory, but there may be some circumstances where full redaction is possible and appropriate.

But the Advisory Committee has become aware that the Judicial Conference’s Committee on Court Administration and Case Management (“CACM”) has asked the FJC to design and conduct studies regarding the inclusion of certain sensitive personal information in court filings. Those studies would update the privacy study issued by the FJC in 2015. They would gather information about compliance with privacy rules and the inclusion of unredacted Social Security numbers in court filings. The advisory committee has decided to defer consideration of the suggestion while those new studies are underway.

Suggestion to Adopt a National Rule Addressing Debtors’ Electronic Signatures.
Professor Gibson reported on this item.

An attorney suggested the adoption of a national rule to allow debtors to sign petitions and schedules electronically without requiring their attorneys to retain the original documents with wet signatures.

But only a year ago, in its Spring 2022 meeting, the advisory committee decided not to take further action on a suggestion by CACM to consider a national rule on electronic signatures of non-CM/ECF users. The advisory committee decided then that a period of experience under local rules addressing e-signatures would help inform any national rule, and it reasoned that e-signature technology would also probably develop and improve in the meantime.

In light of that recent decision, the advisory committee decided to defer further consideration of this suggestion to a later date. Nothing has changed since a year ago. Also, the project on electronic filing by self-represented litigants may also have implications for the e-signature issue.

Suggestions Regarding the Required Course on Personal Financial Management.
Professor Gibson reported on this item.

The advisory committee continues to consider suggestions concerning the course on personal financial management discussed earlier.

Professor Bartell’s research has shown that, in a single year, thousands of debtors’ cases were closed without a discharge because of the debtors’ failure to file proof that they have taken this course. Debtors in that situation have to pay to reopen their cases to file the certificates. The Consumer Subcommittee has been considering whether and how the rules might be amended to decrease that number.

One question is whether to change the deadlines for the filing of those forms—now certificates of completion—or perhaps to require simply that they be filed by the point at which the court rules on discharge. There is also a rule that requires the court to remind debtors of this requirement if they haven’t filed it within 45 days after the petition. Another question is whether the date for that notice reminder should be changed or whether more than one notice should be given.

Proposed Amendment to Rule 1007(h) to Require Disclosure of Postpetition Assets. Professor Gibson reported on this item.

The advisory committee continues to consider requirements to disclose assets acquired after a petition is filed in an individual Chapter 11 case or in a Chapter 12 or 13 case. In such cases, which may last several years, the Bankruptcy Code specifies that the property acquired by the debtor during that period is property of the estate.

The current rule requires filing a supplemental schedule for only certain postpetition assets obtained within 180 days after filing the petition. Judge Catherine McEwen, a member of the advisory committee, suggested an amendment to cover all postpetition property in individual Chapter 11, Chapter 12, and Chapter 13 cases.

The Consumer Subcommittee thought that one of the problems with such a rule is how to capture what property needs to be disclosed. It would be impossible to report everything that comes into a debtor's ownership over a three-to-five-year period. Should the rule mandate disclosing only certain types of property, such as only property that has a substantial impact on the estate? Also, courts that currently impose a disclosure requirement by local rule do so in different ways, so there is a lack of uniformity.

The Consumer Subcommittee was not sure there was a problem that needed to be solved. The issue was further discussed at the advisory committee meeting. There, Judge McEwen noted that the Eleventh Circuit has strong case law about judicial estoppel when a debtor has not revealed property in the bankruptcy case. Debtors can lose the right to pursue an undisclosed claim, such as a tort action based on a postpetition injury, and creditors can lose the benefit of such claims. By requiring disclosure, that problem could be avoided. So the advisory committee asked the subcommittee to consider the matter further.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robin Rosenberg and Professors Richard Marcus, Andrew Bradt, and Edward Cooper presented the report of the Advisory Committee on Civil Rules, which last met in West Palm Beach, Florida, on March 28, 2023. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 784.

Action Items

Amendment to Rule 12(a) (Time to Serve a Responsive Pleading). Judge Rosenberg reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 826 of the agenda book.

The amendment makes clear that the times to serve a responsive pleading set by Rules 12(a)(2)–(3) are superseded by a federal statute that specifies another time. It came about because some litigants in Freedom of Information Act cases had difficulty obtaining summonses that called for responsive pleadings within the statute's 30-day deadline; without the amendment, it was not clear if a statute prescribing a different time would apply to the United States under this rule.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 12(a).**

Amendments to Rules 16(b)(3) (Scheduling and Management) and 26(f)(3) (Discovery Plan) Related to Privilege Logs. Judge Rosenberg reported on this item. The advisory committee sought approval to publish these proposed amendments for public comment. The proposed amendments appeared starting on pages 828 and 846 of the agenda book.

These amendments deal with the privilege-log problem and address early in the case how the parties will comply with the requirements of Rule 26(b)(5)(A). The goal is to get the parties to address issues pertaining to privilege logs during their Rule 26(f) conference, in order to reduce burdens while still providing sufficient information about documents being withheld and to reduce the number of unexpected problems at the end of discovery.

The proposed amendments were presented for approval for publication at the Standing Committee's January 2023 meeting. There were concerns about the committee notes' length, so the advisory committee took the amendments back for further consideration. The notes are now half as long.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish for public comment the proposed amendments to Rules 16(b)(3) and 26(f)(3).**

New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The advisory committee sought approval to publish for public comment this proposed new rule, which appeared starting on page 831 of the agenda book.

Since 2017, the Multidistrict Litigation (“MDL”) Subcommittee and the advisory committee have considered whether to propose a rule to govern MDLs. The MDL Subcommittee has heard many times from attorneys in both the plaintiffs’ and defense bars, experienced and first-time transferee judges, and groups including Lawyers for Civil Justice and the American Association for Justice. Judge Rosenberg thanked them for all of the time and meaningful input that they have given the subcommittee. The proposed rule has been well received by all of these groups and was overwhelmingly supported by the transferee judges at the recent transferee-judge conference last fall.

Judge Rosenberg addressed a common question: why is an MDL rule needed? MDLs account for a large portion of the federal docket: 69.8% as of May 2023, up from about 1.3% in 1981. Many judges will be assigned MDLs and will look to the rules for guidance. The Judicial Panel on Multidistrict Litigation is making a concerted effort to expand assignments of MDLs to new judges, and there are more leadership appointments to diverse groups of lawyers. From January 1, 2019, to May 31, 2023, out of 96 new MDLs, 40 went to first-time transferee judges. In 2023 alone, the panel has centralized eight MDLs before eight different judges, six of whom are first-time transferee judges.

The advisory committee and the groups with which it has been working feel it is essential for the court to take an active and informed role early in an MDL proceeding. There are issues that become problematic unless addressed at the outset of the action, particularly in large MDLs.

Transferee judges have also expressed concern that they lack clear, explicit authority for some of the things that they are doing, which most agree are necessary to manage an MDL.

Rule 16 just addresses two-party litigation, and Rule 23 addresses class actions, but we have nothing for MDLs. Managing an MDL is broader than managing a non-MDL proceeding. It is critical for a transferee judge to have a more active management role in an MDL.

The advisory committee used a three-part test to determine whether to go forward with this new rule. First, is there a problem? Yes, there are circumstances in which courts start off on the wrong foot in an MDL and that could cause many problems down the road. Second, is there a rules-based solution? Yes, this proposed rule helps solve the problem by addressing issues early and laying the groundwork for effective case management. Third, would a rules-based solution avoid causing harm? Yes, the advisory committee believes that the proposed rule avoids harm by using the word “should” (with respect to the court’s management of MDLs).

Rule 16.1 focuses the court and the parties on the management issues that can effectively move an MDL forward from an early point, yet the rule recognizes that not all MDLs are alike, that no one size fits all. So the rule is drafted to provide both helpful guidance and flexibility in managing the proceeding.

The advisory committee carefully considered the helpful comments of the Standing Committee at its January 2023 meeting, and many of those comments were incorporated into the revised rule.

In subdivision (a), the advisory committee settled on the word “should”—in most but not all MDLs, the court should schedule an initial management conference. The term “should” indicates that reality, while still providing some flexibility. “Should” has been interpreted as a clear directive in many instances and several of the civil rules already use it.

As for subdivision (b), the advisory committee’s view is that appointing coordinating counsel helps the court get the case moving. The role of coordinating counsel is limited to the initial conference. The rule provides flexibility both to the court, to determine what issues coordinating counsel should address, and to the parties, to inform the court about the case’s status. The advisory committee settled on “may” because an MDL may or may not need coordinating counsel for the initial management conference.

For subdivision (c), the advisory committee chose the first of the two alternatives of the version of Rule 16.1(c) presented at the January 2023 Standing Committee meeting. Most comments preferred this alternative, which lists a cafeteria-style menu of options (reflecting that there is no one-size-fits-all framework for an MDL). It is not a mandatory checklist. Paragraph (c)(1) was modified to say “whether leadership counsel should be appointed” rather than assuming they would be. More specifics were added to the subparagraphs and the committee note to clarify the issues to consider at the initial stages of the MDL. The committee note to paragraph (c)(1)(A) lists factors to consider when selecting leadership counsel. Paragraph (c)(4) was revised in direct response to comments from the Standing Committee about identifying issues, vetting claims, and exchanging information early in the case. Rather than the previous reference to “whether” the parties will exchange information, (c)(4) now refers to “how and when” they will do so. Paragraph

(c)(6) (concerning discovery) was modified to eliminate the word “sequencing” and make it more general. Paragraph (c)(9) is newly added. The court can play a significant role in making sure the settlement process is fair and transparent. Rule 16 already authorizes the court to play some role in the process. In paragraph (c)(12), the advisory committee did not include the word “special” with “master.” It recognizes that the court may make decisions and appointments using its inherent authority. The committee note, in its opening paragraph, uses the phrase “just and efficient conduct” in response to a comment from the Standing Committee about directing the parties to adhere to the Rule 1 principles of just, speedy, and inexpensive determinations.

Professor Marcus added that this draft rule is the product of long deliberations, and the advisory committee needs public comment on it. Professor Bradt, as both an outsider and a recent insider to the process of developing the rule, thought it extraordinary how much information and outreach and response from interested parties there has been. He thought it an extensive and admirable process.

A practitioner member expressed continuing concerns about the proposal. The member’s primary concern was with the committee note, which the member felt was doing the rulemaking rather than the rule. The member gave several examples of portions of the committee note that caused the member concern. These included examples of sentences that the member felt could be omitted as superfluous or confusing, language in the note indicating that a single management conference might suffice for a given MDL, a sentence discussing individual-class-member discovery in class actions, and language suggesting that the court may have a right to know about the status of settlement negotiations. The most important issue for the member was the standard for selecting leadership counsel. The committee note to subdivision (c)(1)(A), this member argued, should not require each leadership counsel to responsibly and fairly represent *all* plaintiffs, because there can be conflicts among the plaintiffs. Further, the criteria should include the number and value of claims that counsel represents in the MDL; when the leadership counsel include those representing the greatest financial interests, that can help avoid a problem with opt-outs.

Another practitioner member countered that the proposed Rule 16.1 fills an important gap. This member, too, could suggest specific changes, but would resist the temptation to do so because the proposed rule was ready for publication. The newer judges and practitioners who are playing important roles in contemporary MDL practice need such a rule, particularly in the absence of an updated version of the Manual for Complex Litigation. This member felt it was useful for the committee note to mention discovery in class actions, because MDLs often encompass class actions. Judge Bates responded that the other member had raised legitimate questions whether the committee note to a rule on MDLs should address discovery in class actions, and also whether the list of criteria for leadership counsel should include the size and number of claims represented.

A judge member stated that the rule is ready for publication. An effort is ongoing to broaden the MDL bench, and training for new judges is important. Professor Coquillette agreed that the rule was ready for publication and he congratulated the advisory committee, though he also expressed concern that committee notes should not try to fill the role of a treatise. Another judge member praised the rule for setting a conceptual framework and focusing on the basics. This member suggested requesting comment on the compensation of counsel. Taken together, this member said, the rule text and committee note might be read to authorize the use of common benefit funds, and there is debate on whether that mechanism can be used in an MDL. Another

judge member predicted that the rule would be very helpful but also warned that the committee note would be cited more often than the rule, because the note addresses the most nettlesome issues; if the committee wished to deal with those issues, this member suggested, it should do so in rule text. Judge Bates predicted that the committee would receive disparate comments on the notes' best practices advice, and wondered how it would address those contending viewpoints. Another judge member said that the rule was ready for publication, and it would help to protect district judges from being reversed on appeal, but this member voiced some uneasiness about the committee notes.

Judge Bates commented that the rule's title, "Managing Multidistrict Litigation," promises more than the rule delivers. The rule really concerns just the initial management conference.

The practitioner member who had initially raised several concerns asked to change, in the second paragraph of the committee note to paragraph (c)(1), the phrase "responsibly and fairly represent all plaintiffs" to "adequately represent plaintiffs." In the same paragraph, the member also asked to replace "geographical distributions, and backgrounds" with "geographical distributions, backgrounds, and the size of the financial interests of plaintiffs represented by such counsel." The member further suggested, in the second paragraph of the portion of the committee note to paragraph (c)(4), striking the third sentence (concerning discovery in class actions).

A judge member asked whether the practitioner member's suggested term "adequately" was intended to incorporate adequacy as the term is understood in Rule 23(a)(4)? In doing so, a lot of the class-action case law might implicitly be incorporated. The practitioner member responded that he found the terms "responsibly and fairly" problematic because those words do not appear anywhere else and their meaning is unclear. He also objected to addressing the appointment of leadership counsel in the committee note instead of in rule text. Judge Rosenberg confirmed that the advisory committee stayed away from "adequately" because it did not want there to be confusion with Rule 23.

As to the practitioner member's suggestion that the note to (c)(1) should advise the judge when selecting leadership counsel to keep in mind "the size of the financial interests of plaintiffs represented by ... counsel," Judge Rosenberg noted that the next sentence, beginning with "Courts have considered the nature of the actions and parties," showed that the nature of the actions is contemplated as a factor, though perhaps it is not clear enough for the point being made about the size of the financial interest. She also did not know how a judge would know the size of the plaintiffs' financial interests. An early census might disclose the *number* of claims represented by someone under consideration for leadership, but would not disclose their size. The practitioner member responded that, in securities cases, it is done all the time for appointing lead counsel at the start of a case. Professor Marcus interjected that securities cases are different. An article by Professor Jill E. Fisch in the *Columbia Law Review* contrasted them with mass torts in particular. And some of the people attending this meeting had previously urged that it was important not to accept numbers as indicative of valid claims, whatever the size of the claims.

The practitioner member responded that, rather than having rules to deal with all of these difficult issues, the committee is burying those issues in the committee note. These topics are contentious, and the financial interest is a factor that a judge could take into account in a products-liability case or in any other MDL. If one lawyer represents \$5 billion in claims and another

represents \$100 million in claims, and the judge selects as lead counsel the one with \$100 million, there will be opt-outs.

Judge Rosenberg still was not clear how a judge would know the financial value. And including language like that could encourage people to simply get lots of claims filed, even nonmeritorious ones, if the word on the street is that, if the judge sees that someone has a lot of dollars and a lot of claims, that person will get leadership. She understood the practitioner member's point and wondered if there were a way to word the committee note to capture it. The language was intended to be comprehensive and to take a lot of factors into account. The closest the committee note got was referring to the nature of the actions—looking at what the applicant for leadership has in the way of actions. Are there a lot of them? Are they high-enough value such that the applicant should be in leadership?

Judge Bates thought this to be a debatable point with merit to each side. There has not yet been a suggestion of language that resolves the debate; public comment may help.

A judge member remarked that mass-tort cases are not the same as securities cases. If a judge goes with the number or value of claims, that will favor those plaintiffs' counsel who have advertiser relationships. In the member's state, in coordinated proceedings in which counsel organize themselves, counsel do not always select as leaders the lawyers with the biggest numbers—they may not be the ones who will make the best presentation on the issues that will decide the case. The member agreed with Judge Rosenberg that relying on claim numbers or value could incentivize putting in massive numbers of cases. Further, a judge may not always know at the beginning who will have the most clients. Sometimes, particularly if there are both a federal and a state MDL, parties wait for the initial rulings to see where they want to file.

Professor Bradt observed that MDLs vary and are fluid. An MDL may be created at different times in a controversy's lifecycle. Sometimes an MDL is created after it is already known who will be involved, and sometimes an MDL is created very early in anticipation of the filing of a lot of future cases. Moreover, one of the things that the rule anticipates is that leadership is also fluid. As the circumstances of the case change, the transferee judge may find it necessary to change the leadership structure. The leadership piece of the rule is capacious in order to account for that.

The practitioner member who had been proposing revisions to the committee note suggested that, if the committee note stopped after paragraph one or paragraph two, the rule would then do what it was intended to do—identify topics for the initial conference. It would be a modest rule, not an attempt to cover the waterfront. But right now, the note is trying to cover the waterfront. Instead, a rule on each one of these topics should be made.

Judge Bates asked the advisory committee's representatives what changes, if any, they would like to adopt before asking the Standing Committee to approve the proposal for publication.

As to the rule's title ("Managing Multidistrict Litigation"), Judge Rosenberg remarked that the advisory committee had gone back and forth. Although the lion's share of the proposed rule is about the initial management, the rule does address later proceedings as well. For example, paragraph (c)(8) speaks of a schedule for additional management conferences with the court. So the advisory committee had stuck with "Managing Multidistrict Litigation" instead of "Initial

Management.” A judge member suggested changing the rule’s title to simply “Multidistrict Litigation.” Rule titles usually do not include gerunds. Judge Rosenberg accepted this suggestion on behalf of the advisory committee.

Professor Marcus responded to a previous remark that there is always more than one management conference. He noted that the rule is not a command to have more than one. Paragraph (c)(8) lets the judge order the lawyers to provide a schedule for further management meetings. Subdivision (d) also advises the judge to be more flexible than under Rule 16 in making revisions to the initial management program. Of the two kinds of issues raised about the rule at today’s meeting—smaller wording issues versus more fundamental issues about what should be included in the rule—the wording issues seemed more promising to look at today. Professor Marcus suspected that there would be a long compilation of public comments if the rule were published.

In response to a suggestion by Judge Bates, Judge Rosenberg stated that subdivision (c)’s text would say simply “any matter listed below” rather than “any matter addressed in the list below.”

Professor Marcus agreed with Judge Bates that the reference to Rule 16(b) in the fourth paragraph in the committee note on paragraph (c)(1) should instead be a reference to Rule 16.1(b).

Judge Bates had asked whether paragraph (c)(6) should say “to handle discovery efficiently” instead of “to handle it efficiently”; after discussion with the style consultants, the advisory committee representatives decided not to make that change.

Judge Rosenberg agreed with Judge Bates that “Even if the court has not” in the committee note to paragraph (c)(9) should be changed to “Whether or not the court has.”

A practitioner member asked if the advisory committee wanted to retain (in the second paragraph of the committee note to paragraph (c)(4)) the sentence about discovery from individual class members. Another practitioner member supported deleting that sentence because it concerned class actions, not MDLs. The practitioner member who had previously expressed support for keeping the sentence suggested that the problem with the sentence was its statement that “it is widely agreed” that such discovery is often inappropriate. There is nothing in Rule 23 law about this, but there is a lot of caselaw. This member suggested that perhaps better language would be, “For example, it may be contended that discovery from individual class members is inappropriate in particular class actions.” An academic member questioned why the example should be included in the note. Whether it is accurate or not, it may be better to take it out or find another example. The practitioner member responded that it comes up in hybrid class MDLs in which there are both class actions and individual claims arising from the same product or course of conduct. The example is a way of reminding courts that they may be dealing with different standards, issues, terminology, and decisions based on whether they are dealing with the individual component or the class component of an MDL.

A practitioner member again raised the question whether all leadership counsel must responsibly and fairly represent all plaintiffs. Another practitioner member responded that it might be wiser to say that they will fairly and reasonably represent the plaintiffs or the group of plaintiffs they are appointed to represent. The reason there are diverse leadership groups in MDLs is that

some will represent class plaintiffs, for example, while others will represent a particular type of claim. “All” plaintiffs may be too literal.

Judge Rosenberg agreed that the proposed committee note should be modified to remove the word “all” in the phrase “responsibly and fairly represent all plaintiffs” in the second paragraph of the committee note to paragraph (c)(1). She also agreed that the second paragraph of the committee note to paragraph (c)(4) should be modified to remove the sentence about class-member discovery.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed new Rule 16.1 for public comment with one change to the title of the proposed rule (striking “Managing”), one change to the text of subdivision (c) (replacing “any matter addressed in the list below” with “any matter listed below”), and the following changes to the committee note as printed in the agenda book:**

- In the second paragraph of the note to paragraph (c)(1), “all” was struck from the phrase “responsibly and fairly represent all plaintiffs.”
- In the fourth paragraph of the note to paragraph (c)(1), “Rule 16(b)” was changed to “Rule 16.1(b).”
- In the second paragraph of the note to paragraph (c)(4), the third sentence (which concerned class-member discovery and began “For example, it is widely agreed”) was struck.
- In the note to paragraph (c)(9), the phrase “Even if the court has not” was changed to “Whether or not the court has.”

Information Items

Discovery Subcommittee Projects. Professor Marcus reported on this item. This subcommittee is considering four issues, of which one may not pan out, and the others are in various states of evolution.

One issue is how to serve a subpoena. Rule 45(b)(1) says that service requires “delivering” the subpoena to the witness. Does that mean in-hand? By Twitter? Perhaps there are amendments that could improve the rule. Rules Law Clerk Chris Pryby wrote an excellent memorandum on state practices for serving subpoenas. The subcommittee will consider that new information.

Second, the subcommittee is considering whether to make rules about filings under seal. The agenda book shows how the subcommittee’s thinking has evolved. When the subcommittee first learned about an Administrative Office project on sealed filings, the subcommittee thought it should wait for that project to finish; now the subcommittee has been told it should not wait. One question is: what standard should be used? The subcommittee’s initial effort provides simply that the standard is not the same as that governing issuance of a protective order for information exchanged through discovery. Another question is: what procedures should be used? The subcommittee identified a wide variety of procedural issues, listed on pages 810–11 of the agenda book, that could be addressed by a uniform national rule. But the scope of what would ultimately

be addressed is uncertain. Professor Marcus asked for input on whether clerk’s offices would welcome a national rule on this.

Third, Judge Michael Baylson submitted a proposal concerning discovery abroad under Rule 28 (Persons Before Whom Depositions May Be Taken). This is not a rule that most attorneys often deal with. The subcommittee is beginning to look at this proposal.

Finally, the FJC has completed a thorough study of the mandatory-initial-discovery pilot project. Its findings do not appear to support drastic changes to the rules. The subcommittee will consider whether any changes to the rules are warranted in light of the study.

* * *

After the Civil Rules Committee delivered this information item, it temporarily yielded the floor to the Evidence Rules Committee. The Report of the Civil Rules Committee continued after the conclusion of the Evidence Rules Committee presentation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Patrick Schiltz and Professors Daniel Capra and Liesa Richter presented the report of the Advisory Committee on Evidence Rules, which last met in Washington, D.C., on April 28, 2023. The advisory committee presented five action items and one information item. The advisory committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 910.

Action Items

New Rule 107 (Illustrative Aids). Judge Schiltz reported on this item. The advisory committee sought final approval of new Rule 107, which appeared starting on page 920 of the agenda book.

Illustrative aids are not themselves evidence. They are instead devices to help the trier of fact understand the evidence. Illustrative aids are used in virtually every trial, but the Federal Rules of Evidence do not address them. Nor do the other rules of practice and procedure. The new rule would fill this gap.

The rule as published would do five things. First, it would define illustrative aids, and it would give judges and litigants a common vocabulary and at least a touchstone in trying to distinguish illustrative aids from admissible evidence.

Second, it would provide a standard for the judge and the parties to apply in deciding whether an illustrative aid may be used: the utility of the aid in assisting comprehension must not be substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. The advisory committee specifically asked commentators to address whether it should be just an “outweighed” standard or a “substantially outweighed” standard.

Third, the new rule as published provided a notice requirement. Before showing the jury an illustrative aid, a litigant would first need to show it to the other side and give the other side a chance to object.

Fourth, the rule bars illustrative aids from going to the jury room unless the parties consent to it or the court makes an exception for good cause.

Finally, the rule would require that, where practicable, illustrative aids be made part of the record so that, if an issue about an illustrative aid comes up on appeal, the appellate court has it in the record.

Professor Capra listed several changes to the proposed rule's committee note made since its publication for public comment but not noted in the agenda book. (These changes are among those listed at the end of this section.) He then discussed the public comments on the proposed new rule. There were many comments and much opposition to the notice requirement. Commenters gave various arguments against the notice requirement, including that it would make litigation more expensive, that it was unnecessary, and that it would steal attorneys' thunder. The advisory committee decided to delete the notice requirement from the proposed rule and instead discuss the issue of notice in the committee note.

Professor Capra also discussed the advisory committee's decision to use the "substantially outweighed" standard. This standard tracks that in Rule 403, and it is geared toward admitting illustrative aids. Based on the public comment, the advisory committee decided that it did not make sense for different tests to apply to evidence and illustrative aids.

Public comment also led the advisory committee to choose the new rule's location within the Federal Rules of Evidence. The rule was published for public comment as Rule 611(d) because Rule 611(a) is frequently used by courts to regulate illustrative aids. But Rule 611, which is in Article Six, is about witnesses, and illustrative aids are not really about witnesses. The new rule fits better in Article One, which is about rules of general applicability. Therefore the proposed rule was designated as new Rule 107.

Last, Professor Capra noted that a new subdivision (d) was added to new Rule 107 to direct courts and litigants to Rule 1006 for summaries of voluminous evidence because there is a lot of confusion in the courts about the difference between summaries and illustrative aids.

A practitioner member observed that he, like other members of the trial bar, had been very concerned about the proposed rule as published. He supported the deletion of the notice requirement and the use of "substantially outweighed" as the standard; he hoped that the latter would encourage the use of illustrative aids. The member stressed that some illustrative aids equate to a written version of the lawyer's actual presentation, such that providing advance notice of the aid would equate to a preview of that presentation. Such disclosures, he argued, would impair truth-seeking and increase the number of objections. So this member had concerns about the seventh paragraph of the committee note (shown on page 923 of the agenda book), which addressed the question of notice in a way that this member thought put too much of a thumb on the scale in favor of advance notice. The member suggested adding the following as the penultimate sentence of the paragraph: "In addition, in some cases, advance disclosure may

improperly preview witness examination or attorney argument or encourage excessive objections.” Asked to explain what number of objections would be optimal, the member modified his suggested sentence by deleting “or encourage excessive objections.” The member also suggested revising the last sentence of the paragraph to reflect the fact that often the parties will resolve issues concerning advance notice by agreement; Professor Capra expressed reluctance to make that change because the potential for the parties to resolve an issue by agreement exists for many types of disputes.

A judge member suggested cutting the entire paragraph discussing notice. The member thought that the paragraph reflected an increasingly outdated view, and it was heavily leaning in a direction objected to by so many commenters. At the least, this member argued, the sentence beginning with the word “ample” should be replaced with the sentence suggested by the practitioner member.

Another judge member likened issues surrounding the definition of “illustrative aid” to issues prevalent in disputes about summary witnesses. The member suggested refining the definition of illustrative aid so that it cannot be used as a vehicle to bring in extra-record information. Professor Capra thought that such a situation would be prevented by Rule 403: if an aid contained additional evidence not yet in the record, that additional evidence would be evaluated under Rule 403. The practitioner member suggested that the “substantially outweighed” standard would address this problem; a purported aid that contained evidence not in the record would be subject to multiple objections, including that it would create unfair prejudice. Professor Capra noted that the Rule 403 and Rule 107(a) balancing tests would work the same way.

Judge Bates asked what would happen if someone used some type of illustrative aid containing certain terms and added a definition not in evidence—supplying additional information beyond what had been admitted into evidence in the case. Professor Capra thought that Rule 403 would prevent that from happening because of the added information’s prejudicial effect.

Judge Schiltz remarked that it is difficult to define illustrative aids to exclude those sorts of situations. The rule gives a negative definition of illustrative aids—that they are not evidence. The rule has to state the idea fairly generally and let trial judges apply it. For instance, the rule cannot say illustrative aids are limited to summaries or compilations because they are much broader than that.

The judge member who had raised the concern about the inclusion of extra-record information again suggested stating explicitly that an illustrative aid cannot include information not already in the record. Professor Capra asked if putting “admissible” on line 4—“understand *admissible* evidence or argument”—would be satisfactory. The judge member responded that, no, someone could help the trier of fact understand admissible evidence by introducing extra-record evidence, as in Judge Bates’ earlier illustration. The judge member also thought that whether the aid’s utility in assisting comprehension is substantially outweighed by the danger of unfair prejudice is not the correct test for introducing unadmitted evidence through illustrative aids; rather, the presence of that unadmitted evidence should disqualify the aid from being used altogether. But the rule currently does not have anything that prevents that.

The judge member further commented that it might be worth adding a requirement in (b) to tell the jury that illustrative aids are not evidence. Professor Capra responded that it was in the committee note instead because most rules of evidence do not address jury instructions in the text.

A practitioner member commented that it was important to keep in mind that the rule as it now stood encompassed illustrative aids used throughout a trial, including during opening and closing arguments. An illustrative aid during a closing argument will typically include argument; it may for example include headings that characterize evidence a certain way.

Professor Bartell suggested taking the fourth sentence of the first paragraph of the committee note and placing it in the rule text to define “illustrative aid.” A judge member expressed support for that suggestion. Professor Capra said that the advisory committee, after repeated consideration, felt that the definition did not work as well in the rule text as in the committee note.

A judge member expressed appreciation for the proposed new rule, and predicted that it would clear up confusion concerning when an exhibit goes back to the jury. The rule does a good job of balancing the interests on that issue. The member also thought that attorneys would generally use common sense to know not to add unadmitted evidence to an illustrative aid. One textual addition that might help reinforce that behavior could be to add the word “the” before the word “evidence” in line 4 of Rule 107(a) as shown on page 920 of the agenda book—“understand *the* evidence or argument.” The member further noted that it would probably be necessary to give limiting instructions to ensure that the jury uses illustrative aids properly. Professor Capra accepted the proposed edit of adding the word “the” before “evidence.”

Judge Bates wondered if the concern about adding extra-record information evidence could be addressed by adding to the first paragraph of the committee note: “An illustrative aid may not be used to bring in additional information that is not in evidence.” Judge Schiltz responded that that would limit argument too much—a lot of argument brings in information not technically in evidence. Judge Bates amended the suggested addition to refer to “additional factual information.” Professor Capra reiterated his belief that if there is other evidence offered in the guise of an illustrative aid, it would be analyzed under Rule 403, not 107.

A judge member understood the concern raised about adding unadmitted evidence to an illustrative aid but thought it was not worth worrying about. It is like closing arguments—there is not a rule saying that something not in evidence cannot be mentioned in closing argument, yet any attempt to do so is met with an objection.

An academic member worried about the possibility that confusion about exactly what an illustrative aid is—how it is different, what it captures, what it does not capture, and how it is implemented—would create a flurry of objections and litigation. The answer might be to monitor the caselaw and anecdotal reports so as to learn how the rule is implemented.

Ms. Shapiro commented that the DOJ trial attorneys with whom she had spoken were thrilled to have a rule like this because the courts’ treatment of illustrative aids—even their vocabulary—has been inconsistent.

Judge Bates asked whether the last sentence of the third paragraph of the committee note should be revised by adding “or argument” after “evidence” on page 922. Professor Capra accepted this change.

As to the seventh paragraph of the committee note (on page 923), Judge Bates also pointed out that a decision had to be made concerning the suggestions to delete or amend that paragraph’s discussion of advance notice. Judge Schiltz recalled that a majority of the advisory committee members had favored a notice requirement; the committee understood the opposition to such a requirement, and had meant to accomplish a compromise by deleting the requirement from the rule text but including the notice discussion in the committee note. He was concerned about changing the committee note too much after achieving that compromise. He thought that adding the sentence about the possible downsides of advance notice and maybe other modest changes would be acceptable, but cutting the paragraph altogether would go too far.

A judge member suggested cutting the sentence that was the penultimate sentence of the seventh paragraph as shown on page 923 (the sentence that began “Ample advance notice”). Judge Schiltz agreed to that change. A judge member expressed support for retaining that sentence because it helpfully illustrated different scenarios for the use of illustrative aids; Professor Capra added that the sentence presented a balanced viewpoint. Another practitioner member, though, supported deleting the sentence because it focused on whether requiring advance notice *can* be done rather than whether it *should* be done—the latter being, in this member’s view, the more important question. Judge Schiltz agreed that he would rather take out the sentence than possibly lose the support of those concerned about the notice issue.

A judge member questioned the use of the term “infinite variety” in the fourth sentence of the note paragraph concerning advance notice. Professor Garner suggested “wide variety,” which Professor Capra accepted.

Professor Capra summarized the amendments to the proposal. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 107 with one change to the proposed rule to add “the” before “evidence” on line 4 on page 920 of the agenda book, and the following changes to the committee note as printed on pages 921–24 of the agenda book:**

- In the first paragraph, fifth line, in the phrase “as that latter term is vague and has been subject,” the language “is vague and” was struck.
- In the second paragraph, third line, the word “factfinder” was changed to “trier of fact.”
- In the second paragraph, last line, the language “to study it, and to use it to help determine the disputed facts” was changed to “and use it to help determine the disputed facts.” The comma preceding this line was also struck.
- In the third paragraph, third line, the word “factfinder” was changed to “trier of fact.” In the third paragraph, second-to-last line, the phrase “finder of fact” was changed to “trier of fact,” and the phrase “or argument” was added after “understand evidence.”

- In the fourth paragraph, second line, the word “information” was changed to “evidence.”
- In the seventh paragraph (which commences “Many courts require”), the sentence “That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used,” was changed to “That said, there is a wide variety of illustrative aids and a wide variety of circumstances under which they might be used.”
- In the seventh paragraph, the sentence beginning “Ample advance notice” was struck and replaced with the sentence: “In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument.”

Amendment to Rule 1006 (Summaries to Prove Content). Judge Schiltz reported on this item. The advisory committee sought final approval for an amendment to Rule 1006, which appeared on page 965 of the agenda book.

Rule 1006 allows a summary of voluminous admissible evidence to be admitted into evidence itself. Unlike an illustrative aid, these summaries are evidence and may go to the jury room and be used like any other evidence. The summary may be used in lieu of the voluminous underlying evidence or in addition to some or all of that voluminous underlying evidence.

Courts have had a great deal of difficulty with Rule 1006. Some incorrectly say that a Rule 1006 summary is not evidence; some incorrectly say that a Rule 1006 summary cannot be admitted unless all the underlying voluminous evidence is first admitted; and some incorrectly say that a Rule 1006 summary cannot be admitted if any of the underlying evidence has been admitted.

The proposed amendment would not change the substance of Rule 1006. It would instead clarify the rule in order to reduce the likelihood of errors.

Professor Richter reported that the advisory committee received seven public comments on the proposed amendment. Those comments were largely supportive. There was one note of criticism. A longstanding part of the foundation for a Rule 1006 summary is that the underlying voluminous materials must be admissible in evidence, even though they need not actually be admitted. Courts were not having a problem with that foundational requirement, so the advisory committee did not include it in the version published for public comment. The advisory committee recognized this omission and, at its Fall 2022 meeting, unanimously agreed to add the requirement of admissibility to the rule text. This addition was shown on page 965, line 5. That was the only change to the proposed amendment since the public-comment period.

Judge Bates asked whether, in line 4, the word “offered” should be added, so that the text reads, “The court may admit as evidence a summary, chart, or calculation *offered* to prove”

Turning to the fourth paragraph of the committee note, a judge member asked whether the verb “meet” in the phrase “meet the evidence” was sufficiently clear. After some discussion among the committee members and the advisory committee’s representatives, the advisory committee’s representatives agreed to replace the word “meet” with “evaluate.”

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 1006 with the following changes: in**

the rule text, adding the word “offered” after “calculation” as shown on page 965, line 4, of the agenda book; and in the fourth paragraph of the committee note, replacing the word “meet” with “evaluate.”

Amendment to Rule 613(b) (Extrinsic Evidence of a Prior Inconsistent Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 613(b), which appeared on page 952 of the agenda book.

Rule 613(b) addresses the situation in which a witness takes the stand and testifies, and a party wants to impeach that witness by introducing extrinsic evidence—for example, the testimony of another witness, or a document—that the witness made an inconsistent statement in the past. Under the common law, before that party is allowed to bring in that extrinsic evidence to show that the witness made an inconsistent statement in the past, the witness had to be given a chance to explain or deny making the statement. This is called the requirement of prior presentation.

Rule 613(b) took the opposite approach: as long as sometime during the trial the witness had a chance to explain or deny the prior inconsistent statement, the extrinsic evidence could come in. But most judges ignore this rule—Judge Schiltz admitted ignoring it himself—and follow the common law. The common-law rule makes sense because the vast majority of the time, the witness will admit making the inconsistent statement, obviating the need to unnecessarily lengthen the trial by admitting the extrinsic evidence. Further, if the extrinsic evidence is admitted after the witness testifies, then someone has to bring the witness back for the chance to explain or deny it—and the witness may have flown across the country.

The proposed amendment therefore restores the common-law requirement of prior presentation. But it gives the court discretion to waive it—for example, if a party was not aware of the inconsistent statement until the witness finished testifying.

Professor Richter reported that the advisory committee received four public comments on Rule 613(b), all in support of restoring the prior-presentation requirement. The comments noted that it would make for orderly and efficient impeachment and impose no impediment to fairness. The proposal would also align the rule’s text with the practice followed in most federal courts. There was no change to the rule text from the version that was published for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 613(b).**

Amendment to Rule 801(d)(2) (An Opposing Party’s Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 801(d)(2), which appeared starting on page 956 of the agenda book.

Rule 801(d)(2) provides an exception to the hearsay rule for statements of a party-opponent. Courts are split about how to apply this rule when the party at trial is not the declarant but rather the declarant’s successor in interest. For example, suppose the declarant is injured in an accident, makes an out-of-court statement about the incident that caused the declarant’s injuries, then dies. If the declarant’s estate sues, may the defendant use the deceased declarant’s out-of-court statement against the estate? Some courts say yes because the estate just stands in the shoes of the declarant and should be treated the same. Some courts say no because it was technically the

human-being declarant who made the out-of-court statement, not the legal entity (the estate) that is the actual party.

The proposed amendment would adopt the former position: if the statement would be admissible against the declarant as a party, then it's also admissible against the party that stands in the shoes of the declarant. The advisory committee thought that the fairest outcome, and it also eliminates an incentive to use assignments or other devices to manipulate litigation.

Professor Capra reported that there was sparse public comment. Some comments suggested that the term “successor in interest” be used, but that was problematic because the term is used in another evidence rule, where it is applied expansively. Because it is not supposed to be applied expansively here, the committee did not adopt that change.

Judge Bates highlighted the statement in the committee note's last paragraph, that if the declarant makes the statement after the rights or obligations have been transferred, then the statement would not be admissible. He asked whether that was a substantive provision and whether there was an easy way to express it in the rule's text. Professor Capra responded that there was not an easy way to express it in the text, and this issue would arise very rarely. Furthermore, the rationale for attribution would not apply if the interest has already been transferred. The advisory committee decided in two separate votes not to include that issue in the rule text and instead to keep it in the committee note.

Turning back to the proposed rule text on line 29 of page 957 (“If a party's claim, defense, or potential liability is directly derived ...”), Professor Hartnett asked whether “directly” was the appropriate term to use. For example, if a right passes through two assignments or successors in interest, would “directly derived” capture that scenario? Professor Capra responded that the term comes from the case law, and “derived” on its own seemed too diffuse.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 801(d)(2).**

Amendment to Rule 804(b)(3) (Statement Against Interest). Judge Schiltz reported on this item. The advisory committee sought final approval of a proposed amendment to Rule 804(b)(3), which appeared starting on page 960 of the agenda book.

Rule 804(b)(3) provides an exception to the hearsay rule for declarations against interest. The proposed amendment addresses a particular application of that rule.

In a criminal case in which the out-of-court statement is a declaration against penal interest—typically, a statement by somebody outside of court that the declarant was the one who actually committed the crime for which the defendant is now on trial—then the proponent of that statement must provide corroborating circumstances that clearly indicate the trustworthiness of the statement.

There's a dispute in the courts about how to decide if such corroborating circumstances exist. Some courts say that the judge may only look at the inherent guarantees of trustworthiness underlying the statement itself, not at any independent evidence (such as security-camera footage

or DNA evidence) that would support or refute the out-of-court confession. But most courts say the judge can look at independent evidence.

The proposed amendment resolves the split. It takes the side of the courts that say that the judges *can* look at independent evidence.

Professor Richter noted that the advisory committee received five public comments on this proposal, all of them in support. But several expressed confusion because, as originally drafted, the proposed rule used the term “corroborating” twice in the same sentence. The distinction was not clear between the finding of “corroborating circumstances” that a court had to make and the corroborating “evidence” that a court could use to make that finding.

The advisory committee modified the text slightly to avoid using the term “corroborating” twice and to clarify the distinction between the finding and the evidence. The revised rule text directs the court to consider “the totality of circumstances under which [the out-of-court statement] was made and any evidence that supports or contradicts it.” Conforming changes were made to the committee note. The committee note also explains that a 2019 amendment to the residual hearsay exception (Rule 807) that does the same thing—expanding the evidence a court may use to find trustworthiness under that exception—should be interpreted similarly, even though amended Rules 804(b)(3) and 807 use slightly different wording.

A judge member observed that the criterion in the rule—that the statement tends to expose the declarant to criminal liability—was broader than Judge Schiltz’s explanation that the statement exposes the declarant to criminal liability for the crime for which the defendant is being tried; the member asked which was the intended test. Judge Schiltz responded that his explanation was just the most common example, and the rule still reaches all statements exposing the declarant to criminal liability.

Judge Bates asked whether it is correct to say in the committee note that the language used in Rule 807, speaking only of “corroborating” evidence, is consistent with the “evidence that supports or contradicts” language in the proposed amendment to Rule 804. “Supporting or contradicting evidence” includes evidence that is not “corroborating.” Professor Capra responded that, because Rule 807’s committee note also discusses an absence of evidence, courts applying the post-2019 Rule 807 have considered evidence contradicting the account. Thus, the two rules, though not identical, are consistent. Judge Schiltz noted that the current proposal gets to the same point in a cleaner way. Professor Capra also remarked that the phrase “corroborating circumstances” was not changed because it has been in the rule for 50 years and there is a lot of law about it.

A judge member asked why the proposed rule uses a narrow term like “contradicts” instead of a broader term like “undermines,” given that “supports” is a broad statement and the opposing term ought to have similarly broad scope. After some discussion, the advisory committee representatives agreed to replace “contradicts” with “undermines” (in line 27 on page 961 of the agenda book) and to make a corresponding change to the committee note.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 804(b)(3) with the following changes:**

in the text of Rule 804(b)(3)(B), replacing “contradicts” with “undermines,” and making the same change in the committee note.

Information Item

Juror Questions. Judge Schiltz reported on this item. The advisory committee proposed an amendment that would have established minimum procedural protections if a court decided to let jurors pose questions for witnesses. The proposed rule was clear that the advisory committee did not take any position on whether that practice should be allowed.

The advisory committee presented this proposal at a previous meeting of the Standing Committee. Some members of the Standing Committee expressed concern that putting safeguards in the rules would encourage the practice.

The matter was returned to the advisory committee for further study. It held a symposium on the topic at its Fall 2022 meeting. The advisory committee then discussed the issue at its Spring 2023 meeting and decided to table the proposal. There was significant opposition to it even within the advisory committee.

Professor Capra noted that the advisory committee has sent its work to the committee updating the Benchbook for U.S. District Court Judges. Judge Schiltz explained that the advisory committee suggested that the proposed procedural safeguards may be appropriate for inclusion in the revision of the Benchbook that is currently being worked on.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (CONTINUED)

Information Items (Continued)

Rule 41(a)(1)(A) (Voluntary Dismissal by the Plaintiff Without a Court Order). Professor Bradt reported on this item.

The question under this rule is: what and when may a plaintiff voluntarily dismiss without a court order and without prejudice? The rule refers to the plaintiff’s ability to voluntarily dismiss an “action.” What does that word mean? Does it mean the entire case, all claims against all defendants? Or can it mean something less? The circuits are split on whether a plaintiff could dismiss all claims against one defendant in a multidefendant case. There’s also a district-court split about whether a plaintiff may voluntarily dismiss even less without a court order, such as an individual claim.

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, is trying to figure out whether and to what extent this is a real-world problem rather than one that courts effectively muddle through. That is, can judges effectively narrow cases, despite the fact that Rule 41(a)(1)(A) speaks only of an “action”? Since the January 2023 Standing Committee meeting, the Rule 41 Subcommittee has conducted outreach with Lawyers for Civil Justice and the American Association for Justice, and it has an upcoming meeting with the National Employment Lawyers Association.

If this is a real problem, the next step would be to ask whether it can be solved by consensus. The subcommittee may need to consider the deeper question of how much flexibility a plaintiff ought to have. And if a plaintiff does have that flexibility, by when must it be exercised? The rule currently says that a plaintiff has until the answer or a motion for summary judgment is filed. But there might be a good reason to move that deadline up to the filing of a Rule 12 motion to dismiss. Further, an amendment to Rule 41 might have downstream effects on other rules designed to facilitate flexibility during litigation, such as Rule 15.

Judge Bates observed that the Eleventh Circuit in *Rosell v. VMSB, LLC*, 67 F.4th 1141, 1143 (11th Cir. 2023), recently held that an “action” means the whole case and therefore dismissed an appeal for lack of jurisdiction. It seems to be an issue that is live in the courts and could be causing problems for litigants.

Professor Bradt noted that the word “action” also appears in, and the interpretive questions thus extend to, Rule 41(a)(2) (concerning dismissals by court order).

Rule 7.1 (Disclosure Statement). Professor Bradt reported on this item.

The advisory committee has formed a subcommittee to examine Rule 7.1, which requires corporate litigants to disclose certain financial interests. The rule helps inform judges whether they must recuse themselves because of a financial interest in a party or the subject matter. It requires a party to disclose its ownership by a parent corporation. The problem is that the rule may not accurately reflect all of the different kinds of ownership interests that may exist in a party. One topic under discussion is when a “grandparent” corporation owns the parent corporation.

This issue has gotten a great deal of attention from the public and from Congress. At the last advisory-committee meeting, a subcommittee to investigate the issue was appointed, and it will be chaired by Justice Jane Bland of the Texas Supreme Court. The subcommittee will have its first meeting soon. It will initially research the relevant case law and local rules in the federal courts, and it will also look to state courts for insight into how best to resolve the issue.

Professor Beale wondered whether the Administrative Office or some other entity could create a database in which one could query a corporation and find all ownership interests in the corporation, in the corporation’s owners, and so on, rather than depending on parties’ disclosures. Professor Bradt responded that the subcommittee is going to look at this possibility, but a technological solution may be challenging because of the proliferation of many kinds of corporate structures.

Professor Bradt noted that it might make sense for the subcommittee to work with the Appellate Rules Committee on this issue because many of the questions addressed during the report about amicus disclosures parallel the questions the subcommittee will be addressing in this project.

A practitioner member commented that law firms have to investigate corporate ownership for conflict purposes. Services already exist with this information. The wheel does not necessarily need to be reinvented. Professor Bradt agreed, but also noted that the subcommittee wants to be mindful of whether those services would be sufficiently accessible to parties with fewer resources.

Additional Items. Professor Marcus briefly reported on several additional items.

Rule 23, dealing with class actions, is before the advisory committee again, this time with respect to two different issues. First, in a recent First Circuit opinion, Judge Kayatta addressed the question of incentive awards for class representatives. Because the Supreme Court has so far declined to grant certiorari on this issue, it remains before the advisory committee. Second, the Lawyers for Civil Justice suggested a change to Rule 23(b)(3) on the “superiority” prong to let a court conclude that some nonadjudicative alternative might be superior to a class action.

The advisory committee also continues to look at methods to sensibly handle applications for in forma pauperis (“IFP”) status. Perhaps it should even be called something different so that people who are eligible will understand what IFP means.

Finally, three suggestions have been removed from the advisory committee’s agenda. The first, suggested in 2016 by Judge Graber and then-Judge Gorsuch, would have amended Rule 38, dealing with jury-trial demands, in response to the declining frequency of civil jury trials. But studies suggest that Rule 38 is not the source of the problem, so an amendment to the rule did not seem the appropriate solution.

Second, Senators Tillis and Leahy wrote to the Chief Justice about a district judge who was extremely active in patent-infringement cases. This judge purportedly held several *Markman* hearings a week, using deputized masters or judicial assistants to assist him with that caseload. The senators did not believe that Rule 53 authorized that kind of use of special masters. But the senators did not suggest that Rule 53 should be changed. Also, the relevant court has revised its assignment of patent-infringement cases in a way that can reduce this problem. This item is therefore no longer on the advisory committee’s agenda.

Third, an attorney proposed amending Rule 11 to forbid state bar authorities to impose any discipline on anyone who is accused of misconduct in federal court unless a federal court has already imposed Rule 11 sanctions. Because this proposal misconstrues the function of Rule 11, the advisory committee removed this proposal from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge James Dever and Professors Sara Sun Beale and Nancy King presented the report of the Advisory Committee on Criminal Rules, which last met in Washington, D.C., on April 20, 2023. The advisory committee presented three information items and no action items. The advisory committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 875.

Information Items

Rule 17 and Pretrial Subpoena Authority. Judge Dever reported on this item. Judge Jacqueline Nguyen chairs the Rule 17 Subcommittee. Rule 17, which deals with subpoenas in criminal trials, has not been updated in about 60 years. The New York City Bar Association’s White Collar Crime Committee submitted a proposal to amend it.

The advisory committee responded to the proposal by first asking whether there is a problem with how Rule 17 currently works. It began gathering information in its October 2022 meeting, and it has continued that information-gathering by asking how companies that deal with big data respond to subpoenas.

About a third of the states have criminal-subpoena rules that are structured differently than the federal rules. The Rule 17 Subcommittee reported on the topic at the advisory committee's April 2023 meeting.

The advisory committee is considering how to appropriately distinguish procedurally between protected information, such as medical records, personnel records, or privileged information, and other information, such as a video of events occurring outside a store.

Professor Beale added that the subpoena issue is an important question. Defense attorneys have very little means to get information from third parties because Rule 17 has been so narrowly interpreted.

Rule 23 and Jury-Trial Waiver Without Government Consent. Judge Dever reported on this item.

The American College of Trial Lawyers' Federal Criminal Procedure Committee submitted a proposal to amend Rule 23(a) to eliminate the requirement that the government consent to a defendant's request for a bench trial.

Currently, a defendant must waive a jury trial in writing, the government must consent, and the court must also approve the waiver. About a third of the states do not require the prosecution's consent to waive a jury trial. The federal rules have always required it.

The advisory committee has not yet appointed a subcommittee to review the proposal. It has asked the Federal Defenders and Criminal Justice Act lawyers on the advisory committee to gather more information. One premise of the proposal was that there is a backlog of trials because of COVID, but none of the district judges on the advisory committee had had that experience. So the advisory committee wanted to gather more information. That process is ongoing.

The advisory committee is also trying to gather information on what rationales, if any, the DOJ gives for not consenting to a jury trial. Part of what animates the discussion is that, although the Sixth Amendment talks about the accused's right to a jury trial, Article III, Section 2's directive that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" does not mention the defendant. So the United States actually has its own, independent interest in having a jury trial.

Professor Beale predicted that the Rule 23 proposal would generate interesting discussion about whether it is appropriate for parties to be adversarial about demands or waivers of juries or whether there is something different about the jury as an institution that makes it inappropriate for parties to try to demand it or waive it for strategic advantage. There are also apparently differences in the government's practices among the 94 judicial districts. She thought that the advisory committee's attention to the issue might spur the DOJ to change its process on its own.

Judge Bates asked to clarify whether the Rule 23 investigation would only focus on the government’s consent to bench trials, not court approval. Professor Beale confirmed that the proposal focused only on government consent.

Professor Marcus remarked that the proposal seems to expand the court’s power by letting it decide whether to grant the defendant’s request for a bench trial even though the government does not consent.

Judge Dever reiterated that only a minority of the states’ practices currently align with the proposal. The federal rule had always required the government’s consent, and the Supreme Court has rejected a constitutional challenge to it.

Judge Bates concluded by noting that the DOJ, whose practices vary from district to district, had volunteered to provide information about what they do and have done with respect to requests for bench trials.

Rule 49.1 (Privacy Protections for Filings Made with the Court). As to this item, Judge Dever deferred to Professor Bartell’s previous report on Senator Wyden’s suggestion concerning privacy protections and court filings.

OTHER COMMITTEE BUSINESS

Information Item

Legislative Update. Judge Bates and Mr. Pryby stated that there was no significant legislative activity to report since the last meeting of the Standing Committee.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting’s agenda. Judge Bates explained that the Standing Committee needed to provide input to the Judicial Conference’s Executive Committee about the strategic plan for the federal judiciary. Judge Bates requested comment, either then or after the meeting, on the draft report that began on page 1005 of the agenda book.

Judge Bates then sought the Standing Committee’s authorization to work with the Rules Committee Staff and Professor Struve to move forward with the report. Without objection: **The Standing Committee so authorized Judge Bates.**

New Business

No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the committee members for their contributions and patience. The Standing Committee will next convene on January 4, 2024.

TAB 1C

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

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 Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
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 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for “Principal & Interest”) with two lines, one for “Principal” and one for “Interest.” The amendments would put the burden on the claim holder to identify the elements of its claim.	

Revised December 7, 2023

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
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 22nd 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.”	
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 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
CR 45	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
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.	

Revised December 7, 2023

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
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).	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word “statement” with “certificate”: Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, “a proceeding by an individual debtor to recover tangible personal property under § 542(a).”	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are 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 second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Revised December 7, 2023

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness’s prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant’s principal, hearsay statements made by the declarant or declarant’s principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule’s provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(j) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the “privilege log” problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)’s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, designation of coordinating counsel, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the “privilege log” problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)’s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

**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 32, 35, and 40, and the Appendix of Length Limits 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. 2-3
2.
 - a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, 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, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and
 - c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, 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. 5-9
3. Approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, 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. 12-13
4. Approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, 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. 17-19

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

- Federal Rules of Appellate Procedure pp. 2-5
- Federal Rules of Bankruptcy Procedure pp. 5-12
- Federal Rules of Civil Procedure pp. 12-16
- Federal Rules of Criminal Procedure..... pp. 16-17
- Federal Rules of Evidence pp. 17-20
- Judiciary Strategic Planningp. 20

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 6, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee (9th Cir.), chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III (E.D.N.C.), chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz (D. Minn.), chair, Professor Daniel J. Capra, Reporter, and Professor Liesa Richter, consultant, 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; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Christopher Ian Pryby, Law Clerk to the Standing Committee;

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, 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 received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. An additional update concerned the start of coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees to evaluate a proposal to adopt a unified standard for admission to the bar of federal district and bankruptcy courts. Finally, the Standing Committee approved a brief report regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee’s recommendations.

Rule 32 (Form of Briefs, Appendices, and Other Papers), Rule 35 (En Banc Determination), Rule 40 (Petition for Panel Rehearing), and Appendix of Length Limits

The Advisory Committee completed a comprehensive review of the rules governing panel and en banc rehearing, resulting in proposed amendments transferring the content of Rule 35 to Rule 40, bringing together in one place the relevant provisions dealing with rehearing. The proposed amendments to Rule 40 would clarify the distinct criteria for rehearing en banc

and panel rehearing, and would eliminate redundancy. Rule 32 and the Appendix of Length Limits would be amended to reflect the transfer of the contents of Rule 35 to Rule 40. The proposed amendments were published in August 2022. The Advisory Committee reviewed the public comments and made no changes.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits 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

The Advisory Committee on Appellate Rules submitted proposed amendments to Rule 6 (Appeal in a Bankruptcy Case) and Rule 39 (Costs on Appeal) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Appellate Rule 6 would clarify the treatment of appeals in bankruptcy cases. A proposed amendment to Appellate Rule 6(a) would account for the fact that the time limits for certain post-judgment motions that reset the time to take an appeal from a district court to a court of appeals are different when the district court was exercising bankruptcy jurisdiction under 28 U.S.C. § 1334 than when it was exercising original jurisdiction under other statutory grants. The proposed committee note provides a table showing which Bankruptcy Rule governs each relevant type of post-judgment motion and the time allowed under the current version of the applicable Bankruptcy Rule. Proposed amendments to Appellate Rule 6(c) would address direct appeals in bankruptcy cases, which are governed by 28 U.S.C. § 158(d)(2). The Advisory Committee determined that Rule 6(c)’s current reliance on Rule 5 (Appeal by Permission) was misplaced and that there is considerable confusion in applying the Appellate

Rules to direct appeals. For that reason, the proposed amendments to Rule 6(c) would address direct appeals in a largely self-contained way. Finally, the proposed amendments also provide more detailed guidance for litigants about initial procedural steps once authorization is granted for a direct appeal to the court of appeals.

Rule 39 (Costs)

The proposed amendments to Rule 39 would clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals or the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments would codify the holding in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628 (2021)—that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court—and would provide a clearer procedure to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments would make Rule 39’s structure more parallel by adding a list of the costs taxable in the court of appeals to the current rule, which lists only the costs taxable in the district court.

Information Items

The Advisory Committee met on March 29, 2023. In addition to the proposals noted above, the Advisory Committee discussed several other matters. The Advisory Committee has been considering potential amendments to Rule 29 (Brief of an Amicus Curiae) for several years and considered possible amendments requiring the disclosure by amici curiae of information about contributions by parties and nonparties. In addition, the Advisory Committee completed a draft of amended Form 4 to create a more streamlined and less intrusive form to use when seeking to proceed in forma pauperis. Because the Rules of the Supreme Court require litigants to use the same form, the draft has been provided to the Clerk of the Supreme Court for review.

Finally, the Advisory Committee discussed new suggestions, including a suggestion regarding the redaction of Social Security numbers in court filings, a suggestion for a possible new rule regarding intervention on appeal, a suggestion regarding third-party litigation funding, and a suggestion to follow the Supreme Court’s lead in permitting the filing of amicus briefs without requiring the consent of the parties or the permission of the court.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: the proposed Restyled Bankruptcy Rules;¹ proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006; new Rule 8023.1;² the abrogation of Official Form 423; and a proposed amendment to Bankruptcy Official Form 410A. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Restyled Rules Parts I–IX (the 1000–9000 series of Bankruptcy Rules)

The Bankruptcy Rules are the fifth and final set of national procedural rules to be restyled. The Restyled Bankruptcy Rules were published for comment over several years in three sets: the 1000–2000 series of rules were published in August 2020, the 3000–6000 series in August 2021, and the final set, the 7000–9000 series, in August 2022. After each publication period, the Advisory Committee on Bankruptcy Rules carefully considered the comments received and made recommendations for final approval based on the same general drafting

¹The Restyled Bankruptcy Rules are at Appendix B, pages 1-454. They are in side-by-side format with the existing unstyled version of each rule on the left and the proposed restyled version shown on the right. The unstyled left-side versions of the following rules reflect pending rule changes currently on track to take effect December 1, 2023, absent contrary action by Congress: Amended Rules 3011, 8003, 9006, and new Rule 9038.

²The proposed substantive changes to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1 are set out separately and begin at Appendix B, page 455. The changes, underlining and ~~strikeout~~, are shown against the proposed restyled versions of those rules.

guidelines and principles used in restyling the Appellate, Criminal, Civil, and Evidence Rules, as outlined below. The Restyled Bankruptcy Rules as a whole, including the revisions based on public comments and a final, comprehensive review, are now being recommended for final approval.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996), and Bryan A. Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure*, Mich. Bar J., Sept. 2005, at 56 and Mich. Bar J., Oct. 2005, at 52; Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using consistent formatting to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. “Hanging indents” are used throughout. These formatting changes make the structure of the rules clearer and make the restyled rules easier to read and understand even when the words are not changed.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words. The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words, as well as redundant “intensifiers”—expressions that attempt to add emphasis but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the

restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers. The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

No Substantive Change. The style changes to the rules are intended to make no changes in substantive meaning. The Advisory Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Advisory Committee also declined to modify “sacred phrases”—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. One example is “meeting of creditors,” a term that is widely used and well understood in bankruptcy practice.

Rules Enacted by Congress. Where Congress has enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 361), and Rule 7004(b) and (h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4118), the Advisory Committee has not restyled the rule.

Amendments to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), related amendments to Rules 4004 (Grant or Denial of Discharge), 5009 (Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied), and 9006 (Computing and Extending Time; Time for Motion Papers), and abrogation of Official Form 423 (Certification About a Financial Management Course)

The amendments to Rule 1007(b)(7) delete the directive to file a statement on Official Form 423 (Certification About a Financial Management Course) and make filing the course certificate itself the exclusive means showing that the debtor has taken a postpetition course in

personal financial management. References in other parts of Rule 1007 and in Rules 4004, 5009, and 9006 to the “statement” required by Rule 1007(b)(7) are changed to refer to a “certificate.” Because Official Form 423 is no longer necessary, the Advisory Committee recommends that it be abrogated.

Rule 7001 (Scope of Rules of Part VII)

The amendment to Rule 7001(a) creates an exception for certain turnover proceedings under § 542(a) of the Code. An individual debtor may need an order requiring the prompt return by 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 exempt property. As noted by Justice Sonia Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585, 592–95 (2021), the procedures applicable to adversary proceedings can be unnecessarily time-consuming in such a situation. Instead, the proposed amendment allows the debtor to seek turnover of such property by motion under § 542(a), and the procedures of Rule 9014 would apply.³

Rule 8023.1 (Substitution of Parties)

New Rule 8023.1 is modeled on Appellate Rule 43. Neither Appellate Rule 43 nor Civil Rule 25 applies to parties in bankruptcy appeals to the district court or bankruptcy appellate panel. This new rule is intended to fill that gap by providing consistent rules (in connection with such appeals) for the substitution of parties upon death or for any other reason.

Official Form 410A (Proof of Claim, Attachment A)

Part 3 of Form 410A is amended to provide for separate itemization of principal due and interest due. Because under Bankruptcy Code § 1322(e) the amount necessary to cure a default

³As noted by Justice Sotomayor, “Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days [citation omitted]. One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments.” *Fulton*, 141 S. Ct. at 594.

is “determined in accordance with the underlying agreement and applicable nonbankruptcy law,” it may be necessary for a debtor who is curing arrearages under § 1325(a)(5) to know which portion of the total arrearages is principal and which is interest.

Recommendation: That the Judicial Conference:

- a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, 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, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and
- c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, 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.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1 and 8006 and proposed six new Official Forms related to the Rule 3002.1 amendments, Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee’s recommendation with one change, discussed below, to Rule 3002.1.

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

In response to suggestions submitted by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute’s Commission on Consumer Bankruptcy, the Advisory Committee proposed amendments to Rule 3002.1 that were published for comment

in 2021. The proposed amendments—intended to encourage a greater degree of compliance with the rule’s provisions—included a new midcase assessment of the mortgage claim’s status in order to give the debtor time to cure any postpetition defaults that may have occurred, new provisions concerning the effective date of late payment-change notices, and requirements concerning notice of payment changes for a home equity line of credit (“HELOC”).

Additionally, the proposed amendments would have changed the assessment of the status of the mortgage at the end of a chapter 13 case from a notice to a motion procedure that would result in a binding order.

There were 27 comments submitted in response to the proposed amendments. Many of them identified concerns about the midcase review and end-of-case procedures. The comments led the Advisory Committee to recommend several changes to the rule as published. Among those changes, the provision for giving only annual notices of HELOC changes is made optional. The proposed midcase review procedure is also made optional, can be sought at any time during the case, is done by motion rather than by notice, and can be initiated either by the debtor or the trustee, not just the trustee as initially proposed. Changes are also made to the end-of-case procedures in response to the comments, including initiating the process by notice rather than by motion from the case trustee.

In addition to the changes discussed above, the Advisory Committee also recommended changes to current Rule 3002.1(i) (which would become Rule 3002.1(h)) to clarify the scope of relief that a court may grant if a claimholder fails to provide any information required under the rule. Following concerns raised during the Standing Committee meeting, the Advisory Committee chair withdrew one aspect of those proposed changes to allow for further consideration and possible resubmission at a later time.

Because the changes to the originally published amendments are substantial, and further public input would be beneficial, the Advisory Committee sought republication of the new proposed amendments to Rule 3002.1. After the Advisory Committee chair withdrew the portion of the proposed amendments noted in the preceding paragraph concerning current Rule 3002.1(i), the Standing Committee unanimously approved for publication the remainder of the proposed amendments to Rule 3002.1.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.

Official Forms Related to Proposed Amendments to Rule 3002.1

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-N (Trustee's Notice of Payments Made),
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made),
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim),
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim)

The proposed amendments to Rule 3002.1 that were published for comment in 2021 called for five Official Forms to implement the proposed procedures. As a result of its recommendation to republish proposed Rule 3002.1, and the substantial changes to the proposed

procedures, the Advisory Committee now seeks publication of six proposed implementing Official Forms.

Information Items

The Advisory Committee met on March 30, 2023. In addition to the recommendations discussed above, the Advisory Committee gave preliminary consideration to a suggestion to require redaction of the entire Social Security number from filings in bankruptcy, a new suggestion to adopt national rules addressing electronic debtor signatures, changes to the timing of clerk notices of a debtor's failure to file the certificate showing completion of a personal financial management course, and a rule amendment that would require the debtor to disclose certain assets obtained after the petition date.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rule 12(a). The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing)

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language could be read to suggest unintended preemption of statutory time directives. While it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. The current rule fails to reflect the Advisory Committee’s intent to defer to different response times set by statute. Thus, the current language could be mistakenly interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) are intended to supersede inconsistent statutory provisions, especially because paragraph (1) includes specific language deferring to different periods established by statute.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1)---namely, that a different response time set by statute supersedes the response times set by those rules. After public comment, the Advisory Committee recommended final approval of the rule as published.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, 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.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee’s recommendations.

Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b)(3) would provide that the court may address the timing and method of such compliance in its scheduling order. During the January 2023 Standing Committee meeting, members expressed differing views concerning the length of, and level of detail in, the committee notes that would accompany the proposed amendments. The Advisory Committee subsequently reexamined the notes in light of that discussion, and at the June 2023 Standing Committee meeting, the Advisory Committee presented shortened notes to accompany the proposed amendments.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings, which the Civil Rules do not expressly address. After several years of work by its MDL Subcommittee, extensive discussions with interested bar groups, and consideration of multiple drafts, the Advisory Committee unanimously recommended that new Rule 16.1 be published for public comment.

Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after transfer. An initial MDL management conference allows for early attention to matters identified in Rule 16.1(c), which may be of great value to the transferee judge and the parties. Because not all MDL proceedings present the same type of management challenges, there may be some MDL proceedings in which no initial management conference is

needed, so proposed new Rule 16.1(a) says that the transferee court “should” (not “must”) schedule such a conference.

Rule 16.1(b) recognizes that the transferee judge may designate coordinating counsel---before the appointment of leadership counsel—for the initial MDL conference. The court may appoint coordinating counsel to ensure effective and coordinated discussion and to provide an informative report.

Rule 16.1(c) encourages the court to order the parties to submit a report prior to the initial MDL conference. The court may order that the report address, inter alia, any matter under Rules 16.1(c)(1)–(12) or Rule 16. The rule provides a series of prompts for the court to consider, identifying matters that are often important to the management of MDL proceedings, including (1) whether to appoint leadership counsel; (2) previously entered scheduling or other orders; (3) principal factual and legal issues; (4) exchange of information about factual bases for claims and defenses; (5) consolidated pleadings; (6) a discovery plan; (7) pretrial motions; (8) additional management conferences; (9) settlement; (10) new actions in the MDL proceeding; (11) related actions in other courts; and (12) referral of matters to a magistrate judge or master.

Rule 16.1(d) provides for an initial MDL management order, which the court should enter after the initial MDL management conference. The order should address matters the court designates under Rule 16.1(c) and may address other matters in the court’s discretion. This order controls the MDL proceedings until modified.

Information Items

The Advisory Committee met on March 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 23 (Class Actions) regarding awards to class representatives in class actions and

the superiority requirement for class certification, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, and Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena. The Advisory Committee also discussed issues related to sealed filings, the standards for in forma pauperis status, and the mandatory initial discovery pilot project.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 20, 2023. The Advisory Committee considered several information items.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17 (Subpoena). On issues related to third-party subpoenas, the Advisory Committee has heard from a number of experienced attorneys, including defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. Through its Rule 17 Subcommittee, the Advisory Committee has collected information from experts regarding the Stored Communications Act and other issues relating to materials held online, as well as issues affecting banks and other financial service entities.

A new proposal from the American College of Trial Lawyers would allow the defendant to waive trial by jury without the government’s consent. The Advisory Committee discussed this proposal and its previous consideration of this issue in connection with deliberations over new Criminal Rule 62 (part of the set of proposed rules—currently on track to take effect December 1, 2023, absent contrary action by Congress—that resulted from the CARES Act directive that rules be considered to address future emergencies).

Finally, the Advisory Committee voted to remove two items from its study agenda: a suggestion to clarify Rule 11(a)(2), which governs conditional pleas, and a suggestion to amend Rule 11(a)(1) to provide for a plea of not guilty by reason of insanity.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee’s recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

The distinction between “demonstrative evidence” (admitted into evidence and used substantively to prove disputed issues at trial) and “illustrative aids” (not admitted into evidence but used solely to assist the trier of fact in understanding evidence) is sometimes a difficult one to draw, and the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards. The proposed amendment, originally published for public comment as a new subsection of Rule 611, would provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening

and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors “substantially” outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness’s Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant’s successor-in-interest. The Advisory Committee reasoned that admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide “corroborating circumstances that clearly indicate the trustworthiness” of the statement. There is a dispute in the courts about the meaning of the “corroborating circumstances” requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also

any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, 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.

Information Items

The Advisory Committee on Evidence Rules met on April 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed possible amendments to add a new subdivision to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) to address permitting jurors to submit questions for witnesses. Proposed amendments setting forth the minimum safeguards that should be applied if a trial court decided to allow jurors to submit questions for witnesses were under consideration for some time, but doubts about the practice of allowing jurors to submit questions for witnesses led the Advisory Committee to table any possible proposed amendments. The Advisory Committee referred the issue to the committee

updating the Benchbook for U.S. District Court Judges, and it is being considered for inclusion in the Benchbook.

JUDICIARY STRATEGIC PLANNING

The Standing Committee approved a brief report on the strategic initiatives that the Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler (N.D. Ala.), judiciary planning coordinator.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Robert J. Giuffra, Jr.	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Carolyn B. Kuhl	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

* * * * *

TAB 1D



Date: November 29, 2023

To: Standing Committee on Rules of Practice and Procedure

From: Tim Reagan
Federal Judicial Center Research Division

Re: Federal Judicial Center Research Projects

This memorandum summarizes current and recently completed Federal Judicial Center research relevant to the Federal Rules of Practice and Procedure.

Current Research for Rules Committees

Defaults and Default Judgments

At the request of the Civil Rules Committee, the Center is studying district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. Of particular interest is under what circumstances they are entered by clerks rather than judges.

Complex Criminal Litigation Website

At the request of the Criminal Rules Committee, the Center is developing as one of its special-topics websites (curated content) a collection of resources on complex criminal litigation.

Completed Research for Rules Committees

Mandatory Initial Discovery Pilot (MIDP)—Final Report

At the request of the Civil Rules Committee, the Center studied a pilot program in two districts, in which initial disclosures required by the Federal Rules of Civil Procedure were supplemented with broader disclosure requirements (www.fjc.gov/content/376773/mandatory-initial-discovery-pilot-final-report). Among other findings, pilot cases had shorter disposition times than nonpilot cases, controlling for case type, district, and the effects of the Covid-19 pandemic.

Federal Courts' Electronic Filing by Pro Se Litigants

In light of interest in whether self-represented litigants should be provided expanded electronic filing opportunities, the Center interviewed a modified random sample of seventy-eight clerks of court or members of their staffs in

late 2021 and early 2022, including courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants).

Electronic filing avoids the burden of visiting a courthouse or the delay inherent in regular mail. One option for electronic filing is use of the court's CM/ECF (case management, electronic case filing) system, which is how attorneys typically file now. Another option is email or its equivalent, such as an electronic drop box. Courts vary according to whether they generally permit or forbid these methods and whether they allow for exceptions to their general rules. Some courts have arrangements with some prisons (typically state prisons) for electronic submissions by prisoners.

Some courts do not require paper service by paper filers on parties already receiving electronic service.

Electronic Filing Times in Federal Courts

In light of a proposal to require electronic filing to be completed by the close of business on the day that the filing is due, the Center catalogued the times all docket entries were made in 2018 for all federal courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/365889/electronic-filing-times-federal-courts). About nine in ten attorney filings were made before 6:00 p.m.

A survey of attorneys' practices and preferences was piloted but discontinued because of the Covid-19 pandemic. Preliminary pilot data suggested that most attorneys working for large firms preferred a filing deadline earlier than midnight, and most other attorneys preferred a midnight deadline.

Electronic Filing in State Courts

The Center surveyed electronic filing rules for thirty states selected to equally represent each of the federal circuits (www.fjc.gov/content/373599/electronic-filing-state-courts).

Current Research for Other Judicial Conference Committees

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center has conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences during the pandemic providing remote public access to proceedings with witness testimony. The committee is considering whether to modify the current policy, which permits judges in civil and bankruptcy cases to provide remote audio access to the public only in nontrial proceedings that do not include witness testimony.

Case Weights for Bankruptcy Courts

Data collection has begun for the Center's updated research on case weights for bankruptcy courts. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships in bankruptcy courts. The research was requested by the Committee on Administration of the Bankruptcy System.

Completed Research for Other Judicial Conference Committees

Evaluation of the Interim Recommendations from the Cardone Report

In 2023, the Center completed an assessment for the Defender Services Committee and the Executive Committee of the implementation of thirty-five recommendations for how the courts manage their responsibilities under the Criminal Justice Act, which specifies how the courts provide financially needy criminal defendants with legal representation (www.fjc.gov/content/380873/evaluation-interim-recommendations-cardone-report). The recommendations were provided in 2017 by the Cardone Committee, named after its chair, Western District of Texas Judge Kathleen Cardone.

Federal-State Court Cooperation: Surveys of U.S. District and U.S. Court of Appeals Chief Judges and State and Territorial Chief Justices and Court Administrators

Prepared for the Committee on Federal-State Jurisdiction, this report updates the findings of a 2016 survey of U.S. chief district judges regarding their past, current, and future plans for cooperation with the state courts, as well as their use of state-federal judicial councils as a forum for communication between the courts (www.fjc.gov/content/378684/federal-state-court-cooperation-surveys-us-district-and-us-court-appeals-chief-judges).

Other Current Research

Manual for Complex Litigation

The Center is preparing a fifth edition of its Manual for Complex Litigation (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

Covid-19 Hospitalization Rates for Judicial Districts

The Center weekly updates a map showing Covid-19 hospitalization rates for each of the ninety-four judicial districts (www.fjc.gov/content/366894/covid-19-and-hospitalization-judicial-district).

Other Completed Research

Emergency Election Litigation: From Bush v. Gore to Covid-19

The Center has prepared 513 case studies of how the federal courts have managed emergency election litigation from 2000 through 2020; the case studies include 717 individual emergency cases. A print publication is in press. The individual case studies are posted on the Center's website (www.fjc.gov/content/case-studies).

Jurisdictions with a High Number of Civil Jury Trials

Congress directed the Center to study factors related to high numbers of civil jury trials in some jurisdictions (www.fjc.gov/content/376750/jurisdictions-high-number-civil-jury-trials). The ten districts with the highest rates of civil jury trials were all small to medium in size. Civil trial rates ranged from 0.29% to 2.75%; the rates for a large majority of districts (82%) were between 0.5% and 1.5%.

Resolving Unsettled Questions of State Law: A Pocket Guide for Federal Judges

The Center prepared a short guide to what federal judges might consider when applying unsettled questions of state law (www.fjc.gov/content/373468/resolving-unsettled-questions-state-law-pocket-guide-federal-judges).

National Security Case Studies: Special Case-Management Challenges

The Center published its seventh edition of *National Security Case Studies: Special Case-Management Challenges* in 2022 (www.fjc.gov/content/372882/national-security-case-studies-special-case-management-challenges-seventh-edition). The cases studied include terrorism prosecutions, espionage prosecutions, and other criminal and civil cases. Challenges include handling classified information and other security concerns.

TAB 2

TAB 2A

MEMORANDUM

DATE: December 8, 2023

TO: Judge John D. Bates
Standing Committee on Rules of Practice and Procedure

FROM: Judge J. Paul Oetken
Andrew Bradt
Catherine T. Struve

RE: Joint Subcommittee on Attorney Admission Report

We write on behalf of the Joint Subcommittee on Attorney Admission to report on the Subcommittee’s initial deliberations. The Subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees¹ and has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.² Part I of this memo summarizes the proposal. Part II summarizes the initial views expressed at the Subcommittee’s October 18, 2023 virtual meeting and Part III presents questions on which the Standing Committee’s guidance would be helpful.

I. The Proposal

Earlier this year, Dean Morrison submitted to the Standing Committee a “Proposal to Adopt a Rule for Unified Bar Admission for All Federal District Courts.” Proponents of the rule include fourteen law firms and non-profit organizations, and six individual attorneys.³ The

1 The Subcommittee members are: Judge J. Paul Oetken (Chair; member, Bankruptcy Rules Committee), Judge André Birotte Jr. (member, Criminal Rules Committee), David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee), Judge M. Hannah Lauck (member, Civil Rules Committee), Catherine M. Recker, Esq. (member, Criminal Rules Committee), and Carmelita Reeder Shinn, Esq. (Clerk of Court representative on the Civil Rules Committee).

2 We enclose the proposal (“Morrison Proposal”), which is docketed as Nos. 23-BK-G, 23-CR-A, and 23-CV-E.

3 Morrison Proposal at 17 (addendum).

proposal consists of a preferred option plus two alternatives.

The proponents' preferred option – we will call this Option One – is a national rule that would create a national “Bar of the District Court for the United States.” Under Option One, admission to this new Bar and the discipline of its members would be administered by the Administrative Office of the U.S. Courts (“AO”). Option One would allow admission to the Bar of the District Court on the basis of membership in good standing in any state’s bar, and would permit members of the District Court Bar to practice in all federal district courts.⁴

The proponents' “First Alternative” – we will call this Option Two – would simply provide that “An attorney who is admitted to practice before any District Court of the United States shall be entitled to practice before any other District Court of the United States without being specifically admitted to the bar of that court.”⁵ Like Option One, Option Two would loosen the strictures on admission to practice; but unlike Option One, Option Two would not centralize the admission, renewal, or disciplinary processes within the AO. It also would not eliminate all district-court admission requirements, but once an attorney is admitted to one district-court bar, all other district courts would have to provide reciprocal admission.

4 The text of the proposed rule is as follows:

There is hereby created a Bar of the District Court for the United States. Admission to the bar shall be governed by the provisions below and shall be administered by the Administrative Office of the United States Courts. Subject to the direction of the Judicial Conference of the United States, that Office shall set the fees for admission and renewals and shall administer a disciplinary system for admitted attorneys.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, and who is currently a member of the bar of any United States District Court, shall automatically be a member of the Bar of the District Court of the United States and shall be entitled to practice before any United States District Court.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, but who is not currently a member of the bar of any United States District Court, may become a member of the Bar of the District Court of the United States by filing an application with the Administrative Office of the United States Courts showing such good standing membership.

Morrison Proposal at 14-15.

5 *Id.* at 15.

Presumably, attorneys would select a district with minimal admission requirements, and this rule would bind all other district courts to recognize that admission.

The proponents' "Second Alternative" – we will call this Option Three – would be a rule that bars district courts from having a local rule requiring (as a condition of admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.⁶

The proponents point to a 2015 study of federal district court requirements concerning attorney admission, and report that their research indicates that study continues to be "overall accurate."⁷ They draw from that study two main conclusions: "First, there are major differences among the districts in their requirements for admission to what is, in essence, a single court system. Second, many of the requirements are burdensome and appear to be mainly relics from a different era."⁸

The study (we will call it the Maryland study) was performed at the request of a committee of the U.S. District Court for the District of Maryland. This quote from the executive summary highlights the Maryland study's key findings concerning the 94 federal districts:

The districts divide into two broad categories: districts where attorneys must be members of either the state bar or highest state court of the state encompassing the district ("no reciprocity jurisdictions") and districts that allow in some form out-of-state attorneys who are not members of the state bar encompassing the district to become members of the district's bar ("reciprocity jurisdictions"). Currently, 56 districts, or 60 percent, are no reciprocity jurisdictions and 38 districts, or 40 percent, are reciprocity jurisdictions.

The 38 reciprocity jurisdictions can be broken into three subcategories: (1) reciprocity extending to members of specific out-of-state or out-of-district bars, (2) reciprocity extending to members based on their concurrent memberships in the state or federal bar where their principal law offices are located, and (3) reciprocity extending generally to members of any state or federal bar. Within this third category, the nature of general reciprocity can be based on state bar membership, state or federal bar membership, or joint state and federal bar

6 The proposed rule would read: "No district court may enact a rule requiring that an attorney seeking admission to the bar of that court, including for pro hac vice admissions, must be a member of the bar, or a resident of the state in which that court is located. Any existing rule requiring local state bar admission or in-state residence is invalid and unenforceable." *Id.* at 15-16.

7 Morrison Proposal at 2.

8 *Id.*

membership.

Pro hac vice admissibility rules also vary by jurisdiction. Currently, 76 districts, or 81 percent, require admission to any state or federal bar for pro hac admission eligibility, 12 districts, or 13 percent, require a federal bar admission, one district administers a reciprocity rule for pro hac admissions, and five districts, or 5 percent, do not permit pro hac admissions at all.

Of the districts that permit pro hac vice admission, local counsel requirements vary throughout the jurisdictions. Currently, 26 districts, or 29 percent, only require designation of local counsel, 17 districts, or 19 percent, require that local counsel sign all documents and attend all court proceedings, 11 districts, or 12 percent, require that local counsel sign all documents, 11 districts, or 12 percent, have miscellaneous requirements, and 24 districts, or 27 percent, have no requirement to associate with local counsel.⁹

Based on the Maryland study, the proponents contend that the variations in bar-admission requirements are both burdensome and unjustified. They highlight in particular that a majority of the 94 districts require membership in the embracing state’s bar (which in four states—California, Florida, Hawaii, and Delaware—requires passage of the state bar exam). Even if an attorney meets the requirement for admission to a district-court bar, compliance with the divergent requirements can be time-consuming and expensive, including district-court fees, which range from \$188 to over \$300.¹⁰ Absent admission to a district-court bar, attorneys must seek *pro hac vice* status, sometimes in each case pending in a district. The availability of *pro hac vice* admission varies across the districts, as do fees, which can reach \$500. All told, the proponents assert that unified federal bar admission would “simplify their lives greatly and save them significant amounts of money and time.”¹¹

Moreover, the proponents contend, differences in bar-admission requirements across district courts are unjustified and obsolete. Attorneys practicing in federal court are typically focused on federal law, making any expertise in the local state law unnecessary in most cases. Even in civil cases in which subject-matter jurisdiction is based on diversity of citizenship, the applicable choice-of-law rules may lead to application of the law of a state other than the one in

9 U.S. District Court for the District of Maryland, Survey of Admission Rules in Federal District Courts (Jan. 2015), at 1, available at https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Secti ons/Litigation/USDCTMDSurvey0115.pdf.

10 Effective December 1, 2023, the attorney admissions fee payable to the AO was raised from \$188 to \$199, so the minimum fee a district can charge now is \$199. See <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

11 Morrison Proposal at 5.

which the district court is located, rendering local knowledge irrelevant. Proponents also posit that “the outcomes in most [diversity] cases depend heavily on the facts, with the substantive state law playing a smaller role.”¹² Additionally, the massive footprint of multidistrict litigation (“MDL”) on the civil docket means that much practice in diversity cases is in MDL transferee courts, with most transferee judges not requiring the many lawyers involved to be admitted to the district where pretrial proceedings have been centralized. Given the prominence of MDLs, and that less than 3% of cases transferred into them are ever remanded to transferor courts, the proponents assert that the persistence of MDL judges’ not requiring transferee-district bar admission illustrates the unnecessary nature of such requirements more generally.

The proponents also report that nationwide rulemaking is necessary because the districts will not change their local bar-admission requirements themselves. A number of the proponents have petitioned districts with an in-state bar requirement to remove it, with no success as of yet. Moreover, the proponents assert that a national rule will be workable and relatively easy to implement because the proponents report that, as of August 2022, all districts use the same system, PACER NextGen, for attorney registration, account management, and e-filing.

II. Initial Subcommittee Discussion

The Subcommittee met by Zoom on October 18, 2023.¹³ Judge Oetken invited the reporters to introduce the proposal.

A reporter briefly summarized prior discussions over the past 90 years on the question of whether there should be uniform standards for admission of attorneys to the bars of the federal courts. She highlighted in particular one tangible step in this regard – that is, the 1968 adoption of Appellate Rule 46. Rule 46(a)(1) mandates that an attorney is eligible for admission to the bar of a court of appeals if the attorney is “of good moral and professional character” and admitted to the bar of the U.S. Supreme Court, a state high court, another federal court of appeals, or a federal district court. Rules 46(a)(2) and (3) accord the court of appeals the authority to set the form of the application and to prescribe the fee. Rule 46(b) recognizes the court of appeals’ authority to suspend or disbar the attorney, subject to a loose substantive test (suspension or disbarment by another court, or “conduct unbecoming”) and some basic procedural protections. Rule 46(c) recognizes a court of appeals’ authority to impose discipline short of suspension or disbarment upon lawyers practicing before the court, so long as it provides notice and an opportunity to be heard.

In 2002, an attorney named Frank Amador had proposed that the Civil Rules be amended

¹² *Id.* at 9.

¹³ Due to a scheduling conflict, Judge Birotte did not participate. In addition to the Subcommittee Chair, other Subcommittee members, and reporters, Judge John Bates (Standing Committee Chair) and Thomas Byron (Standing Committee Secretary) also participated.

to adopt the Appellate Rules' approach. The documentary record suggests that this proposal was removed from the docket without extensive discussion. In contrast, during roughly the same time period the rulemakers had engaged in an extended study and discussion of whether there should be federal rules of attorney conduct governing practice in the federal courts, but that idea had generated a lot of pushback and that project had ultimately foundered.

This reporter noted that the Maryland study provided an important foundation for the Subcommittee's discussions, and she summarized Options One through Three in the Morrison proposal. An initial question for the Subcommittee, she suggested, was which versions of the proposal to focus on. Which might be the best way to address the concerns articulated by the proposal's proponents? And what are potential downsides to each version of the proposal?

In the discussion that ensued, the following themes emerged.

Potential models to consider. Participants expressed interest in considering other possibilities in addition to Options One through Three as set out in the Morrison proposal. They observed that it might be possible to combine features of Options Two and Three, for example.

It was also noted that Appellate Rule 46 provides a possible model to consider. A participant queried whether a rule modeled on Appellate Rule 46 would fulfill all the goals of the Morrison proposal. Admission to the bar of a court of appeals under Appellate Rule 46 is not automatic based on reciprocity; the attorney must, for example, also be "of good moral and professional character" and must pay any "fee prescribed by local rule or court order." Participants noted that the proponents would prefer that lawyers not have to pay a fee to practice in each and every district, and would prefer that lawyers not have to incur the inconvenience of separate applications to practice in each district.

Rulemaking authority. Especially as to Option One, participants raised questions about rulemaking authority. Does the Rules Enabling Act authorize the adoption of a rule that would create a new bar? It was noted that, if project participants evince an interest in pursuing Option One, the question of rulemaking authority would require attention.

Practical challenges regarding Option One. A number of participants questioned the feasibility of adopting a centralized bar and attorney-discipline system. The AO, participants forecast, would not have the resources to staff such a system, and a rule creating such a system would constitute an "unfunded mandate."¹⁴ And how would disciplinary officials in the AO in Washington, D.C. investigate allegations concerning the conduct of a lawyer in the District of Montana? A participant noted that the members of the district courts' grievance committees tend to be highly respected members of the local legal community, and questioned how the AO could replicate that. Another participant agreed, and predicted that a proposal to centralize attorney

14 The proponents, by contrast, predict that centralizing admissions and discipline will save the system money overall. See Morrison Proposal at 4.

discipline would generate substantial opposition.

In sum, no participant voiced support for pursuing Option One, and multiple participants voiced reluctance to pursue it. It was also suggested that the goals of the Morrison proposal could be served by changes short of adopting Option One.

Potential interest in Option Three. A number of participants expressed sympathy with the thinking behind Option Three – that is, the option that would bar districts from requiring admission to the bar of the state in which they sit. Such a requirement poses a particular barrier in districts located in a state that requires applicants for bar admission to take the state’s own bar exam.

On the other hand, it remains to be seen whether that requirement can be eliminated while still permitting districts to achieve their goals of protecting the quality of law practice within the district. (See the notes below on quality-of-lawyering concerns.)

Revenue issues. Participants noted that the fees that each district collects from applications for bar admission and pro hac vice admission can be an important source of funds. Examples of the uses to which those funds are put were mentioned:

- A clinic for self-represented litigants;
- Guardians ad litem for defendants who are minors;
- Bench/bar activities.

Participants predicted that districts would be very concerned about a change that would deprive them of those fees.¹⁵

A subcommittee member noted that, a few years ago, the District of Maryland had changed its attorney-admission rule from a restrictive approach to a reciprocity approach. Under the new approach, lawyers who are not members of the Maryland bar must be members in good standing of their home-state bar and of the bar of a federal district court.¹⁶ The District of Maryland charges a one-time fee to be admitted to the bar of the district.¹⁷ The court has been

15 The proponents, however, argue that “bar admissions should not be a profit center for the judiciary.” See Morrison Proposal at 4.

16 See D. Md. Rule 701.1(a).

17 See U.S. District Court for the District of Maryland, Schedule of Fees (setting \$200 admission fee), available at https://www.mdd.uscourts.gov/sites/mdd/files/ScheduleofFees_0_1.pdf. The schedule lists a renewal fee (due every six years) of \$75.

tracking the effect of that change on the fees collected.

Quality of lawyering. Participants noted that one concern driving restrictions on attorney admissions relates to the quality of lawyering. These concerns relate both to the disciplinary record and practice experience of an attorney initially seeking admission and also to the ongoing disciplinary record of previously admitted attorneys.

A participant asked whether a more open attorney-admissions standard could still allow a district to take into account an applicant’s disciplinary history. Participants suggested that this is an option. The District of Maryland, for example, requires the applicant to disclose any disciplinary history.¹⁸ Appellate Rule 46(a)(1) requires the applicant for admission to be “of good moral and professional character,” and a court of appeals can operationalize that requirement by requiring disclosure of disciplinary history (as, for example, the Tenth Circuit does).

Another question regarding admissions standards concerns the length of practice experience that an applicant might have. A state bar’s reciprocity requirement, for example, may include a length-of-practice requirement. So, for instance, the reciprocity requirement of the Virginia state bar requires five years of practice in the reciprocal jurisdiction in order to attain reciprocal admission to the Virginia bar without taking the Virginia bar exam. By requiring admission to the Virginia bar as a condition of admission to the Eastern District of Virginia bar, the Eastern District of Virginia thus effectively requires that any E.D. Va. applicants who haven’t passed the Virginia bar have at least five years of practice experience.

A participant asked whether the rule could require ongoing supplementary disclosures concerning new disciplinary actions taken against a member of the district court’s bar. This participant noted that a judge may find it useful to know on an ongoing basis of new disciplinary action in another jurisdiction; such knowledge may prompt the judge to supervise more closely the conduct of the attorney in question.

Attorney discipline. Participants stressed the importance of separating analytically the question of attorney admission from the question of attorney discipline. Even if one were to loosen the standards for admission to a district court’s bar, districts would likely have a strong wish to maintain local control over disciplinary matters.

A participant noted that the attorney-discipline process in the Southern District of New York features an active grievance committee and that the district has a process by which that committee liaises with the state’s disciplinary authorities and coordinates reciprocal suspensions.

Another participant pointed out that the proponents’ Option Two would authorize

18 See U.S. District Court for the District of Maryland, Attorney Admission Application, available at <https://www.mdd.uscourts.gov/sites/mdd/files/AdmissionsApplication.pdf>.

lawyers to practice before a federal district court without being admitted to its bar; this raised the question of whether a lawyer engaging in such practice could be disciplined by that district court. It was noted that Appellate Rule 46(c), for example, authorizes disciplinary measures against an attorney practicing before a court of appeals even if the attorney is not a member of the court's bar.¹⁹

Areas for research. Participants suggested a number of possible avenues for further research, which are set out in Part III below.

III. Requests for Standing Committee Guidance

Here is a tentative summary of the likely direction of the project based on the views expressed at the Subcommittee's first meeting:

- No participant in the Subcommittee discussion has expressed support for pursuing Option One, and participants observed that its implementation would raise serious practical problems.
- The Subcommittee will consider further the following possible options (along with possible permutations):
 - Option Two (admission to any federal district court entitles one to practice in any other federal district court).
 - Option Three (no federal district court can require in-state bar admission or in-state residence as a condition of admission to that court's bar).
 - A rule modeled on Appellate Rule 46.
- Three important issues that the Subcommittee will keep in mind are:
 - The access issues (i.e., saving attorneys time and money) that motivate the Morrison proposal.
 - A district court's interest in controlling who may practice before it in order to maintain the quality and integrity of the district court bar.
 - Effects on court revenue.

¹⁹ The 1967 Committee Note explained that Rule 46(c) "affords some measure of control over attorneys who are not members of the bar of the court. Several circuits permit a non-member attorney to file briefs and motions, membership being required only at the time of oral argument. And several circuits permit argument pro hac vice by non-member attorneys."

- The Subcommittee will research the following matters:
 - The application and efficacy of Appellate Rule 46 in the various circuits.
 - Data on revenue (amounts & uses) from attorney admissions in selected federal districts.
 - The history of prior related proposals (such as the Amador proposal)²⁰ and the bearing of that history on the current proposals.
 - As appropriate, research concerning rulemaking authority to implement the options under consideration.²¹

The Subcommittee hopes to obtain the Standing Committee’s reactions to the tentative plan sketched here. Does the Standing Committee want the Subcommittee to further pursue Option One? Or should the Subcommittee instead forgo further consideration of Option One and focus on possibilities that would leave attorney-discipline authority, and the mechanics of attorney admission, with the local courts while preempting some of the more restrictive local approaches to attorney admission?

Are there other considerations that the Subcommittee should keep in mind? And does the Standing Committee want to see research on additional topics (in addition to those noted above)?

We look forward to the Standing Committee’s guidance.

Encl.

20 Since the Subcommittee meeting, Reporters Bradt and Struve have consulted with Professors Edward Cooper and Richard Marcus, who were (respectively) the Civil Rules Committee’s Reporter and Associate Reporter at the time of the Amador proposal. They do not recall additional discussions of the proposal beyond those reflected in the documentary record.

21 As noted earlier in the memo, if the rulemakers were to proceed with Option One, that proposal might raise the most serious questions concerning rulemaking authority. 28 U.S.C. § 1654 provides: “In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.” The Rules Law Clerk has agreed to research this statute and its bearing, if any, on local district authority over attorney admissions.

By Federal Express

February 23, 2023

H. Thomas Byron III, Secretary,
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Submission of a Proposal to Adopt a Rule for
Unified Bar Admission for All Federal District Courts

Dear Secretary Byron:

Enclosed is a Proposal, with three Exhibits, asking the Committee on Rules of Practice and Procedure to adopt a rule for the unified bar admission to all federal district courts. Under this Proposal, once a lawyer was admitted to one district court, the lawyer could practice in all 94 districts. The text of the proposed rule, as well as two alternatives, are set forth at the end of the Proposal, which is also posted here: <https://www.lawhq.com/file/federal-court-admission-proposal.pdf>.

The Proponents are fourteen law firms and non-profit organizations and six individual attorneys; they are identified in the Addendum to the Proposal. These include law firms that represent both plaintiffs and defendants, as well as non-profit organizations that lie along the ideological spectrum. Members of one of the organizations are spouses of military personnel who move frequently and for whom admission to each new district court where they live is a substantial barrier to their practicing law. Separate bar admission is especially problematic in the many districts that require admission to the local state bar, including those that insist that even attorneys with many years of practice must take the state bar exam to be admitted.

The undersigned and Thomas Alvord of the law firm LawHQ are the principal drafters of the Proposal. The Proponents would like to be notified when the Committee considers this matter in open session so that we might attend. For the convenience of the Committee, all communications can be directed to the undersigned at abmorrison@law.gwu, or 202 994 7120.

Respectfully Submitted,



Alan B. Morrison

February 23, 2023

**BEFORE THE COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE**

**PROPOSAL TO ADOPT A RULE FOR UNIFIED
BAR ADMISSION TO ALL FEDERAL DISTRICT COURTS**

The individual attorneys and organizations that are listed in the Addendum to this request (the Proponents) ask the Committee on Rules of Practice and Procedure to consider and then adopt a rule under which there would be a single application for admission to the bar of all United States District Courts. Under that rule, an attorney would apply for admission to practice in all the United States District Courts, and once admitted, the attorney could practice in all 94 districts. A draft of the proposed rule is set forth below, as are two alternative proposals that would achieve most, but not all, of the benefits of the unified rule.

Introduction & Summary of Rationale for the Rule

The question of whether local or national rules should govern admission to the bars of the district courts was raised shortly after the Federal Rules of Civil Procedure became effective in 1938. A committee of Federal District Judges, chaired by Judge John Knox of the Southern District of New York, prepared a report about local rules generally, FED. JUDICIAL CONFERENCE, REPORT ON LOCAL DIST. COURT RULES (1940), *reprinted* in 4 Fed. R. Serv. 969 (1941) (the “Knox Report”). The Report sets forth the circumstances in which the committee thought local rules might appropriately supplement the uniform civil rules. In concluding that bar admission rules were appropriate for local adoption, this was the committee’s entire rationale: “[C]onsiderations of local policy and conditions play a controlling role. Calendar practice and

assignment of cases for trial is another of those subjects on which nearly every district has rules but with wide variations of detail. The necessity for these variations is readily apparent.” *Id.*

There is no need to debate whether the Report’s conclusion as to the desirability of having local rules for bar admission was correct in 1940. Rather, the question before this Committee is whether a uniform rule would best serve the federal courts, the attorneys who practice there, and their clients. For the reasons that follow, the answer to that question is that the time has arrived for a unified admission rule for the district courts.

The principal reason why a unified rule should be adopted is that the similarities among the practices in the district courts vastly exceed their differences. Both civil and criminal cases are now predominately governed by federal substantive law, and all procedural and evidentiary rules are federal. On the other side, multiple admissions and renewals impose significant burdens of time and expense on the federal courts, the attorneys who must obtain individual admission to numerous different districts, including pro hac vice admission, and the clients that they serve.

In 2015, the United States District Court for the District of Maryland undertook a comprehensive survey of the admission rules of the 94 district courts (the Maryland Report).¹ Although that Report is eight years old, our analysis indicates that it remains an overall accurate reflection of the status of admission rules in the district courts today. The Report is very detailed, but two significant conclusions are apparent. First, there are major differences among the districts in their requirements for admission to what is, in essence, a single court system. Second, many of the requirements are burdensome and appear to be mainly relics from a different era. This welter of requirements, and the lack of any apparent reason for these

¹https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/US_DCTMDSurvey0115.pdf.

variances, should prompt the Committee to seek a more sensible alternative to the current situation. This proposal for a one-time admission rule for all district courts is that alternative.

For the Proponents there is one particular aspect of the current situation that has impelled them to undertake prior efforts with individual district courts and to support this proposal. *See* Exhibits 1 & 2 attached. As shown in the Maryland Report, 60 of the 94 districts include in their admission rule a requirement that members of their bars be admitted to the local state court bar. That requirement is unnecessary in today's federal court litigation world, and, more importantly, it imposes on attorneys the additional annual cost of another state bar membership and/or multiple discretionary pro hac vice admissions. Moreover, the state bars in the district courts in California, Florida, Hawaii, and Delaware, all of which impose this requirement, also require even lawyers already admitted to practice elsewhere to pass their state bar exam, which is a further barrier to district court admission. *See* Exhibit 1 at 14, note 6. Prior to filing this request, many of the Proponents joined petitions to a number of district courts, asking them to eliminate the local bar requirement, but in every case their requests were rejected (without explanation) or no response was given. *See* Exhibits 1 & 2. It is therefore apparent that, if change is to occur within the federal judiciary, it can only come from this Committee.

In the sections below, we explain why a unified admission rule is desirable, and why a state bar admission requirement is unnecessary. Then we explain our main and alternative proposals. Although our request is for the adoption of a final rule, we recognize that the Committee has a process that must be followed. Accordingly, our immediate request is that the Committee consider this proposal at a forthcoming meeting and begin the process of gathering additional information that will bear on this Proposal.

The Benefits of a Single Admission Rule

Before discussing the advantages of a single admission rule, we decided to deal upfront with the issue of how the financial impact of a decision to create a unified bar admission rule should be factored into the decision. Although we do not have access to the data on how much money is received by all 94 districts from fees for regular admissions, renewals, and pro hac vice admissions, we assume it is significant, although probably not in terms of the overall budget for the federal judiciary.² But whatever the order of magnitude, a significant part of the revenue raised is offset by the costs incurred by the court system in administering the multiple admission system. Those include direct out of pocket expenses for printing and mailing certificates, as well as the time spent by staff in each district processing applications, reminding attorneys to renew when they fail to do so in a timely fashion, and handling situations in which an attorney has been disciplined in another jurisdiction. By contrast, a system in which an attorney will be admitted once for all district courts, and in which renewals and any disciplinary matters will be done centrally, will cut down dramatically on both out of pocket expenses and staff time. And to the extent that the current system provides additional revenue beyond the costs, we do not believe that bar admissions should be a profit center for the judiciary. In our view, a unified admission system should assure that its costs are covered, but not otherwise generate any significant net revenue.

The most obvious reason for having a unified admission system for all federal district courts is that they all operate under the same rules of civil, criminal, and bankruptcy procedure,

² The minimal charge for admission for all district courts is set by the Judicial Conference (28 U.S.C. § 1914). The current minimum is \$188, but some courts charge more than \$300. *See* Exhibit 3 at 1-2. There are also renewal fees that must be paid at various times in various amounts. *Id.* at 2.

all trials use the same federal rules of evidence, and all appeals are governed by the Federal Rules of Appellate Procedure (FRAP). Indeed, the admission rules for all the courts of appeals are governed by FRAP 46, although they are administered by the individual circuits. Under FRAP, there is one admission rule, just as the courts of the States of New York, California, Texas, and Florida, have one bar admission, even though those systems are divided in several geographic subdivisions. Under FRAP 46, as well as United States Supreme Court Rule 5.1, the sole admission requirement is that an applicant be admitted to the highest court of any state. A unified admission system for the district courts would eliminate the need for each district court to have its own staff doing admissions and renewals, handling the paperwork, and properly depositing the money received. A lawyer would have only one certificate of admission to all the federal district courts, and if an attorney were disciplined by any court, there would only have to be one federal office/court to resolve the matter.

From the perspective of attorneys, the change would simplify their lives greatly and save them significant amounts of money and time. Once admitted to one federal district court, the attorney would never have to apply to another district. The savings would be monetary – the cost of the application, plus the cost of obtaining a certificate of good standing from their principal bar – and equally important, they would not have to spend time obtaining the additional information now required in some districts as part of the application. They would also avoid the delay in their practice until their application is approved. Finally, state courts will be relieved of being asked for certificates of good standing so that attorneys can be admitted to additional federal district courts.

Because of the limitations on district court admission discussed below, lawyers often must move for admission pro hac vice in each case in which they wish to appear. The Supreme

Court has recognized the inadequacy of pro hac vice admissions because they do “not allow the nonresident attorney to practice on the same terms as a resident member of the bar. An attorney not licensed by a district court must repeatedly file motions for each appearance on a pro hac vice basis.... [T]he availability of appearance pro hac vice is not a reasonable alternative for an out-of-state attorney who seeks general admission.” *Frazier v. Heebe*, 482 U.S. 641, 650-51 (1987). In addition, there is generally a fee for each case, up to \$500 in one district, and some districts include annual or lifetime limits on pro hac vice admissions as well as other restrictions. *See Exhibit 3 at 3-4.*³

Under our proposal, a lawyer would only have to make a single application to be admitted to all federal district courts. The applicant would only have to have been admitted to practice in a single state bar (defined to include the District of Columbia and the territories of the United States). We also do not see the need for a sponsor who is admitted to the district courts, but would not oppose such a requirement.

We think it would be appropriate to require that applicants state in their application that they are familiar with the federal rules of the subject areas in which they expect to practice (*i.e.*, civil, criminal, or bankruptcy). It would also be reasonable to require applicants to affirm in their application that they recognize that most districts have local rules and that it is their responsibility to familiarize themselves with them when practicing in a new district. Our proposed rule would not preclude a district court from requiring an attorney to meet certain additional experience requirements before the attorney can be lead attorney in a civil or criminal

³ For a case in which a local rule forbids an attorney not admitted to practice before the district court from being permitted to appear in more than three unrelated cases in any twelve-month period, or in more than three active unrelated cases at any one time, where there are expected to be thousands of cases filed under a statute that requires that they all be filed in that district, see *Malafrente v. United States*, Docket No. 7:22-cv-00168 (E.D.N.C).

trial. But it would preclude a district from requiring that one of the attorneys in a case reside in or maintain an office in the district. That kind of requirement may once have been appropriate, but in the world of the Internet and videoconferencing, it cannot be justified.⁴

The Need to Eliminate Local Bar Admission Requirements

The reasons for adopting a unified rule are not what has primarily motivated the Proponents to submit their proposal. Instead, it is the requirement in sixty districts that to be admitted to practice, the applicant must be a member of the local state bar. Because that requirement is both unjustified and burdensome, and it will not be changed by the district courts that impose it, the Proponents ask this Committee to forbid district courts from requiring it, whether by issuing a unified admission rule that does not contain it, or by directing districts to remove it from their existing rules.⁵

Attached as Exhibits 1 and 2 are copies of petitions filed with various district courts seeking the elimination of the local state bar requirement and the responses to them. The local courts could not, of course, issue a unified rule, although they could have asked this Committee to do so. Exhibit 1 was filed in the Northern District of California in February 2018, and although it asked for a rule change, its immediate request was that the court publish the proposal

⁴ There is also considerable academic support for reducing barriers to district court admission standards. *See e.g., The Case for a Federally Created National Bar by Rule or by Legislation*, 55 Temp. L. Q. 945, 960-964 (1982); *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 Fordham Urb. L.J. 969, 978 (1992); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 Tex. L. Rev. 335, 379 (1994); *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?* 30 Geo. J. Legal Ethics 125 (2017).

⁵ Most district courts with this requirement mandate that attorneys continue their state bar membership as a condition of their district court bar membership, whereas others make exceptions. For example, the Northern District of California has a grandfathered exception in local rule 11-1. “For any attorney admitted to the bar of this court before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.” If the local state bar requirement serves any purpose at all for the federal courts, the courts that make exceptions seem particularly irrational, although less burdensome.

for public comment. Instead, less than two months later, the Chief Judge of the District advised the petitioners that their proposal had been rejected, but with no reasons given for the refusal to seek public comment. Petitioners then asked the Judicial Council of the Ninth Circuit to exercise its authority under 28 U.S.C. § 2071(c)(1), to review and order changes to the Northern District's local bar rule. That request went unanswered for almost four years, and when a response came, it was a rejection, again without any explanation. *See* Exhibit 1.

Exhibit 2 was filed in the Eastern District of Virginia on July 5, 2022, along with similar petitions filed in fifty-nine districts that currently do not admit attorneys without a local state bar license. While some districts have responded that they will review the proposal in upcoming committee meetings, the only definitive responses so far have been rejections of the proposal, again without explanation (sample attached with Exhibit 2). Even if some, or even all, of these districts amend their rules to permit attorneys with out-of-state licenses to be admitted, that still would not achieve the simplicity and efficiency of a unified rule for district court admission.

Before the Federal Rules of Civil Procedure became effective in 1938, the district courts followed the procedural rules of the state courts in which they were located, and so it made sense to require that those who practiced in federal court be knowledgeable about the local state rules. The adoption of federal civil rules was followed by the Federal Rules of Criminal Procedure (1946) and the Federal Rules of Evidence (1975). The bankruptcy courts have always had their own rules, and their current Rules became effective in 1983. With all district court procedures federalized, that leaves only the argument that membership in the local state bar is needed

because the governing substantive law is that of the state where the district court sits. But even if true in some cases, that possibility cannot justify the local bar requirement.⁶

First, the governing law can be state law only in civil cases and only in those in which the basis for subject matter jurisdiction is diversity of citizenship. For fiscal year 2022 among the private civil cases filed, about two-thirds were diversity cases (including the large numbers in MDLs discussed below).⁷ By definition, in diversity cases, with citizens from more than one state as parties, there is, generally speaking, a substantial chance that the applicable law will be that of a state other than the one in which the case was filed. As the Supreme Court noted thirty-five years ago, in a case in which it set aside a district court's residence requirement as an undue barrier to admission to its bar, "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." *Frazier v. Heebe*, 482 U.S. 641, 648 n.7 (1987).

Second, as the data in Exhibit 1, pp 7-8, shows, the vast majority of diversity cases involve tort and contract claims.⁸ In the experience of the Proponents, the outcomes in most of those cases depend heavily on the facts, with the substantive state law playing a smaller role. And to the extent that there are issues of local state law to be resolved, there is no reason to suppose that competent lawyers on both sides will need local lawyers to assist them in making

⁶ Given the increasing number of cases that are subject to MDLs, where the cases are transferred to a single district, even if a client in such cases wanted a local lawyer, that desire would be thwarted in those situations.

⁷ https://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2022.pdf. There were 105,212 diversity cases filed and 131,131 federal question cases. In addition, there were 38,428 civil cases involving the United States. If those are included, fewer than half of all civil cases filed were diversity actions.

⁸ The data in Exhibit 1 are from the fiscal year ending June 30, 2016. Because this proposal only asks the Committee to begin consideration of this matter, and because the Committee has access to much more up-to-date and more refined data than do the Proponents, we have not updated our data set at this time, but could do so if that would assist the Committee.

the legal arguments. Indeed, federal law already allows one group of lawyers who are admitted to a single bar to practice in every federal (and state) court. Under 28 U.S.C. § 517, “The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” Although many cases involving the United States raise only issue of federal law, suits under the Federal Tort Claims Act are specifically based on state law under 28 U.S.C. § 2674.

Third, a local bar requirement cannot be justified on a paternalistic theory that such a rule is in the best interest of the clients. Diversity cases in federal court require a controversy of at least \$75,000, and generally the amount is much larger. There is no reason to assume that the clients in those cases are unsophisticated and cannot make rational determinations about their choice of counsel, taking into account all the relevant factors, not just the governing law (if it can be known when counsel are selected). There are many ways in which clients may make unwise selections of their counsel, but except in limited situations like class actions, the federal courts do not supervise those choices. There is no reason for the district courts to do that by means of the local state bar admission rule that is found in the rules of sixty district courts.

Fourth, the trend towards states adopting the Uniform Bar Examination (UBE) has continued to accelerate. As of the time of this filing, thirty-nine of the fifty states and the District of Columbia accept the UBE, including fourteen that did not do so when the petition to the Northern District of California was filed in February 2018.⁹ If most state bars now accept the

⁹ <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F196>.

UBE, which covers procedure as well as substance, there can be no reason why district courts should insist on local state bar admission.

Among the holdouts from the UBE are California, Delaware, Florida and Hawaii, which have traditionally been the most restrictive in terms of bar admission generally by requiring a local state bar examination even for experienced attorneys. Each of the district courts in those states has a local state bar requirement for admission to their courts. *See* Exhibit 1 at 14, note 6. As Justice Kennedy observed in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 68 (1988), “[a] bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise.” For lawyers who have been practicing elsewhere for a number of years, the examination requirement is particularly burdensome. The bar exam is a general test, and most lawyers specialize, and hence have no regular contact with many areas that the exam tests. Taking a bar exam also entails expenses for the exam, a prep course, and travel to the exam’s location, not to mention the time away from the lawyer’s practice. We do not argue that these burdens alone warrant the elimination of the local bar admission requirement, but they surely must be taken into account in determining whether that requirement should be maintained.¹⁰

Last, there is a trend that is significant for this proposal, which was underway when the Northern District petition was filed and has greatly accelerated in recent years: the massive increase in Multi-District Litigation (MDL) cases. Most of those cases are based on state law tort claims, mainly those involving unsafe drugs or other products. As of November 15, 2022, there were 397,845 cases pending in MDL proceedings, which were sent from all over the country under 28 U.S.C. § 1407 to a single district judge for all pre-trial matters, including

¹⁰ Attorneys with their primary practice area in another state must pay bar dues to other states if they wish to be admitted to the federal court there. Those dues add up. The 2023 bar dues for California are \$510 annually. <https://www.calbar.ca.gov/Attorneys/For-Attorneys/About-Your-State-Bar-Profile/Fees-Payment>.

settlements, and in some cases trials.¹¹ These proceedings routinely involve hundreds or thousands of cases, whose lawyers are not members of the bar of the state or federal court where the proceedings take place. Indeed, in the 3M earplug case, there are upwards of 300,000 plaintiffs. Quite sensibly, most judges in those cases do not require counsel to be admitted to the district court bar, or even require pro hac vice applications, even though almost all of those claims are based on state tort laws. If they did, their clerks' offices would be overwhelmed with processing pro hac vice paperwork.

The MDL cases are important for another reason. To our knowledge, the federal judges who handle them have never suggested that there are problems of any kind, let alone serious ones, because the lawyers are not members of the state bar of the district to which the case happens to be sent. If cases of such monetary and social significance can be litigated successfully by attorneys who are not members of the local state bar, there is no reason for that requirement to apply to any other case. In short, as the American Law Institute observed, the requirement of local bar membership “is inconsistent with the federal nature of the court's business.” RESTATEMENT OF LAW, THIRD, THE LAW GOVERNING LAWYERS § 3 comment g (AM. LAW INST. 2000). Support for eliminating local bar admission requirements for district courts also comes from the American Bar Association (ABA). At its Midyear Meeting on February 13-14, 1995, the ABA approved a resolution stating that it “supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules.”

¹¹ https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-November-15-2022.pdf. As of September 30, 2022, there were a total of 596,136 civil actions including those in MDLs, which means that about two-thirds of all civil cases are now in MDL proceedings.

Finally, although the 1940 Knox Report supported local bar admission rules, the model rule that it proposed did not require membership in the local state bar. Admission to another bar was an acceptable alternative to the Knox Committee as long as “the requirements for admission to that bar were not lower than those that were at the same time in force for admission to the bar of this state.” *See* Exhibit 1, Addendum at 7. If that option were satisfactory in 1940, it surely should suffice today.

The Federal Courts Today Have the Infrastructure for a Unified Admission Rule

Even if it made sense in the past to create a single admission to all federal district courts, it would have been impracticable to implement, but not today. Until recently, every federal district court maintained its own system for attorney filings, and it would have been a herculean task to enable every district court to use the same attorney registration, account management, and now, e-filing, but the situation has been changing. As of August 2022, all federal district courts now use the same system to handle all these functions.

Since 1988, each district court has managed its documents, dockets, e-filing, and its use of the PACER system which is overseen by the Administrative Office of the United States Courts. PACER has evolved and improved over time. In August 2014, the Administrative Office activated PACER NextGen. The change from PACER to PACER NextGen provided “users with several new benefits. One of these benefits is Central Sign-On, a login process which allows e-filing attorneys to use one PACER login and password to access any NextGen court (district, appellate and bankruptcy) in which they practice.”¹² It took eight years for all the district courts

¹² <https://www.mow.uscourts.gov/attorney/nextgen-cmecf>

to make the transition to PACER NextGen, but today all federal district and appellate courts (except the Supreme Court) use PACER NextGen.

While some code changes would be necessary to update PACER NextGen to allow for a single, uniform admission to all federal district courts, these changes would be small. The PACER NextGen system is already set up for a Central Sign-On with access to all federal district courts. Attorneys already have just one username for maintaining their Pacer NextGen account, for accessing every federal district court, and for e-filing in every court. All district courts are using this same system. A change to a single admission would impose little burden, if any, on the system.

Text of Proposed Unified Admission Rule

There is hereby created a Bar of the District Court for the United States. Admission to the bar shall be governed by the provisions below and shall be administered by the Administrative Office of the United States Courts. Subject to the direction of the Judicial Conference of the United States, that Office shall set the fees for admission and renewals and shall administer a disciplinary system for admitted attorneys.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, and who is currently a member of the bar of any United States District Court, shall automatically be a member of the Bar of the District Court of the United States and shall be entitled to practice before any United States District Court.

Any attorney who is a member in good standing of the bar of the highest court of any State, the District of Columbia, or any Territory, but who is not currently a member of the bar of any United States District Court, may become a member of the Bar of the District Court of the

United States by filing an application with the Administrative Office of the United States Courts showing such good standing membership.

Comment: This proposal will eliminate any role for the individual district courts in the admission, renewal, and disciplinary processes, and it will shift all those responsibilities to the Administrative Office of the United States Courts. It will also eliminate any current requirement for admission to the District Court bar beyond being a member in good standing of a state bar (broadly defined). This alternative should also drastically reduce the need for pro hac vice admissions because admission to the District Court Bar will be simple to obtain.

Reciprocal Practice Rule (First Alternative)

An attorney who is admitted to practice before any District Court of the United States shall be entitled to practice before any other District Court of the United States without being specifically admitted to the bar of that court.

Comment: This alternative would have almost the same substantive impact as the unified rule, but it would not centralize the admission, renewal, and disciplinary processes. It would still enable district courts to utilize restrictive admission requirements, but their impact would be limited to attorneys who first seek admission to those courts, and it could not prevent out-of-district attorneys from practicing in a restrictive-admission court.

Elimination of Local State Bar Admission Requirement (Second Alternative)

Rule to be issued under 28 U.S.C. § 2071.

No district court may enact a rule requiring that an attorney seeking admission to the bar of that court, including for pro hac vice admissions, must be a member of the bar, or a resident of

the state in which that court is located. Any existing rule requiring local state bar admission or in-state residence is invalid and unenforceable.

Comment: This alternative eliminates existing requirements that an applicant must be a member of the local state bar of that district or a resident of that state. The existing structures for admission, renewal, and discipline, under which those matters are handled by each district, are retained. In that respect, this alternative would be similar to FRAP 46, which eliminated prior local rules that imposed additional requirements for admission to the circuit court bars, but did not create a central admissions process.

ADDENDUM - PROPONENTS

ORGANIZATIONS AND LAW FIRMS

Alexander Dubose & Jefferson LLP, www.adjtlaw.com

CATO Institute, www.CATO.org

Clausen Miller P.C., www.clausen.com

EarthJustice, www.earthjustice.org

GuptaWessler PLLC, www.guptawessler.com,

Hamilton Lincoln Law Institute, www.hlli.org

LawHQ, P.C., www.lawhq.com

Military Spouse JD Network, www.msjdn.org

Pacific Legal Foundation, www.PacificLegal.org

Public Citizen Litigation Group, www.citizen.org

Public Justice, www.publicjustice.net

Sanford Heisler Sharp, LLP, www.sanfordheisler.com

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EXHIBIT 1

February 6, 2018

**PETITION OF PUBLIC CITIZEN LITIGATION GROUP & 12 OTHERS
PURSUANT TO LOCAL RULE 83-2
TO AMEND LOCAL RULE 11-1(b)**

This Court and the three other federal district courts in California have promulgated rules under which attorneys may not be admitted to practice in those courts unless they are active Members of the Bar of the State of California. This Petition asks this Court to amend Local Rule 11-1(b) to delete the requirement that applicants for admission to the bar of this Court must be members of the California bar. Copies of this Petition are being sent to the Clerk of each of the District Courts in the Ninth Circuit. All of those courts require that members of their bars be admitted to the state court in which the district is located. However, within the Ninth Circuit, only three States require that all applicants for admission take the bar exam for that jurisdiction (California, Nevada, and Hawaii, plus the Territories of Guam and North Marianas). NAT'L CONFERENCE OF BAR EXAM'RS AND AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 36 (2017) ("Nat'l Conf Report") <http://www.ncbex.org/pubs/bar-admissions-guide/2017/mobile/index.html#p=48>

SUMMARY OF PROPOSAL

Pursuant to Local Rule 83-2 and 28 U.S.C. § 2071(c), this Petition asks the Court to amend Rule 11-1(b), after providing notice and an opportunity to submit comments, to delete the requirement for California Bar admission, with the proposed text appearing on page 5. As more fully explained below, three reasons support this change.

(1) The requirement for California Bar admission does not bear any reasonable relationship to the actual practice in this Court because the procedures followed are established by federal rules and the issues in the vast majority of the cases in this Court arise under federal, not California law.

(2) Because the California Bar does not allow any attorney to be admitted on motion, having to take the California Bar exam imposes unjustified burdens of time and money for an attorney whose primary reason to obtain admission to that Bar is to be admitted to practice in this Court. In addition, once admitted, a lawyer must continue to be an active dues-paying member of the California Bar to remain a member of the Bar of this Court, even when a lawyer does not regularly practice in California. These burdens are wholly out of proportion to any possible benefit that might be realized for clients and the Court from imposing such a requirement.

(3) The requirements for pro hac vice admission — in particular the payment of \$310 for each attorney in each case — are burdensome. The required payment must be made not only by attorneys who have a major role in a case, but also by those whose appearance is on behalf of an amicus or a class member objecting to a settlement of a class action, or in connection with motions pertaining to a subpoena issued in support of litigation pending in a different district.

THE PETITIONERS

The Addendum to this Petition describes each of the Petitioners and explains their interests in supporting the proposed rule change. The reasons for their support vary, because the petitioners represent a variety of affected persons, including non-profit organizations providing pro bono legal services; organizations of attorneys; and a

membership organization of for-profit businesses. Each Petitioner has concluded that the current requirement of membership in the California bar imposes unnecessary burdens on lawyers and clients alike, although in different ways and in different circumstances.

HISTORY OF RULE 11-1(b)

Shortly after the Federal Rules of Civil Procedure became effective in 1938, a committee of Federal District Judges, chaired by Judge John Knox of the Southern District of New York, prepared a report, FED. JUDICIAL CONFERENCE, REPORT ON LOCAL DISTRICT COURT RULES (1940), *reprinted* in 4 Fed R. Serv. 969 (1941) (hereinafter, the “Knox Report”). The Report sets forth the circumstances in which the committee thought local rules might appropriately supplement the uniform civil rules. The Report concluded that bar admission rules were appropriate for local adoption. The committee also included as an Appendix to the Report model rules for bar admission and other topics that it considered appropriate. A copy of the pages of that Appendix relating to attorney admission is included in the Addendum to this Petition.

The model rule on bar admission is noteworthy in that it did not suggest that the federal courts require admission to the bar of the state in which the federal court was located. Rather, it would have allowed admission for any attorney who was admitted by the highest court of “this state . . . or any other state” with one proviso: that the applicant “must show that at the time of his admission to the bar of that [other] court, the requirements for admission to that bar were not lower than those that were at the same time in force for admission to the bar of this state.” Knox Report Appendix at 29. The committee described the proviso as “a step in the direction of higher standards for admission and will tend to make applicable to the Federal bar in any state at least the

standards which that state requires.” *Id.* at 30. Thus, to the extent that the committee envisioned admission to a district court bar to exclude attorneys admitted in other states, it was solely because a particular state — not all other states — had lower standards for admission than the state where the district court was located.

This Court first enacted local rules in 1977 and amended them in 1988. On March 22, 1994, the Court appointed a committee to review all of the local rules and make suggestions for revisions. The committee issued its report on November 1, 1994, and on January 20, 1995, the Court published the report and requested comments on the proposed changes, which included a proposed change to Rule 11 on bar admission. The first ten pages of the notice and report, which include the material relevant to Rule 11, are attached (the “Notice”).

At that time, this Court had no requirement that a member of the Bar of this Court be admitted to the California Bar. The committee proposed that change, among amendments that it designated “Policy Suggestions,” as one that “it felt would be wise as a matter of policy.” Notice at vii. In support of the change, the committee offered no studies or other evidence beyond its self-evident observations that the proposed rule “more closely restricts bar membership to members of the California bar” and that “the previous rule was less restrictive on this issue.” The Rule was adopted, with no changes, but with one noteworthy feature: it allowed those attorneys who were admitted to this Court prior to the 1995 amendment to continue as members of the bar of this Court.

As a result, Rule 11-1 of this Court now provides as follows:

(b) Eligibility for Membership. To be eligible for admission to and continuing membership in the bar of this Court an attorney must be an active member in good standing of the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other

than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

PETITIONERS' PROPOSED RULE

Petitioners propose that the Rule be amended by deleting the following language:

the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

In the place of the language limiting new admissions to members of the California Bar, the following language, eliminating that restriction, would be inserted: “the bar of any State, Territory, or the District of Columbia.” Under this proposal, Rule 11-1(b) would read as follows:

(b) Eligibility for Membership. To be eligible for admission to and continuing membership in the bar of this Court, an attorney must be an active member in good standing of the bar of any State, Territory, or the District of Columbia.¹

REASONS TO GRANT THE PETITION

1. The Current Rule Is Not Reasonably Related to Any Legitimate Purpose.

The requirement of admission to the California Bar is a barrier to admission to the federal courts in California by out-of-state attorneys in good standing where they primarily practice, and, therefore, there should be a good reason for it. This Petition is not like a court challenge to a bar admission rule in which the Court would have to give deference to the entity that issued the rule and would have to determine the appropriate level of scrutiny to apply. Because this Court has the power to change the rule whenever it finds cause to do so, the Petition need only show that the California Bar requirement is not reasonably necessary to serve a legitimate purpose.

¹ The full text of current Local Rule 11 is included in the Addendum.

(a) Federal Law Dominates the Cases in this Court.

The only possible justification for requiring licensed attorneys who wish to become members of the Bar of this Court to be admitted to the State Bar of California would be that many of the cases in this Court involve questions of California law. Yet because so many do not involve California law, that argument does not justify the rule. To begin with, federal courts apply federal procedural rules — civil, criminal, bankruptcy, and evidence, as well as the Court’s local rules — to the proceedings before them. Before 1938, federal courts applied local procedural rules, and so knowing California state procedures might have made sense then, but that is no longer the case. To the extent that California Bar admission is a proxy for a lawyer being available to be in court, the increased use of electronic filing and teleconferencing has reduced the need for counsel who live and regularly practice in California. Moreover, even when motions are not decided on the papers alone, many judges hold hearings by telephone even for lawyers who have offices in the District. *See* Civ. L. R. 7-1(b).

On the substantive side, criminal cases are governed by federal criminal statutes and the Federal Rules of Criminal Procedure and the United States Constitution. Most laws at issue in bankruptcy and admiralty proceedings are federal, although issues of state law arise regarding claims in bankruptcies and may arise in other cases as well. Even then, for reasons discussed below for civil cases generally, the applicable state law may not be that of California. In short, as the American Law Institute observed, the requirement of local bar membership “is inconsistent with the federal nature of the court’s business.” *RESTATEMENT OF LAW, THIRD, THE LAW GOVERNING LAWYERS* § 3 comment *g* (AM. LAW INST. 2000).

On the civil side, cases fall into two major categories: cases arising under federal law, for which California state law is only rarely even a small part of the governing authority, and diversity cases, in which state law is the basis for the underlying claim. During the year ending June 30, 2016, 6,925 civil cases were commenced in the Northern District of California. *Statistical Tables for the Federal Judiciary*, ADMIN. OFFICE OF THE U.S. COURTS Table C-3 at 5 (June 30, 2016), <http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2016>. In addition, 591 criminal cases and 10,777 bankruptcy cases were filed, for a total of 18,293 cases. *Id.* Tables D at 3; Table F at 3. Among the civil actions, the United States was a party in 651, *id.* Table C-3 at 5, and pursuant to 28 U.S.C. § 517, its attorneys may appear in any court, federal or state. Of the 6,274 private cases, 1,084 were prisoner petitions, 590 were intellectual property cases, 502 were labor suits, and 963 were civil rights suits. *Id.* at 6. Complaints in these categories all appear to be based on federal substantive law, although some cases may also include closely related state-law claims under supplemental jurisdiction. Even in those “mixed” cases, the lawyer’s expertise in employment, securities, or antitrust law, for example, is far more important to the client than whether the lawyer is admitted to the state court where the federal court is situated.

Of the 3,135 remaining private civil cases, 722 were contract cases, 273 were real property cases, 411 were personal injury cases, and 662 were “other tort cases,” which may well include federal admiralty cases. *Id.* The remaining 1,067 cases were not categorized, but, based on their placement in the table, and the absence of any category for securities and antitrust cases, some of them are certainly cases based on federal substantive law. The Administrative Office does not publish statistics on the basis of

subject matter jurisdiction by District for *filed* cases, but from its data set on case *closings*, assisted by a researcher at the Federal Judicial Center, Petitioners were advised that there were 1,038 civil cases, based on diversity of citizenship, terminated in fiscal year 2016 in the Northern District of California. On the assumption that terminations and filings were approximately the same, diversity cases represented 16.5% of the private civil cases, but only 5.6% of the total of all cases.²

(b) Even Cases in This Court Involving State Substantive Law Do Not Require California Expertise.

Moreover, even when state law is significant in a particular case, the state law at issue is by no means certain to be the law of California. In diversity cases, the parties will always be from at least two jurisdictions, one of which is not California. With the laws of two or more jurisdictions a possibility, there is no particular reason to think that California law would apply even in a diversity case in federal court in California, using the applicable conflicts of laws principles (which will be decided based on the choice of law principles of the State in which the district court is located) or the choice of law provision in a contract. Moreover, a number of MDL diversity cases, including nationwide class actions, end up in California, where the judge will have to decide which state law(s) to apply to the claims. In one substantive area of law in which California is different from that of most states — it has community property — the exclusion of matrimonial cases from the scope of diversity jurisdiction, *Ankenbrandt v. Richards*, 504

² The Northern District's caseload is in line with the national numbers. Thus, of the 1,187,854 cases filed in all district courts for the 12 months ending March 31, 2016, 833,515 were bankruptcy cases, 79,787 were criminal cases and 274,552 were civil cases of which only 82,990 (7.0% of total filings and 30.2% of civil filings) were diversity cases. *Federal Judicial Caseload Statistics*, ADMIN. OFFICE OF THE U.S. COURTS (Mar. 31, 2016), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016>.

U.S. 689 (1992), makes it unlikely that community property issues will arise with any frequency in this Court. To be sure, some cases in this Court involve questions of California law. But even in that subset of cases, there is no reason to presume that private lawyers who practice primarily outside of California are not fully qualified to represent their clients in those cases.

Two other reasons show that close familiarity with the substantive law of a particular state is not likely to be a significant factor in most federal court litigation. First, advising a client in advance about state law is quite different from handling a lawsuit after the claim has arisen. In the former situation, knowledge of the law can help avoid problems by careful planning, but that is no longer an option once the breach of contract or harm constituting a tort or a violation of another law has occurred. At that point, the role of the lawyer is to research existing law and apply it to the facts of the case, rather than predict what problems might arise and anticipate how to avoid them. Second, good litigators, which describes most of the lawyers who handle civil cases in federal courts, are used to venturing into new areas of substantive law; indeed, that is one of the skills that makes them good litigators. Thus, even if there are nuances of California law at issue in a given case, that is a common aspect of practice for a federal court litigator.

(c) Other Aspects of the Current Rule Show that the California Bar Admission Requirement is Unnecessarily Burdensome.

Two features of the current rule undermine any purported basis for the requirement of California Bar admission. First, the rule makes an exception for attorneys who were admitted to the Bar of this Court prior to September 1, 1995, based on admission to the bar of another State, even if they still are not admitted in California.

That exception shows that the Court recognizes that litigants, opposing counsel, and the judges of this Court are able to conduct litigation with lawyers who have been admitted to the Bar of the Court, but not the California Bar.³

Second, the current rule requires that attorneys must continue to be “active” members of the California Bar. As a result, if a California attorney moves his or her primary practice to another jurisdiction, the right to practice in this Court will depend on whether the attorney continues to pay the \$410 that is currently charged active California lawyers, as well as the costs to comply with the CLE requirement of the California Bar (25 hours of CLE every three years, <http://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements>). The CLE requirement may not dovetail with any CLE requirements of the lawyer’s primary bar, and may require the lawyer to incur substantial additional costs.

Moreover, the requirement for admission to the local state court as a condition of admission to the federal court inevitably restricts clients’ choices of who their attorneys will be. That limitation is unjustified because there is no reason to assume that clients with cases in this Court will not be able to make a proper assessment as to whether the case is one in which knowledge of local law is important or whether their preferred lawyer is able to handle the matter, even with local law issues as part of the mix. Federal court diversity contract or property claims typically involve significant matters, for which the client is either sophisticated or has advice of in-house counsel. As for plaintiffs in tort actions, there is no reason to think that the market for cases in the federal courts is so

³ The fact that former members of the California Bar admitted to this Court after September 1995 are removed from the Court’s bar if they retire from the California bar, even while maintaining active status in the bar of another state, further shows the arbitrariness of the current rule.

imperfect that this Court needs to require that the plaintiff hire a lawyer who is a member of the California Bar for cases in this Court, regardless of how insignificant issues of California law may be to the outcome. The argument to allow client choice is even stronger, and the local law rationale even less weighty, in federal question, criminal, and bankruptcy cases, yet the California Bar admission requirement applies to those lawyers who only handle cases arising under federal law.

In addition, the rules of professional responsibility and the legal malpractice laws protect clients from unqualified and unethical lawyers, far more effectively than the rule requiring California Bar admission. Local Rule 11-4(a)(1) of this Court incorporates the State Bar of California's Rules of Professional Conduct, including Rule 3-110 which states:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Finally, under the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some judges, to appear in court. *See* Civil L.R. 11-3(a)(3), (e). Unless there is some reason to believe that clients cannot make appropriate decisions about which lawyer they

want to represent them in federal court litigation, a local rule insisting that clients prefer California lawyers, no matter what the legal and factual issues may be, is very hard to justify.

2. California Bar Admission Is Burdensome.

Because California does not allow admission on motion and does not provide for admission on a reciprocity basis, the burden imposed by this Court’s admission rule is even greater. Even if California allowed admission on motion or through reciprocity, Petitioners would nonetheless urge this Court’s to revise its rule for the reasons set forth in the prior section. Nonetheless, the requirements for admission to the California State Bar exacerbate the problem.

Everyone, no matter how long they have practiced law, no matter if their work specializes in a single subject, even one dominated by federal law, must pass the California Bar exam to be admitted to the State Bar, and thus to be eligible for admission to the Bar of this Court. As Justice Kennedy observed in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 68 (1988), “[a] bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise.” For lawyers who have been practicing elsewhere for a number of years, the exam requirement is particularly burdensome. The bar exam is a general test, and most lawyers specialize, and hence have no regular contact with many areas that the exam tests. As a result, a practicing lawyer will probably have to take a not-inexpensive California Bar prep course,⁴ especially given the low pass rate for the California bar (35.3% for the February 2017 exam),

⁴ Kaplan’s discounted courses currently are priced between \$1699 and \$2399. *California Bar Review Course*, KAPLAN (last visited Jan. 31, 2018), <https://www.kaptest.com/bar-exam/courses/california-bar-review-course?state=california>.

including the attorneys-only exam (44.5% for the same exam). *General Statistics Report, February 2017 California Bar Examination*, THE STATE BAR OF CAL. (Mar. 26, 2017), http://www.calbar.ca.gov/Portals/0/documents/admissions/Statistics/FEB2017STATS.052617_R.pdf.

In contrast to an experienced lawyer who decides to live and work in California, it is very hard for litigating lawyers practicing elsewhere to justify taking the time away from pending matters, which may result in a substantial loss of income, to take a state bar exam that is needed only to be admitted to the federal district courts of that state in order to handle an occasional matter there. Finally, the attorney exam itself costs \$983, and once admitted, the lawyer must pay \$410 per year to the California Bar, which the lawyer would not pay except to continue to be a member of the bar of this Court.⁵

Whether California Supreme Court is justified in continuing to insist that all applicants must take the California Bar exam is not the question that this Court must decide. Rather, given the admitted difficulty in obtaining bar admission in California, the question is whether this Court is justified in insisting that applicants for admission satisfy that requirement in addition to being in good standing in another State or the District of Columbia. And on that question, the answer is decidedly “No.”

The four district courts in California that require admission in the State court are not unique among the federal district courts. However, the combination of State court bar admission and requiring all bar applicants to take the bar exam places those courts in a distinct minority. A majority of district courts nationwide require admission to the local

⁵ There is also a \$153 laptop charge for the exam. *Schedule of Fees*, THE STATE BAR OF CAL. (last visited Jan. 31, 2018), <https://www.calbarxap.com/applications/CalBar/info/fees.html>.

State Bar, but only eight of the States comprising those districts require all applicants to take their state's bar exam.⁶ As petitioners explain above, we see no connection between being admitted to the bar of the state where a federal district court is located, and the ability to provide quality legal services in that court. We therefore oppose all such requirements as unnecessary anywhere. The requirement is also unduly burdensome for the additional reasons that admission to the California Bar requires every applicant to pass the California Bar exam and continue to be an active dues-paying member of that bar.

3. Pro Hac Vice Admission Is Not A Feasible Alternative.

The third factor compounding the problem for lawyers and clients with cases in this Courts is that admission on a pro hac vice basis is not a feasible option for several reasons. First, it is available only with the cost and burden of having local counsel in the case. N.D. Cal. Civ. R. 11-3(a)(3). Second, pro hac vice admission is not automatic, although most pro hac vice motions are granted, with no apparent requirement that the Court determine whether there are any issues of California state law in the case and whether the attorney seeking admission is qualified to handle them. Far from supporting the current practice, the ease of admission suggests that there is no real reason to have the California Bar admission requirement in the first place.

⁶ The other state bars that do not allow admission on motion are Delaware, Florida, Hawaii, Louisiana, Nevada, Rhode Island and South Carolina, plus Guam and the Northern Mariana Islands. Of these, Rhode Island requires that attorneys admitted elsewhere only have to take the essay portion of the Rhode Island Bar Exam. In February 2017, South Carolina began using the Uniform Bar Exam, which will make it easier to gain admission to its bar, but not eliminate the cost of application and annual dues. NAT'L CONF REPORT, *supra* note 1, at 21-22, 27, 32, 36-37, <http://www.ncbex.org/pubs/bar-admissions-guide/2017/mobile/index.html>.

Third, the charge of \$310 is for *each* individual attorney’s pro hac vice admission in *each* case, and is presently the second highest pro hac vice admissions fee in the United States. The charge is the same as the fee for permanent admission to the bar of this Court, and payment is required even if it the lawyer is simply objecting to a class action settlement or seeking to file an amicus brief. In this respect the fee operates like a toll on access to justice and is particularly harmful where a lawyer is handling a matter on a pro bono basis. For these reasons, pro hac vice admission is not a substitute for full admission, and the pro hac vice rule does not create a feasible alternative.⁷

4. State Bar Admission Is Not Needed to Discipline Unethical Attorneys.

Courts have a legitimate interest in being able to assure that Members of their Bar are subject to discipline by them. Eliminating the requirement that a lawyer be admitted to the State Bar in the district in which the federal court sits would not present a problem in this regard, especially when compared with the situation in which a lawyer is admitted pro hac vice. First, a Member of the bar of this Court who acts contrary to court rules may permanently lose the right to practice in this Court, whereas an attorney admitted pro hac vice will mainly lose the opportunity to participate in one case.

Second, if a lawyer is disciplined in one jurisdiction, that information is generally forwarded to all other jurisdictions in which the lawyer is admitted, which may not include places in which the lawyer is admitted for one case on a pro hac vice basis.

Third, the best proof that discipline is not a problem is the fact that many districts do not require admission to the local state bar, and there is no evidence of which we are

⁷ Rule 11-3(b) imposes additional restrictions on pro hac vice admission. With certain limited exceptions, an applicant is not eligible for pro hac vice admission if she or he “(1) Resides in the State of California; or (2) Is regularly engaged in the practice of law in the State of California.”

aware that those districts are having any discipline problems with out of state attorneys who are Members of their Bar.

Finally, the Court has, unintentionally, conducted a limited experiment on whether there would be any discipline or other problems from an attorney's lack of admission to the California bar, and so far as Petitioners can determine, there are no reports of such problems. The experiment arose from the express exception created in 1995 for attorneys who are not members of the California Bar, but who had previously been admitted to the Bar of this Court. If any problems arose from that general exception, they surely would have surfaced in the intervening 23 years, and the fact that they have not provides further support for the conclusion that the requirement of membership in the California Bar to be eligible for membership in the Bar of this Court should be deleted, and the Petition granted.

CONCLUSION

For the foregoing reasons, the Court should institute a notice and comment rulemaking proceeding that would eliminate the requirement that an attorney must be a member of the State Bar of California to be a member of the Bar of this Court from Rule 11-(b), which would then read as follows:

(b) Eligibility for Membership. To be eligible for admission to and continuing membership in the bar of this Court, an attorney must be an active member in good standing of the bar of any State, Territory, or the District of Columbia .

Respectfully Submitted



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ADDENDUM

DESCRIPTIONS OF PETITIONERS

Public Citizen Litigation Group is a public-interest law firm within the non-profit consumer advocacy organization Public Citizen Foundation. Our lawyers are located in the District of Columbia, but regularly appear in cases in federal courts across the country, including in the Northern District of California. At times during the firm’s 45 years, we have represented in the Northern District clients litigating as parties, clients filing as *amicus curiae*, clients appearing as objectors to proposed class action settlements, and “John Does” challenging subpoenas to Internet Service Providers seeking information to identify the Does. In each case, we represent the client on a pro bono basis, although where we represent a plaintiff we may seek an award of attorney fees when we prevail. Currently, none of our attorneys is admitted to practice in the Northern District. Therefore, to appear in the Northern District, we must find local counsel, generally also pro bono, and the attorney from our office with primary responsibility must apply for pro hac vice admission and pay a fee, currently \$310. The requirement of paying a pro hac fee applies even to our staff attorney who is a member of the California Bar but on inactive status, because the Northern District of California deems a lawyer “inactive” who is on inactive status with the California Bar. Another of our attorneys was previously admitted to the Northern District but lost her admission after approximately 15 years, when she voluntarily retired from the California Bar (but retained her membership in the Bar of the District of Columbia).

American Civil Liberties Union is a national civil liberties and civil rights organization founded in 1920 with affiliates or chapters in every state. It often litigates cases in California federal courts, and the rule as it stands is an impediment to its doing so, and to its working with attorneys who are not members of the California state bar, even if those attorneys are fully capable of and deeply versed in litigating in federal court. For the reasons elaborated in the petition, it supports the requested rule change.

Association of Corporate Counsel, is a global bar association of over 40,000 in-house attorneys who practice in the legal departments of more than 10,000 organizations located in at least 85 nations. It strongly supports the amendment by this court of Local Rule 11.1(b) to delete the requirement of membership in the California bar in order to be admitted to the bar of this Court. Our members’ companies may be involved in litigation in this district and wish to use the expertise of our members, as well as outside counsel, who may not be California bar members but who would be the most knowledgeable and efficient choices for their legal work. These in-house and outside counsel, admitted in other jurisdictions, perform for sophisticated corporate clients and should be allowed to practice in federal court without the unnecessary burden of gaining admission to the California bar.

Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato files *amicus* briefs in cases arising around the country, and thus has an interest in

ensuring reasonable admission rules in all jurisdictions that permit the filing of *amicus* briefs, including the Northern District of California. *See, e.g., Google LLC v. Equustek Solutions, Inc.*, No. 5:17-cv-04207-EJD, Dkt. 27 & 40 (N.D. Cal.). As a non-profit organization, Cato is especially sensitive to litigation costs, and high *pro hac* admission fees may preclude us from filing. Cato also has a larger institutional interest in vindicating the right to choice of counsel, both as a general means of securing access to justice for all litigants, and also as a component of criminal defendants' Sixth Amendment right to the assistance of counsel. Cato supports the petition because the proposed rule change would enable parties to choose from a wider range of qualified counsel and secure representation at lower cost.

Center for Constitutional Litigation, P.C. (CCL) is a law firm located in New York, NY with a nationwide practice, that occasionally has cases and currently has one case pending in the Northern District of California, though no lawyer in the firm is admitted to that court's bar or the bar of the State of California. In that case, CCL lawyers represent the City of Oakland in *City of Oakland v. Wells Fargo & Co.*, Case No. 3:15-cv-04321-EMC, having been admitted *pro hac vice*. Because our practice takes our lawyers into federal and state courts throughout the nation, CCL is keenly interested in the rules that govern its admission to the bar of this Court. When lawyers in the firm have cases in the Northern District, they must associate with (and pay) local counsel, whether that is in the best interests of their clients and they must apply for and pay for *pro hac vice* admission in each case in which they are counsel.

Competitive Enterprise Institute's Center for Class Action Fairness represents class members *pro bono* against unfair class action procedures and settlements. With a high volume of class actions filed in the Northern District, we regularly appear in the Northern District on behalf of individual class members objecting to unfair class action settlements. We handle all of these cases *pro bono*, although we may seek attorneys' fees where our work substantially improves a settlement. Only one of our five attorneys is admitted to the Northern District and is a member of the California bar. Because a large percentage of our caseload is in the Northern District, it is impractical for that single attorney to handle all of our work in the Court. As a result, our other attorneys often must apply for *pro hac vice* admission and pay the \$310 fee, instead of paying the identical Northern District bar admission fee only once. We also are required to retain local counsel who are physically present in the district in such cases, even though those local counsel add nothing to our understanding of the local rules or the underlying law. This adds thousands of dollars a case to our expenses. Combined with the expense of litigating across the country and our limited budget, it has affirmatively deterred us from participating in meritorious litigation.

Consumers for a Responsive Legal System ("Responsive Law") is a non-profit organization located in Washington, D.C. Responsive Law seeks to make the legal system more affordable, accessible and accountable to ordinary Americans. Responsive Law believes that requiring state bar membership for an appearance in federal court provides no benefit to individuals and small businesses seeking counsel for matters before a federal court. It does, however, limit the number and variety of lawyers from

whom a litigant can select its counsel, thereby restricting consumer choice and artificially raising costs for parties in federal litigation. Unchecked protectionism of this sort is one of the reasons why the United States currently ranks 94th out of 113 countries in "affordable and accessible civil justice" according to the most recent Rule of Law Index issued by the World Justice Project.

Earthjustice is a non-profit public interest law firm. Earthjustice is headquartered in San Francisco, has an office in Los Angeles, and maintains additional offices in Alaska, Hawaii, Washington, Colorado, Montana, Pennsylvania, Florida, New York and Washington D.C. Although a number of attorneys in Earthjustices's California offices are admitted to and practice in the Northern District, some of Earthjustices's litigation in this District is handled by attorneys who are not based or barred in California, and sometimes these non-California attorneys co-counsel a case in this District with an attorney who is admitted here. If these non-California attorneys were admitted to the Northern District bar, they would not need local counsel and would not have to pay the \$310 pro hac vice filing fee for each case on which they worked.

Natural Resources Defense Council is a non-profit advocacy organization with members throughout the United States. NRDC is headquartered in New York, and maintains non-California offices in Illinois, Montana, and Washington, DC, as well as in San Francisco and Santa Monica, California. Although a number of attorneys in NRDC's California offices are admitted to and practice in the Northern District, some of NRDC's litigation in this District is handled by attorneys who are not based or barred in California, and sometimes these non-California attorneys co-counsel a case in this District with an attorney who is admitted here. If these non-California attorneys were admitted to the Northern District bar, they would not need local counsel and would not have to pay the \$310 pro hac vice filing fee for each case on which they worked.

Pacific Legal Foundation (PLF) is a national pro bono public interest litigation firm with offices in California, Washington, Florida, and Virginia. A number of PLF attorneys are members of the bar associations of states other than California, although most PLF attorneys are also members of the California State Bar. PLF litigates constitutional and other claims on behalf of its clients in federal courts across the nation. PLF attorneys are experts in several areas of federal law, including property rights and permit exactions, federal environmental law (particularly the Clean Water Act and Endangered Species Act), race and sex preferences and discrimination, and freedom of speech and association. These legal fields employ a more or less unified national body of federal case law that is applicable in all federal courts. In litigating claims grounded in these fields, PLF attorneys' credentialing by the state bar association for the state in which the federal district court sits is not germane to their ability to represent clients and serve as officers of the federal district court. These attorneys' original credentialing as lawyers by any state bar adequately serves these purposes. The Northern District's rule requiring members of the Northern District Bar to first be members of the California State Bar serves no purpose that membership in another state bar association does not serve, and impedes PLF attorneys who are not California State Bar members from carrying out their

public interest mission in representing clients with federal law claims that are properly venued in the Northern District of California.

Robert S. Peck is president of the Center for Constitutional Litigation, P.C. (CCL), a law firm located in New York, NY, and is admitted to practice in the State of New York and the District of Columbia. He is admitted to practice and has handled cases in the Supreme Court of the United States, six federal circuit courts of appeal, and five U.S. District Courts, while also having appeared pro hac vice in four other federal circuit courts and 13 other U.S. District Courts. In addition, he has litigated cases in state court in 25 states. Because his practice occasionally takes him to various federal district courts in California, including a current matter pending in the Northern District of California, he is keenly interested in the rules that govern admission to practice in the Northern District. Currently, when litigating in that court, he must associate with (and pay) local counsel, whether that is in the best interests of his clients and must apply for and pay for pro hac vice admission in each case in which he is counsel.

Public Justice is a national public interest advocacy organization headquartered in Washington D.C. with a branch office in Oakland, California. Our in-house staff attorneys team with private attorneys around the country to fight injustice and preserve access to the courts for ordinary people. The bulk of our litigation is in the federal courts. Public Justice is supported by the membership contributions of thousands of attorneys nationwide, many of whom are not members of the California bar and hence are not eligible to be members of the Northern District bar. Instead, when they have cases in the Northern District, they must associate with (and pay) local counsel, whether or not that is in the best interests of their clients, and they must apply for and pay for pro hac vice admission in each case in which they are counsel. We support the petition because we believe that the current admissions rules in this District are unduly restrictive and burdensome. In addition, we believe that the choice of whether to have a lawyer admitted to the state court in which the federal court sits is one that should be left to the client and the client's counsel, not imposed on the client by the Northern District rules.

John Vail is the principal of John Vail Law PLLC, a law firm located in Washington, DC, and devoted to appellate and motions practice throughout the United States. Mr. Vail is admitted to the bars of Tennessee, New Mexico, North Carolina, and the District of Columbia, and to numerous federal district and appellate courts, including the Supreme Court. He has served as counsel in cases in state and federal courts in California. He has expended significant time and effort being admitted pro hac vice in courts around the country. He has been consulted about appearing in cases pending in the Northern District. The current rules regarding admission impede him from appearing there.

LOCAL RULE 11-1 (Current Version)

11-1. The Bar of this Court.

(a) Members of the Bar. Except as provided in Civil L.R. 11-2, 11-3, 11-9 and Fed. R. Civ. P. 45(f), an attorney must be a member of the bar of this Court to practice in this Court and in the Bankruptcy Court of this District.

(b) Eligibility for Membership. To be eligible for admission to and continuing membership in the bar of this Court an attorney must be an active member in good standing of the State Bar of California, except that for any attorney admitted before September 1, 1995 based on membership in the bar of a jurisdiction other than California, continuing active membership in the bar of that jurisdiction is an acceptable alternative basis for eligibility.

(c) Procedure for Admission. Each applicant for admission must present to the Clerk a sworn petition for admission in the form prescribed by the Court. Prior to admission to the bar of this Court, an attorney must certify:

(1) Knowledge of the contents of the Federal Rules of Civil and Criminal Procedure and Evidence, the Rules of the United States Court of Appeals for the Ninth Circuit and the Local Rules of this Court;

(2) Familiarity with the Alternative Dispute Resolution Programs of this Court;

(3) Understanding and commitment to abide by the Standards of Professional Conduct of this Court set forth in Civil L.R. 11-4; and

Familiarity with the Guidelines for Professional Conduct in the Northern District of California.

(d) Admission Fees. Each attorney admitted to practice before this Court under this Local Rule must pay to the Clerk the fee fixed by the Judicial Conference of the United States, together with an assessment in an amount to be set by the Court. The assessment will be placed in the Court Non-Appropriated Fund for library, educational and other appropriate uses.

(e) Admission. Upon signing the prescribed oath and paying the prescribed fees, the applicant may be admitted to the bar of the Court by the Clerk or a Judge, upon verification of the applicant's qualifications.

(f) Certificate of Good Standing. A member of the bar of this Court, who is in good standing, may obtain a Certificate of Good Standing by presenting a written request to the Clerk and paying the prescribed fee.

(g) Reciprocal Administrative Change in Attorney Status. Upon being notified by the State Bar of California (or of another jurisdiction that is the basis for membership in the bar of this Court) that an attorney is deceased, has been placed on "voluntary inactive" status or has resigned for reasons not relating to discipline, the Clerk will note "deceased," "resigned" or "voluntary inactive," as appropriate, on the attorney's admission record. An attorney on "voluntary inactive" status will remain inactive on the roll of this Court until such time as the State Bar or the attorney has notified the Court that the attorney has been restored to "active" status. An attorney who has resigned and wishes to be readmitted must petition the Court for admission in accordance with subparagraphs (c) and (d) of this Rule.

(1) The following procedure will apply to actions taken in response to information provided by the State Bar of California (or of another jurisdiction or other jurisdiction that is the basis for membership in the bar of this Court) of a suspension for **(a)** a period of less than 30 days for any reason or **(b)** a change in an attorney's status that is temporary in nature and may be reversed solely by the attorney's execution of one or more administrative actions. Upon receipt of notification from the State Bar that an attorney has been suspended for any of the following, the Clerk will note the suspension on the attorney's admission record:

- (A)** Noncompliance with Rule 9.22 child and family support;
- (B)** Failure to pass PRE;
- (C)** Failure to pay bar dues;
- (D)** Failure to submit documentation of compliance with continuing education requirements.

While suspended, an attorney is not eligible to practice in this Court or in the Bankruptcy Court of this District. In the event that an attorney files papers or otherwise practices law in this Court or in the Bankruptcy Court while an administrative notation of suspension is pending on the attorney's admission record, the Clerk will verify the attorney's disciplinary status with the State Bar (or other jurisdiction, if applicable). If the attorney is not then active and in good standing, the Chief District Judge will issue an order to show cause to the attorney in accordance with Civil L.R. 11-7(b)(1).

Upon receipt by the Court of notification from the State Bar that the attorney's active status has been restored, the reinstatement will be noted on the attorney's admission record.

(2) In response to information provided by the State Bar of California (or other jurisdiction that is the basis for membership in the bar of this Court) that an attorney has been placed on disciplinary probation but is still allowed to practice, the Clerk will note the status change on the attorney's admission record. An attorney with that status must, in addition to providing the notice to the Clerk required by Civil L.R. 11-7(a)(1), report to the Clerk all significant developments related to the probationary status. Upon receipt by the Court of notification from the State Bar that the attorney's good standing has been restored, the change will be noted on the attorney's admission record.

**KNOX REPORT RULES APPENDIX
ATTORNEYS' PORTION**

**SUGGESTED LOCAL RULES FOR THE
UNITED STATES DISTRICT COURTS**

1 Rule 1. Attorneys.

**2 (a) *Roll of Attorneys.* The bar of this court
3 consists of those heretofore and those hereafter
4 admitted to practice before this court, who have
5 taken the oath prescribed by the rules in force
6 when they were admitted or that prescribed by
7 this rule, and have signed the roll of attorneys
8 of this district.**

**9 (b) *Eligibility.* Any person who is a member
10 in good standing of the bar of (1) the highest
11 court of this state or of (2) the highest court of
12 any other state, is eligible for admission to the
13 bar of this court, but any person who may apply
14 for admission to the bar of this court on the basis
15 of his admission, after the effective date of this
16 rule, to the bar of the highest court of any other
17 state must show that at the time of his admission
18 to the bar of that court, the requirements for
19 admission to that bar were not lower than those
20 that were at the same time in force for admission
21 to the bar of this state.**

Note. It is stated elsewhere in this report that nation-wide uniformity regarding eligibility for admission to practice in the various district courts is neither feasible nor desirable. However, since nearly every district has rules on this subject, and since some of those rules seem to make possible the infiltration of unfit persons into the Federal bar, and since some are couched in archaic and obscure language, this draft is

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presented for the consideration of those judges who may feel that the substance of the practice which it states would fit the needs of their respective districts. It will be noted that the draft contains a proviso that will be a step in the direction of higher standards for admission and will tend to make applicable to the Federal bar in any state at least the standards which that state requires.

22 (c) *Procedure for Admission.* Each applicant
23 for admission to the bar of this court shall file
24 with the clerk a written petition setting forth
25 his residence and office addresses, his general
26 and legal education, and by what courts he has
27 been admitted to practice. If he is not a
28 resident of this [district] [state] [and] [or]
29 does not maintain an office in this [district]
30 [state] for the practice of law, he shall des-
31 ignate in his petition a member of the bar
32 of this court who maintains an office in this
33 [district] [state] for the practice of law with whom
34 the court and opposing counsel may readily com-
35 municate regarding the conduct of cases in
36 which he is concerned, and he shall append to
37 his petition the written consent of the person so
38 designated. The petition shall be accompanied
39 by certificates from two reputable persons who
40 are either members of the bar of this court or
41 known to the court, stating how long and under
42 what circumstances they have known the peti-
43 tioner and what they know of the petitioner's
44 character. If a certificate is presented by a
45 member of the bar of this court, it shall also

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46 state when and where he was admitted to prac-
47 tice in this court. The clerk will examine the
48 petitions and certificates and if in compliance
49 with this rule, the petitions for admission will be
50 presented to the court at the opening of the first
51 ensuing session which convenes not earlier
52 than _ days after the filing of the petition.
53 When a petition is called, one of the members of
54 the bar of this court shall move the admission
55 of the petitioner. If admitted the petitioner
56 shall in open court take an oath to support the
57 Constitution and laws of the United States, to
58 discharge faithfully the duties of a lawyer, and
59 to demean himself uprightly and according to
60 law and the recognized standards of ethics of
61 the profession, and he shall, under the direction
62 of the clerk, sign the roll of attorneys and pay
63 the fee required by law.

Note. It has been suggested that the rule should

provide for the appointment of a committee of the bar to pass upon applications and, if necessary, examine the applicants personally. Rules of this character have long been in force in the district court of Massachusetts and have been incorporated into new rules in Arkansas and Oklahoma. Although the committee recognizes the desirability of such a procedure for some courts, it does not feel that it is necessary in the majority of districts and, therefore, it has not incorporated the provision into this rule. For judges who desire to inaugurate such a practice, the Arkansas, Massachusetts, and Oklahoma rules will serve as helpful guides.

It will be noted that the proposed rule provides that the petitions and certificates are to be presented to the court by the clerk “at the opening of the first ensuing session which convenes not earlier than — days after

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the filing of the petition.” This, of course, is a routine matter for the clerk and the provision must be varied to conform to the custom of the particular district concerned.

The alternative bracketed words “[district] [state]” in lines 28,29,30 and 33 are presented in consequence of the fact that in states where there are more than one district, the situations differ so that choice is essential.

For example, in New York there is no valid or practical distinction so far as the New York City bar is concerned between the Southern and Eastern districts of New York, and opinion, therefore, supports a requirement not measured by the district. In general, the word “state” should be used except where special reasons exist for limiting the rule to the “district.”

64 (d) *Permission to Participate in a Particular*
65 *Case.* Any member in good standing of the bar
66 of any court of the United States or of the highest
67 court of any state, who is not eligible for admis-
68 sion to the bar of this district under subdivision
69 (b) of this rule, may be permitted to appear and
70 participate in a particular case. In his applica-
71 tion so to appear he shall make the designation
72 and append thereto the consent which are
73 required by subdivision (c) of this rule from non-
74 resident applicants for admission to the bar of
75 this court.

76 (e) *Disbarment and Discipline.* Any member
77 of the bar of this court may for good cause shown
78 and after an opportunity has been given him to

79 be heard, be disbarred, suspended from practice
80 for a definite time, reprimanded, or subjected
81 to such other discipline as the court may deem
82 proper.

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83 Whenever it is made to appear to the court
84 that any member of its bar has been disbarred
85 or suspended from practice or convicted of a
86 felony in any other court he shall be suspended
87 forthwith from practice before this court and,
88 unless upon notice mailed to him at his last
89 known place of residence he shows good cause
90 to the contrary within_ days, there shall be
91 entered an order of disbarment, or of suspension
92 for such time as the court shall fix.

93 Any person who before his admission to the
94 bar of this court or during his disbarment or
95 suspension, exercises in this district in any action
96 or proceeding pending in this court any of the
97 privileges of a member of the bar or who pre-
98 tends to be entitled so to do, is guilty of con-
99 tempt of court and subjects himself to appro-
100 priate punishment therefor.

Note. This subdivision is in accord with Rule 2 (5) of
the Rules of the Supreme Court of the United States
and the decision of that Court in *Selling v. Radford*
(243 U. S. 46).

**NOTICE OF PROPOSED RULES CHANGES
NDCA JANUARY 1995**

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**RULES COMMITTEE
OF THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 Golden Gate Avenue
San Francisco, California 94102**

January 20, 1995

TO: MEMBERS OF THE PUBLIC

FROM: JUDGE JAMES WARE, CHAIR

The United States District Court for the Northern District of California proposes to revise its Local Rules and has authorized circulation of the proposed revisions to the public generally for comment. The proposed revisions are intended to accomplish three primary objectives: (1) to conform the Local Rules to amendments to the national rules; (2) to renumber the local rules to correspond to the numbering of the national rules; and (3) to incorporate procedures which were tested under a pilot program pursuant to the Civil Justice Reform Act and which have been shown to be effective to secure the just, speedy and inexpensive determination of matters before the Court.

Enacted in 1977, the Local Rules of the Court are intended to supplement the national rules. They were last revised on November 1, 1988. Since 1988 amendments have been made to the national rules without corresponding amendments to applicable Local Rules. Effective December 1, 1993, a major amendment was made to the Federal Rules of Civil Procedure. In addition, over the course of time, the Court received numerous suggestions for modifications to its Local Rules from the bench and bar.

In 1993, Chief Judge Thelton E. Henderson requested the Rules Committee of the Court to undertake a major revision of the Local Rules. On March 22, 1994, pursuant to 28 U.S.C. § 2077, Chief Judge Henderson appointed an Advisory Committee on Civil Rules. The Advisory Committee was requested to review the Local Rules of the Court and to issue a report and recommendation to the Court.

On November 1, 1994, the Advisory Committee issued its report and recommendations, which were referred to the Rules Committee of the Court. The Rules committee considered the report and recommendations of the Advisory Committee, as well as suggestions from other sources. On January 10, 1995, the Rules Committee presented its proposed revisions of the Local Rules to the Court, which approved their publication for public comment.

The proposed revisions include modifications to the Bankruptcy Local Rules. October 22, 1994, the Bankruptcy Reform Act of 1994 became effective. It made comprehensive changes in the Federal Rules of Bankruptcy Procedure. The Bankruptcy Court for this District proposes to amend its Local Rules to reflect those amendments and to coordinate the numbering of the proposed Bankruptcy Local Rules with the proposed revisions of the Civil Local Rules.

The Court has not approved these proposed revisions but submits them for public comment. We request that all comments and suggestions be sent as soon as convenient and, in any event, no later than April 20, 1995 to:

Judge James Ware
Chair of the Rules Committee
280 South First Street
San Jose, California 95113

At the conclusion of the comment period, the Rules Committee will consider the proposed revisions in light of any comments and will make recommendations to the Court. If adopted, the Revised Local Rules would become effective on July 1, 1995.

**RULES COMMITTEE
OF THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

District Judge, James Ware, Chair
United States Courthouse
280 South First Street
San Jose, California 95118

District Judge William H. Orrick, Jr.
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

District Judge Marilyn Hall Patel
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

Magistrate Judge Joan S. Brennan
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

Bankruptcy Judge Randall Newsome
United States Bankruptcy Court
1300 Clay Street, Room 300
Oakland, California 94612

ADVISORY COMMITTEE ON CIVIL LOCAL RULES

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Richard Wicking, Clerk
U.S. District Court
450 Golden Gate Avenue
San Francisco, CA 94102

Ian Keye
Court Operations Manager
U.S. District Court
450 Golden Gate Avenue
San Francisco, CA 94102

MEMORANDUM

TO: Rules Committee, United States District Court
Northern District of California

FROM: Local Rules Advisory Committee

DATE: November 1, 1994

RE: Draft of Proposed New Local Rules

The Local Rules Advisory Committee hereby transmits to the Rules Committee its proposal for new civil Local Rules. This memorandum is intended to introduce the draft by explaining the method by which it was prepared and the animating goals behind some of the proposals.

This Committee was appointed by Chief Judge Henderson pursuant to 28 U.S.C. § 2077(b) in March, 1994. Working closely with Judge Ware, the Committee has undertaken a comprehensive revision of the Court's Local Rules. In general, this revision was designed to accomplish several objectives:

- (1) to remove provisions that were no longer applicable or appeared to conflict with pertinent provisions of the Federal Rules of Civil Procedure;
- (2) to remove provisions that appeared unnecessary because the matters involved are now covered by the Federal Rules of Civil Procedure;
- (3) to move into the Local Rules provisions currently in the Court's General Orders that seemed more appropriately included in the Local Rules;
- (4) to arrange the provisions of the Local Rules so that they correspond to the Federal Rules of Civil Procedure;
- (5) to integrate the provisions of General Order 34 into the Local Rules; and
- (6) to consider possible changes in the rules on grounds of policy.

To accomplish these objectives, the Committee began with a rearrangement of the current local rules already done by Judge Ware that corresponded to the Federal Rules of Civil Procedure. Throughout the process, the Committee has worked closely with Judge Ware in fashioning the draft. Members of the Committee surveyed the current local rules to be sure that their provisions were properly re-designated to correspond to pertinent Federal Rules. In addition, the Court's General Orders and the standing orders of each Judge were reviewed to identify measures that might profitably be included in the Local Rules. The local rules of the other three districts in California were also reviewed to identify measures that might profitably be included in the Local Rules in this District.

Based on these various review processes, the Committee reached the conclusion that a number of matters presently covered in the local rules or General Orders should be in local rules but do not fit into civil Local Rules. Indeed, as to some of these matters other committees are drafting proposed rules. Accordingly, the attached draft contains a general set of civil Local Rules. As explained in proposed Local Rule 1-2(a), it contemplates adoption of additional local rules governing the following areas:

- (1) Admiralty and Maritime Cases
- (2) Alternative Dispute Resolution
- (3) Bankruptcy Proceedings
- (4) Criminal Proceedings
- (5) Habeas Corpus Proceedings

Based on existing rules, the Committee is preparing proposals for the first and last of the above additional areas. Our intention is not to make any substantive change in the rules governing these areas. We understand that others are drafting rules for Bankruptcy and Criminal proceedings. A draft set of rules regarding Alternative Dispute Resolution incorporating provisions regarding arbitration from the Court's present local rules and from General Order 35 is under way but has not been completed for review by the Court.

Accordingly, the draft civil Local Rules follow the format of the Federal Rules of Civil Procedure. The final editing was delegated to a subcommittee, and there may be the occasion for the committee to suggest some additional modifications of language in some proposed rules. The draft includes cross-references to the current local rules and also occasional committee notes regarding the purpose of the provisions. It is likely that a reading of the entire document is the most effective way to appreciate its provisions, but we thought it would be worthwhile to point out certain features in the cover memorandum.

The remainder of this memorandum will highlight certain of the changes in light of the various objectives the drafting committee was pursuing. These might most easily be organized as uniformity, adjusting the local rules to the national rules and taking account of the CJRA experience, simplification and policy changes. The references to specific provisions will therefore be presented in that manner.

Uniformity

Some proposals reflect the committee's conclusion that uniformity is an important objective. Although specific standards are sometimes included, the committee was more concerned with having a uniform standard than with the specific content of the standard in question.

Local Rule 1-2 (Standing Orders): This rule establishes that the goal of the entire package of rules is to provide a comprehensive and uniform set of procedures so that individual orders will not be necessary with regard to matters covered by the local rules. The committee expected that matters relating to the conduct of the trial would still be tailored by individual judges.

Local Rule 7-2(a) (Motions): This rule provides that the notice period for motions be 35 days. The committee found that different judges had different notice requirements, but that several had directed 35 days' notice by standing orders, and the committee adopted that standard. The committee felt that the actual number of days was less important than that one uniform standard be employed by all judges.

Form A (Case Management Conference Statement and Proposed Order): Having surveyed the diverse requirements of different judges, the committee developed one form for such statements. The committee hopes not so much that this form be adopted unaltered as that it be used by all judges so that there would not be individual variations.

Adjusting to the national rules and CJRA experience

Several members of the committee have also served in the CJRA Advisory Group and had experience in the drafting of General Order 34. As the Court is aware, the December, 1993, amendments to Rules 16 and 26 altered provisions covering similar matters. Having reflected on the experience under General Order 34 and the new provisions of the national rules, the committee attempted to develop a coherent and effective case management system for civil cases in the district.

Local Rule 16 (case management): This rule incorporates the recent changes in Federal Rules 16 and 26 as well as building on the experience of General Order 34. Except for cases excluded under Local rule 16-1, all cases will involve a

tailored version of the initial disclosure requirements of Federal Rules 26(a)(1). Rule 16-2 sets out the basic case management schedule providing that most specified events occur during the first 120 days after commencement of the case. Although early discovery by consent is allowed, Local Rule 16-3 directs that non-consensual discovery occur only after the Court has considered the needs of the case in light of the disclosures made. Parties who would suffer prejudice from waiting could obtain relief from the court to permit earlier initiation of formal discovery. Some features of General Order 34 that foreshadowed changes made in the national rules (e.g., early production of core documents) have been retained.

Largely invisible on the enclosed draft is another category of adjustments to take account of provisions of the Federal Rules. On occasion the committee eliminated provisions now in the local rules on the basis that the national rules adequately deal with the issue. For example, the draft does not include current rule 120-4 concerning calculation of time because it is inconsistent with Federal Rule 6(d). In this instance, the committee was aware that the existing rule is simple to use, but felt that it would be dubious to deviate from the Federal Rules on this point. Similarly, the committee is recommending considerable editing of current local rule 400, so that there is no repetition of the applicable Federal Rules or statutes, and the provisions regarding handling of appeals from decisions of Magistrate Judges have been trimmed on the theory that the Federal Rules provide substantial guidance. Other changes of this sort involved the local rules concerning the civil jury.

Simplification

In conjunction with reorganizing the rules to correspond to the arrangement in the Federal Rules, the committee tried to simplify the text of the current rules. Examples include:

Proposed Local Rules 3-4 and 3-5 on the form of papers filed would therefore cover all the materials appearing in current rules 120-1, 120-2, 200-1 and 200-2.

Proposed Local Rule 7-8 restates current local rule 220-9 so that it is easier to follow.

Policy Suggestions

The committee also included some changes that it felt would be wise as a matter of policy.

Local Rule 11 more closely restricts bar membership to members of the California bar; the previous local rule was less restrictive on this issue. It also requires lawyers admitted to practice before the Court to notify the Court of any change in their status in other courts that might bear on their status as members of the bar of this Court. In addition, Local Rule 11-11 spells out requirements for

student practice before the Court.

Local Rule 37 sets out a new means of resolving discovery disputes involving an informal chambers conference or an expedited motion. Some judges have experimented with such alternative devices, and the committee is recommending that the Court make them generally available to streamline and reduce the cost of discovery.

The committee has also recommended that chambers copies may be lodged at any branch of the clerk's office (Local Rule 3-7), as well as a mechanism for receipt of sealed documents (Local Rule 79-6). In addition, it has amplified the related case procedures to take advantage of economies that might result from coordination of cases (Local Rule 3-13).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
(415) 522-4100



CHAMBERS OF
PHYLLIS J. HAMILTON
CHIEF JUDGE

April 3, 2018

Alan B. Morrison
Lerner Family Associate Dean for Public
Interest & Public Service
George Washington University
School of Law
2000 H Street, NW
Washington, DC 20052

Dear Mr. Morrison

I write in response to your letter of February 6, 2018, and accompanying petition to amend the Northern District of California's Civil Local Rule 11-1(b). As per our Civil Local Rule 83-1, your petition and supporting materials have been fully vetted first by the court's Local Rules Committee and then by the entire court. We have voted to deny your petition.

Thank you for your interest in our local rules.

Sincerely,

A handwritten signature in blue ink, appearing to be "PH", with a long horizontal line extending to the right.

Phyllis Hamilton
Chief Judge

cc: Hon. Richard Seeborg,
Chair, Local Rules Committee

Susan Y. Soong, Clerk of Court

May 23, 2018

**BEFORE THE JUDICIAL COUNCIL OF THE
NINTH CIRCUIT**

PETITION TO MODIFY OR ABROGATE LOCAL RULE

Pursuant to 28 U.S.C. § 2071(b), the District Courts of the United States are authorized to promulgate Local Rules. Those Rules remain in effect unless “modified or abrogated by the judicial council of the relevant circuit.” 28 U.S.C. § 2071(c)(1). On February 6, 2018, petitioner Public Citizen Litigation Group, joined by 12 other organizations and individuals, petitioned the United States District Court for the Northern District of California to amend its Local Rule 11-1(b), which limits admission to that Court to attorneys who are active members of the State Bar of California. The Court denied the Petition, without explanation. Petitioners now ask the Judicial Council of the Ninth Circuit to review that denial.

The Petition, a copy of which is attached, did not contend that the Local Rule was unlawful. Rather, it asked that the Rule be amended to delete the requirement that applicants must be active members of the Bar of the State of California for three basic reasons:

- (1) The requirement for California Bar admission does not bear any reasonable relationship to the actual practice in that Court because the procedures followed are established by federal rules and because the legal issues in the majority of the cases in that Court arise under federal, not California law.
- (2) Because the California Bar does not allow attorneys admitted in other jurisdictions to be admitted on motion, every applicant must take the California Bar exam. That requirement imposes unjustified burdens of time and money attorneys whose primary reason to obtain admission to that Bar is to be admitted to practice in the Northern District. In addition, once admitted, an attorney must continue to be an active dues-

paying member of the California Bar to remain a member of the Bar of the Northern District, even when the attorney does not regularly practice in California. These burdens are wholly out of proportion to any possible benefit that might be realized for clients and the District Court from imposing such a requirement.

(3) The requirements for pro hac vice admission — in particular the payment of \$310 for each attorney in each case — are burdensome, making pro hac vice admission an inadequate alternative to full admission.

An Addendum to the Petition described the eleven non-profit organizations and two attorneys that joined the Petition and identified their interests in the proposed change in Rule 11-1(b). Except for the American Civil Liberties Union, all of the original petitioners are petitioners before the Judicial Council.

The Petition noted that, pursuant to Local Rule 83-2, all amendments to Local Rules require public notice and an opportunity to submit comments, and it requested that such a public rulemaking process be commenced. Because all of the District Courts in the Ninth Circuit have similar requirements, copies of the Petition were sent to the Clerks of the other District Courts, as set forth in the attached cover letter to the Chief Judge of the Northern District.

Instead of commencing a public rulemaking proceeding, the Local Rules Committee of the Court and then the entire Court voted to deny the Petition. The attached letter dated April 3, 2018 from Chief Judge Phyllis Hamilton gave no reasons why public comments were not sought, and offered no reason for denying the Petition.

Because the Court gave no reason why the Petition was denied, petitioners have nothing to add to what is in the Petition. Petitioners are not aware of any procedural requirements applicable to a review of a Local Rule by the Circuit Council, but suggest that the public

comment procedure in 28 U.S.C. § 2071(b), applicable to amendments to other rules, would be appropriate in connection with the Council's review of Local Rule 11-1(b) of the Northern District. Petitioners request that, after receiving comments from interested persons, the Council direct the District Court for the Northern District of California to amend Local Rule 11-1(b) to provide as specified on page 5 of the Petition.

Respectfully submitted,



Alan B. Morrison
George Washington University Law School
2000 H Street NW
Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu

Attorney for the Petitioners

May 23, 2018



OFFICE OF THE CIRCUIT EXECUTIVE
UNITED STATES COURTS FOR THE NINTH CIRCUIT

JAMES R. BROWNING UNITED STATES COURTHOUSE
95 SEVENTH STREET
POST OFFICE BOX 193939
SAN FRANCISCO, CA 94119-3939

SUSAN Y. SOONG
CIRCUIT EXECUTIVE

TEL: 415-355-8960

February 24, 2022

Mr. Alan B. Morrison
The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

Re: Petition to Modify or Abrogate Local Rule

Dear Mr. Morrison

Thank you for your submission for review to the Judicial Council for the Ninth Circuit, concerning the Northern District of California's Civil Local Rule 11-1(b). You requested the Judicial Council modify or abrogate the rule. The Judicial Council considered your request at its February 2022 meeting. On February 24, 2022, the Judicial Council denied the request from Alan B. Morrison to direct the District Court for the Northern District of California to amend the Local Rules related to state bar admission requirement.

Sincerely,

/s/ Lucy H. Carrillo
Assistant Circuit Executive
Court Operations, Policy, and Legal
Affairs Unit

EXHIBIT 2

Thomas Alvord
LawHQ, P.C.
299 S. Main St. #1300
Salt Lake City, UT 84111
385-285-1090 Ext 30002
thomasalvord@lawhq.com

July 5, 2022

United States District Court
Eastern District of Virginia
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Proposed Amendments to the Local Rule Regarding Admission of Out-Of-State Attorneys

To Whom It May Concern,

We would like to propose the following amendments to Local Civil Rule 83.1(A) and (C):

(A) **Eligibility:** Any person who is an Active Member of [the bar of the highest court of any state, territory, the District of Columbia, or any federal court](#) ~~the Virginia State Bar~~ in good standing is eligible to practice before this Court upon admission.

* * *

(C) **Procedure for Admission:** Every person desiring admission to practice in this Court shall file with the Clerk written application therefor accompanied by an endorsement by two (2) qualified members of [the bar of the highest court of any state, territory, the District of Columbia, or any federal court](#) ~~the bar of this Court~~ stating that the applicant is of good moral character and professional reputation. The form for such application may be obtained from the Clerk's Office.

As a part of the application, the applicant shall certify that applicant has within ninety (90) days prior to submission of the application read or reread (a) the Federal Rules of Civil Procedure, (b) the Federal Rules of Evidence, and (c) the Local Rules of the United States District Court for the Eastern District of Virginia.

The applicant shall thereafter be presented by a qualified practitioner of [the bar of the highest court of any state, territory, the District of Columbia, or any federal court](#) ~~the Court~~ who shall in open Court by oral motion, and upon giving assurance to the Court that the practitioner has examined the credentials of the applicant and is satisfied the applicant possesses the necessary qualifications, move the applicant's admission to practice.

The applicant shall in open Court take the oath required for admission, subscribe the roll of the Court, and pay to the Clerk the required fee. For such payment, the applicant shall be issued a certificate of qualification by the Clerk. For good cause shown, the Court may waive payment of the fee.

Federal government attorneys, whether they are Department of Justice attorneys, or assistant United States attorneys, or employed by any other federal agency, are not required to pay the admission fee if they are appearing on behalf of the United States.

The practice of law in federal courts is a nationwide practice in many circumstances. Cases are decided based upon federal, not state, law principles. Often cases are heard in jurisdictions removed from where the filing party resides. We believe this Court should implement this amendment for four reasons: (i) It best serves the people of this district by providing broader access to legal services, (ii) There is precedence for admitting out-of-state

attorneys, (iii) For decades the federal courts have been encouraged to remove barriers to admission, and (iv) It is the purview of this Court to set its admission rules.

First, we believe this Court should allow admission to out-of-state attorneys because it best serves those who reside within the jurisdiction of this Court. Over 34 years ago the United States Supreme Court noted “[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries.” *Frazier v. Heebe*, 482 U.S. 641, 648 n.7 (1987). This is even more true today!

At LawHQ, we have found there is indeed a demand for specialized legal services regardless of state boundary. LawHQ has clients in 47 states who have asked us to help them with legal issues. Yet, LawHQ is limited in how we can serve clients because our attorneys are not admitted in every state. We practice federal law, in federal courts, before federal judges, but we can only be admitted in certain U.S. District Courts and not others, even though we are practicing the same federal law in the federal court system. While there are *pro hac vice* admissions, it has additional financial and administrative costs and is “not on the same terms” as general admission.¹ The residents in this district should be allowed to select an attorney with the “specialized federal law” experience of their choosing. In many cases, denying parties the attorney of their choosing who specialize in a particular area will also deny that person representation. For instance, most FDCPA cases go to default judgment because the defendant

¹ In striking down a provision for federal bar admission that required attorneys to maintain a local residence in the State, the United State Supreme Court commented that the *pro hac vice* “alternative does not allow the nonresident attorney to practice on the same terms as a resident member of the bar. An attorney not licensed by a district court must repeatedly file motions for each appearance on a *pro hac vice* basis.... [T]he availability of appearance *pro hac vice* is not a reasonable alternative for an out-of-state attorney who seeks general admission.” *Frazier v. Heebe*, 482 U.S. 641, 650-51 (1987).

has inadequate access to representation. Allowing broader admission of out-of-state attorneys will provide broader access to legal services to residents in this district.

Restricting admission to only in-state attorneys puts the people and businesses within this district at a disadvantage compared to those residing in other districts that do allow admission to out-of-state attorneys. Given the “more mobile federal bar” and “increased demand for specialized legal services regardless of state boundaries” that the Supreme Court noted, we believe this proposed amendment best serves the individuals and businesses in this district.

Second, many districts admit out-of-state attorneys and these admissions have not caused any issues in the administration of justice. Currently 34 of the 94 federal district courts admit attorneys licensed out-of-state, making this the local rule in over a third of the U.S. District Courts.² All United States courts of appeals admit attorneys if they are admitted to practice before “the highest court of a state.” *Fed. R. App. P. 46(a)(1)*. And the United States Supreme Court admits attorneys who have been “admitted to practice in the highest court of a State.” *United States Supreme Court Rule 5.1*. If the United States Supreme Court, all United States courts of appeals, and 34 district courts only require admission to “the highest court of a state,” there is no good reason to limit admission in this district to in-state attorneys.

² The following U.S. District Courts admit attorneys licensed out-of-state: Arkansas Eastern, Arkansas Western, Colorado, D.C., Connecticut, Illinois Central, Illinois Northern, Illinois Southern, Indiana Northern, Indiana Southern, Maryland, Michigan Eastern, Michigan Western, Missouri Eastern, Nebraska, New Mexico, New York Northern, New York Western, North Dakota, Ohio Northern, Oklahoma Eastern, Oklahoma Northern, Oklahoma Western, Pennsylvania Western, Tennessee Eastern, Tennessee Middle, Tennessee Western, Texas Eastern, Texas Northern, Texas Southern, Texas Western, Vermont, Wisconsin Eastern, Wisconsin Western

Third, for decades the federal courts have been encouraged to remove barriers to admission. In 1995 the American Bar Association House of Delegates passed the following resolution:³

RESOLVED, That the American Bar Association supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating state bar membership requirements in cases of U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules.

For 30 years the National Association for the Advancement of Multijurisdiction Practice has sought to remove local rules of practice that limits those who may appear before federal courts.⁴ Four years ago, Public Citizen Litigation Group submitted a petition asking the Northern District of California to remove the requirement that attorneys be admitted to the California bar.⁵ This petition was signed by the American Civil Liberties Union, Association of Corporate Counsel, Cato Institute, Center for Constitutional Litigation, Competitive Enterprise Institute's Center for Class Action Fairness, Consumers for a Responsive Legal System, Earthjustice, Natural Resources Defense Council, Pacific Legal Foundation, Public Justice, and John Vail Law. There is a chorus of many other professors, commentators, and attorneys who have sought to modernize the federal court admission requirements by removing specific state bar requirements for admission to the federal courts.⁶

³ [Attorney Admission Practices in the U.S. Federal Courts](#), The Federal Lawyer, (Sept 2016).

⁴ See e.g. *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Howell*, 851 F.3d 12, 16 (D.C. Cir. 2017).

⁵ [Petition of Public Citizen Litigation Group](#); see also [Press Release of Public Citizen](#).

⁶ See e.g. *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 Temp. L. Q. 945, 960-964 (1982); *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 Fordham Urb. L.J. 969, 978 (1992); *Fred C. Zacharias, Federalizing Legal Ethics*, 73 Tex. L.Rev. 335, 379 (1994); *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?* 30 Geo. J. Legal Ethics 125 (2017).

Fourth, it is the purview of this Court to set the admission rules of this Court. “In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.” *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367, 63 S. Ct. 573, 575, 87 L. Ed. 838 (1943). Each U.S. District Court has the power to regulate its admission criteria, independent of state laws or state bar licensing requirements:

Although federal courts often reference state rules in their [admission] requirements... they need not do so.... [F]ederal courts have the right to control the membership of the federal bar.... The power to admit and regulate attorneys is not... the sole bailiwick of the states. Since both the federal courts and state bars have the ability to regulate attorneys, the question becomes which has the greater power to regulate admission to the federal bar.... When state licensing laws purport to prohibit lawyers from doing that which federal law expressly entitles them to do, the state law must give way.

In re Desilets, 291 F.3d 925, 929-30 (6th Cir. 2002) (internal citations omitted).

Admission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges. The two judicial systems of courts, the state judiciatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.... In short, a federal court has the power to control admission to its bar and to discipline attorneys who appear before it.... As we have discussed, and as nearly a century of Supreme Court precedent makes clear, practice before federal courts is not governed by state court rules. Further, and more importantly, suspension from federal practice is not dictated by state rules.

In re Poole, 222 F.3d 618, 620-22 (9th Cir. 2000) (internal citations omitted); see also, *Spanos v. Skouras Theatres Co.*, 364 F.2d 161 (2d Cir. 1966).

To conclude, we would ask this Court to implement the proposed amendment for the benefit of this district’s residents. This change allows the people and businesses in this district to receive the “specialized federal law” expertise they need and want “regardless of state boundaries.” It is a small change with a big impact on both access to justice and access to legal representation. Many U.S. District Courts, and all appellate courts, already admit out-of-state

United States District Court
Eastern District of Virginia
July 5, 2022
Page 7

attorneys and have done so without issue. Your thoughtful consideration and response to this proposed amendment is much appreciated.

Thank you,



Thomas Alvord
Managing Attorney
LawHQ, P.C.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA
600 GRANBY STREET
NORFOLK, VIRGINIA 23510

CHAMBERS OF
MARK S. DAVIS
CHIEF JUDGE

TELEPHONE: (757) 222-7014
FACSIMILE: (757) 222-7179

October 24, 2022

Thomas Alvord, Esq.
LawHQ, P.C.
299 S. Main Street #1300
Salt Lake City, UT 84111

Re: Proposed Amendments to the Local Rule Regarding Admission of
Out-Of-State Attorneys

Dear Mr. Alvord:

Thank you for your letter of July 5, 2022, regarding proposed changes to the Court's Local Civil Rule 83.1 to allow non-Virginia licensed attorneys admission to the Bar of the Eastern District of Virginia. The judges of the Court have considered the matter and have decided to retain the existing rule.

The Court appreciates your input and interest in the Court's local rules. With best regards, I am

Sincerely yours,



Mark S. Davis
Chief Judge, United States District Court for the
Eastern District of Virginia

MSD:rsk

EXHIBIT 3

SAMPLE OF EXISTING BAR ADMISSION REQUIREMENTS

Each federal district sets its own bar admission requirements. Listed below are a sample of some of these requirements in various categories beyond the local state bar admission requirement. They illustrate the costs and burdens imposed by restrictive bar admission requirements that would be mitigated by a unified rule.

I. Limitations on Reciprocity

Most districts do not have reciprocal admission, and some that do are limited. For example, the District of Kansas and the Western District of Missouri allow only automatic reciprocal admission to their bars¹ The reciprocity between Southern and Eastern Districts of New York extends only to attorneys admitted in the District of Vermont or the District of Connecticut, and to the state bar in those states..²

Reciprocity may also be limited to attorneys who are members of the bar of the state where they maintain their principal law office, as in the District of Columbia,³ or to members of the bars of certain circuit courts, as in the District of Vermont.⁴

II. Admission Fees

All federal districts charge admission fees. Federal law requires the courts to collect fees as prescribed by the Judicial Conference of the United States (JCUS).⁵ JCUS has set the fee for the admission of an attorney to a district court bar at \$188, although courts may charge more.⁶ The Western District of North Carolina charges a \$288, and the Eastern District of Michigan

¹ See, e.g., *Rules of Practice*, United States District Court for the District of Kansas (Nov. 25, 2021), <https://ksd.uscourts.gov/sites/ksd/files/11-25-21-KSD-Local-Rules-Master-Copy.pdf>.

² See *Local Rules of United States District Courts for the Southern and Eastern Districts of New York*, United States District Court for the Southern District of New York (Oct. 15, 2021), https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf.

³ See *Rules of the United States District Court for the District of Columbia*, United States District Court for the District of Columbia (May 2022), https://www.dcd.uscourts.gov/sites/dcd/files/local_rules/Local%20Rules%20May_2022_0.pdf.

⁴ See *Local Rules of Procedure*, United States District Court for the District of Vermont (Mar. 1, 2017), <https://www.vtd.uscourts.gov/sites/vtd/files/LocalRules.pdf>.

⁵ 28 U.S.C. § 1914.

⁶ See *District Court Miscellaneous Fee Schedule*, United States Courts (Dec. 1, 2020), <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

charges \$307.⁷ The Northern District of California charges \$317, and the Central District of California increases the fee to \$331 for attorneys admitted for more than three years.⁸

III. Renewal Requirements and Fees

Districts often require attorneys to pay regular renewal fees. For example in the Northern District of Alabama, every 5 years attorneys must submit a certification of continued good standing, along with a renewal fee of \$50.⁹ In the Southern District of Illinois, attorneys must pay a \$100 renewal fee every two years, and in the Northern District of New York the fee is \$50 every two years.¹⁰ In the District of Kansas and the Northern District of Iowa, attorneys must renew their registration each year and pay a \$25 fee.¹¹

Even more burdensome, the Southern District of Texas requires attorneys to re-apply every five years and pay the full \$188 admission fee each time.¹² In the Eastern District of Louisiana a renewal fee of \$188 is required every three years, along with a comprehensive re-registration statement.¹³

IV. Pro Hac Vice Admission Fees

For those districts permitting pro hac vice admissions, many impose separate fees. There is no applicable federal law for these fees, and so districts have great discretion in setting fees.

⁷ See *Court Fees*, United States District Court for the Western District of North Carolina (Dec. 1, 2020), <https://www.ncwd.uscourts.gov/court-fees>; *Fee Schedule*, United States District Court for the Eastern District of Michigan (2022), <https://www.mied.uscourts.gov/index.cfm?pageFunction=coFeeSchedule>.

⁸ See *Court Fee Schedule Summary*, United States District Court for the Northern District of California (Oct. 1, 2022), <https://www.cand.uscourts.gov/about/clerks-office/court-fees/>; *Schedule of Fees*, United States District Court for the Central District of California (2022), <https://www.cacd.uscourts.gov/sites/default/files/forms/G-072/G-72.pdf>.

⁹ See *Schedule of Fees*, United States District Court for the Northern District of Alabama (Dec. 1, 2020), <https://www.alnd.uscourts.gov/sites/alnd/files/NDAL%20Fee%20Schedule%20Effective%2012-01-2020.pdf>.

¹⁰ See *Fee Schedule*, United States District Court for the Southern District of Illinois (2022), <https://www.ilsd.uscourts.gov/AttyFeeSchedule.aspx>; *Court Fees & Rates*, United States District Court for the Northern District of New York (2022), <https://www.nynd.uscourts.gov/court-fees-rates>.

¹¹ See *Rules of Practice*, United States District Court for the District of Kansas (Nov. 25, 2021), <https://ksd.uscourts.gov/sites/ksd/files/11-25-21-KSD-Local-Rules-Master-Copy.pdf>; *Schedule of Fees*, United States District Court for the Northern District of Iowa (Dec. 1, 2020), https://www.iand.uscourts.gov/sites/iand/files/Fee%20Schedule_revised%20Oct2019.pdf.

¹² See *Local Rules of the United States District Court for the Southern District of Texas*, United States District Court for the Southern District of Texas (May 1, 2000), <https://www.txs.uscourts.gov/sites/txs/files/LR%20May%202020%20Reprint.pdf>; https://www.laed.uscourts.gov/sites/default/files/local_rules/2022%20CIVIL%20RULES%20LAED%20w%20Amendments%203.1.22.pdf.

¹³ *Fee Schedule*, United States District Court for the Eastern District of Louisiana (2022), <https://www.laed.uscourts.gov/CASES/fee.htm>; *Local Civil Rules of the United States District Court for the Eastern District of Louisiana*, United States District Court for the Eastern District of Louisiana (Mar. 1, 2022),

In the District of Montana, the pro hac vice admission fee is \$262, and in the Western District of North Carolina the fee is \$288.¹⁴ In the District of Hawaii, the fee is \$300.¹⁵ California courts impose some of the most burdensome pro hac vice admission fees, with the Northern District of California charging \$317, and the Central District charging \$500 per case.¹⁶

V. Limitations on Pro Hac Vice Admissions

Many districts impose significant restrictions on pro hac vice admissions, such as limiting the number of times an applicant can be admitted pro hac vice or requiring supervision by local counsel.

A. Caps on Pro Hac Vice Admissions

Some federal districts limit the number of appearances a pro hac vice attorney can make in a given time period. For example, in the District of Maryland, “no attorney may be admitted pro hac vice in more than three (3) unrelated cases in any twelve (12) month period, nor may any attorney be admitted pro hac vice in more than three (3) active unrelated cases at any one time.”¹⁷

A similar limitation is imposed in the Southern District of Florida and the Eastern District of North Carolina.¹⁸ In the Northern and Southern Districts of Mississippi the cap is five unrelated pro hac vice admissions within one year.¹⁹

B. Local Counsel Requirements

¹⁴ See *Fee Schedule*, United States District Court for the District of Montana (Dec. 1, 2020), <https://www.mtd.uscourts.gov/fee-schedule>; *Court Fees*, United States District Court for the Western District of North Carolina (Dec. 1, 2020), <https://www.ncwd.uscourts.gov/court-fees>.

¹⁵ See *Fee Schedule*, United States District Court for the District of Hawaii (Dec. 1, 2020), <https://www.hid.uscourts.gov/court-resources/schedule-of-fees>.

¹⁶ See *Court Fee Schedule Summary*, United States District Court for the Northern District of California (Oct. 1, 2022), <https://www.cand.uscourts.gov/about/clerks-office/court-fees/>; *Schedule of Fees*, United States District Court for the Central District of California (2022), <https://www.cacd.uscourts.gov/sites/default/files/forms/G-072/G-72.pdf>.

¹⁷ *Local Rules*, United States District Court for the District of Maryland (July 1, 2021), <https://www.mdd.uscourts.gov/local-rules>.

¹⁸ See *Local Rules*, United States District Court for the Southern District of Florida (Dec. 1, 2021), https://www.flsd.uscourts.gov/sites/flsd/files/Local_Rules_Effective_120121_FINAL.pdf; *Local Rules*, United States District Court for the Eastern District of North Carolina (Dec. 2019), <https://www.nced.uscourts.gov/pdfs/LocalCivilRulesDecember2019.pdf>.

¹⁹ See *Local Uniform Civil Rules*, United States District Court for the Northern District of Mississippi and the Southern District of Mississippi (Dec. 1, 2021), <https://www.msnd.uscourts.gov/sites/msnd/files/forms/2021-%20MASTER%20COPY%20-%20CIVIL%20FINAL.pdf>.

Many districts strictly limit what pro hac vice attorneys can do, requiring the pro hac vice attorney to designate an attorney already admitted to the district bar—local counsel—to sign all papers and filings submitted to the court and/or to “participate meaningfully” in the case.²⁰

For example, in the Northern District of Alabama an attorney can only be admitted pro hac vice if an attorney already admitted to the district bar is also representing the same client in that case, and the local counsel must review and sign all pleadings and other papers submitted to the court by the pro hac vice attorney.²¹ In the District of Delaware, local counsel must file all papers and attend all court proceedings, as is the case in many districts.²²

VI. Miscellaneous Restrictions

In the District of Massachusetts, the United States Attorney for the district has an opportunity to review an attorney’s application to the district bar and recommend rejection of the application.²³

In the Northern District of Indiana, the court may require any attorney residing outside of the district, even one already admitted to the district court bar, to retain local counsel in a case.²⁴

In some districts, like the Eastern District of Oklahoma, the eligibility criteria for admission pro hac vice in a case are not clearly defined but rather left entirely to the discretion of the court in each case.²⁵

²⁰ See, e.g., *Rules of Practice*, United States District Court for the District of Kansas (Nov. 25, 2021), <https://ksd.uscourts.gov/sites/ksd/files/11-25-21-KSD-Local-Rules-Master-Copy.pdf>.

²¹ See *Local Rules*, United States District Court for the Northern District of Alabama (Dec. 4, 2019), <https://www.alnd.uscourts.gov/sites/alnd/files/ALND%20Local%20Rules%20Revised%2012-04-2019.pdf>.

²² See *Local Rules of Civil Practice and Procedure for the United States District Court for the District of Delaware*, United States District Court for the District of Delaware (Aug. 1, 2016), <https://www.ded.uscourts.gov/sites/ded/files/local-rules/District%20of%20Delaware%20LOCAL%20RULES%202016.pdf>; see also *Local Uniform Civil Rules*, United States District Court for the Northern District of Mississippi and the Southern District of Mississippi (Dec. 1, 2021), <https://www.msnd.uscourts.gov/sites/msnd/files/forms/2021-%20MASTER%20COPY%20-%20CIVIL%20FINAL.pdf>.

²³ See *Local Rules of the United States District Court for the District of Massachusetts*, United States District Court for the District of Massachusetts (June 17, 2022), <https://www.mad.uscourts.gov/general/pdf/local-rules/Combined%20Local%20Rules.pdf>.

²⁴ See *Local Rules*, United States District Court for the Northern District of Indiana (Feb. 25, 2022), <https://www.innd.uscourts.gov/sites/innd/files/CurrentLocalRules.pdf>.

²⁵ See *Local Civil Rules*, United States District Court for the Eastern District of Oklahoma (July 5, 2016), https://www.oked.uscourts.gov/sites/oked/files/Local_Civil_Rules.pdf.

TAB 2B

MEMORANDUM

DATE: December 1, 2023
TO: Standing Committee on Rules of Practice and Procedure
FROM: Catherine T. Struve
RE: Project on self-represented litigants' filing and service

As you know, a working group that was convened to consider filing methods open to self-represented litigants has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive a notice of electronic filing (NEF) through CM/ECF or a court-based electronic-noticing program.

In spring 2023, Tim Reagan and I conducted additional interviews of court personnel on these topics, and I enclose a report that summarizes findings from those interviews. This memo provides a very brief update concerning the working group's 2023 discussions on both the filing and the service topics.

The service topic concerns whether to repeal the current rules' apparent requirement that non-CM/ECF users serve CM/ECF users separately from the NEF generated after a filing is scanned and uploaded into CM/ECF. The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their post-case-initiation filings¹ on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even those that are CM/ECF users. In the advisory committees' discussions of this topic during the past year, participants were receptive to the possibility of amending the service rules to eliminate the requirement of paper service on those receiving NEFs. At the working group's most recent (September 2023) meeting, participants expressed support for that idea, but also suggested a number of possible drafting changes to the then-extant sketch of a possible amendment. That redrafting is yet to be done, so I am not including here a

¹ The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). As noted, the discussion here focuses on filings subsequent to the initiation of a case.

sketch of a possible amendment. We intend to develop that proposal in preparation for the spring advisory committee meetings.

On the filing topic, last year's round of advisory-committee discussions disclosed both some support for adopting a rule that would broaden self-represented litigants' access to CM/ECF and also a fair amount of opposition to adopting a rule that would require broad access for self-represented litigants to CM/ECF. In the light of those discussions, at its September 2023 meeting the working group considered the possibility of proposing a rule that would merely disallow districts from adopting blanket bans entirely denying all CM/ECF access to all self-represented litigants. Such a rule might say that even if a district generally disallows CM/ECF access for self-represented litigants it must make reasonable exceptions to that policy. This proposal, too, will be developed in preparation for the spring advisory committee meetings. I welcome the opportunity to gather input from Committee members on how best to draft such a proposed rule so as to address the concerns expressed by participants in the process who are most wary of a broad right of CM/ECF access.

Encl.

MEMORANDUM

DATE: September 18, 2023

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Update concerning spring 2023 district-court interviews

During March 2023, Tim Reagan and I interviewed 17 district-court employees¹ who hale from nine districts.² This memo summarizes some of the themes that emerge from the interviews.

We are indebted to the 17 interviewees, who took time from their extremely busy schedules to share their courts' experiences with us. And I am also indebted to Tim, who guided my research and provided me with the entrée that enabled us to talk with the court staff with whom we spoke – many of whom he or his colleagues had interviewed in the course of last year's research. His and his colleagues' study provided the foundation for this further research, and Tim's expert presence on our video meetings and phone calls was invaluable. Tim also generously allowed me to choose the focus of this round of follow-up interviews.

I chose to focus this round specifically on personnel in districts where – we believed – the district has adopted the approach of exempting litigants from separate service on CM/ECF participants. But once we had the opportunity to talk with court personnel from a given district, of course we took the opportunity to ask them about the other two topics (CM/ECF access, and alternative modes of electronic access) as well. And in some instances, we also had the opportunity to inquire about special programs that the district had adopted concerning incarcerated litigants.³ To make the inquiry manageable, I restricted our scope to district courts

1 In some instances, more than one person joined the interview: we spoke with two people in the District of Arizona, two in the District of Columbia, five in the District of Kansas, two in the Western District of Pennsylvania, and two in the District of South Carolina.

2 The districts in question were: D. Ariz.; D.D.C.; N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; W.D.Pa.; D.S.C.; and D. Utah.

We also interviewed a Pro Se Law Clerk from another district, but that interview turned out to be brief because she explained that her district does not actually engage in any of the service or filing practices on which we wanted to focus.

3 Those inquiries are omitted from this memo, in part because we did not have time to pursue them in all interviews.

(not bankruptcy or appellate courts) and focused our questions on the practice in civil cases (not criminal cases). This memo first sketches some findings concerning the service issue, and then turns to CM/ECF and alternative electronic access.

I. Exempting litigants from separate service on CM/ECF participants

We confirmed through our interviews that the following districts have exempted paper filers from traditionally serving papers⁴ on litigants who are on CM/ECF:

- The District of Arizona
- The Northern District of Illinois
- The Western District of Missouri
- The Southern District of New York
- The Western District of Pennsylvania
- The District of South Carolina
- The District of Utah

For short, I'll refer to these districts as the "service-exemption" districts. Notably, these districts vary in how explicitly their published materials tell self-represented litigants about the exemption; only one of these districts is very explicit and consistent on this point.⁵

Once we confirmed that a district was indeed a service-exemption district, we asked the personnel from that district the questions noted in Part I.B of my March 3, 2023 memo.

Those personnel reported no problems with the implementation of the service-exemption policy. We specifically asked about burdens on the clerk's office, and no one could think of any.⁶ One interviewee stated that the lawyers representing other parties in the case don't want paper copies of filings anyway.⁷

As to the question, how do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still

4 As discussed previously, we are focusing here on Civil Rule 5 service (that is, for papers subsequent to the complaint), not on Civil Rule 4 service.

5 The Southern District of New York is explicit: "Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service." S.D.N.Y. ECF Rules & Instructions 9.2; see also *id.* Rules 9.1, 19.1, & 19.2; Role of the Pro Se Intake Unit, <https://www.nysd.uscourts.gov/prose/role-of-the-prose-intake-unit>.

6 Interviewees who responded to the burdens question and said no included: D. Ariz.; N.D. Ill. (no effect on the clerk's office because "We don't monitor how service is done."); W.D. Mo. (might even save clerk's office "a little smidge" of work because they need not deal with later filing of a certificate of service); W.D. Pa.; S.D.N.Y.; D.S.C.

7 D. Ariz.

required), responses varied. It was noted that this particular question would only arise in a case where multiple parties are not on CM/ECF – which some of our interviewees noted would be unusual.⁸ Also, even in such a case, the question would arise only if the person making the paper filing was not enrolled in an electronic-noticing program (because such a program would generate a NEF when the paper filing was entered in CM/ECF, and the NEF would state if any other party to the case required traditional service).⁹ One interviewee said they thought that this information might be included in a notice that the court sends to self-represented parties early in the case.¹⁰ A number of interviewees observed that a useful way to discern who needs traditional service is to look at the docket; if it shows no email address for a self-represented litigant, that is a tip-off that the person is not receiving electronic noticing.¹¹ Interviewees from another district stated that the issue might be addressed in a court order early in the case.¹² Interviewees from two districts said that the issue simply had not arisen.¹³

In at least three of the relevant five or six districts,¹⁴ the service exemption encompassed both service on CM/ECF participants and service on participants in a court-run electronic-noticing program,¹⁵ but one interviewee surmised that the program in their district encompassed only service on CM/ECF participants and not service on participants in the court-run electronic-noticing program¹⁶ and, upon reviewing my notes, I am not sure that I posed this question to the interviewee from one other district.¹⁷

8 N.D. Ill. (interviewee stated this would be very rare, but might arise in a lawsuit involving spouses, or a lawsuit in which two individuals are jointly suing the police); W.D. Mo. (interviewee could not think of a case involving more than one self-represented party); D.S.C. (interviewee stated that “theoretically that could happen, but as a practical matter it hasn’t been a concern”).

9 S.D.N.Y.

10 D. Ariz.

11 D. Ariz.

12 W.D. Mo.; D.S.C.

13 W.D. Pa. (clerk’s office assumes that litigants comply with their service requirements); D. Utah.

14 If my memory serves, the District of South Carolina does not offer electronic noticing.

In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish. If a self-represented litigant signs up to use CM/ECF but is making paper filings, that litigant need not be traditionally served.

15 D. Ariz.; S.D.N.Y. ECF Rules & Instructions 9.1 (the service exemption encompasses service on “all Filing and Receiving Users who are listed as recipients of notice by electronic mail”); id. 2.2(b) (“A pro se party who is not incarcerated may consent to be a Receiving User (one who receives notices of court filings by e-mail instead of by regular mail, but who cannot file electronically).”); D. Utah.

16 N.D. Ill.

17 W.D. Mo.

Our interviewees confirmed that when a litigant makes a filing in paper, that filing will always be scanned by the clerk’s office and placed into CM/ECF.¹⁸ (Interviewees noted a few exceptions, such as documents submitted by a person who is under a filing restriction,¹⁹ documents submitted by a litigant whose case had been closed for several years,²⁰ documents submitted for in camera review, documents that have no discernible connection to any litigation,²¹ correspondence to the judge that should not be filed in the case.²²) A number of interviewees reported that their office sets a goal for the maximum time interval between the court’s receipt of a paper filing and the time when that filing has been scanned and is entered into CM/ECF;²³ the goals ranged from 12 business hours²⁴ to one business day²⁵ or two business days.²⁶

In some districts, a filing that is made under seal would need to be traditionally served on the other participants in the case, because in those districts that filing would not be available to the parties in the case via CM/ECF.²⁷ But that’s true of filings made under seal by attorneys via CM/ECF, just as it would be true of paper filings made under seal by a self-represented litigants; in either event, the filer would be directed to serve the filing on the other parties by traditional

18 D. Ariz. (implicit in answer to related question); D.S.C.; D. Utah.

19 D.S.C.

20 D. Utah (interviewee stated that depending on the filing, they would check with chambers before docketing such a submission).

21 S.D.N.Y. (the stated example was a document “talking about [the litigant’s] meatloaf recipe”; the clerk’s office would consult the judge before docketing such an item).

22 W.D. Pa. (judge might determine that certain correspondence should not be filed, e.g., a letter from a criminal defendant discussing their lawyer’s performance in ways that implicate attorney-client privilege); S.D.N.Y. (letter threatening the judge).

23 I did not note a specific goal stated by the interviewees from the W.D. Pa., but they stated that the usual turnaround time from opening to scanning to docketing is generally from 4 to 6 business hours.

24 N.D. Ill. (this is the goal, but it is hard to meet on the Tuesday after a Monday holiday).

25 W.D. Mo. (interviewee stated that the informal deadline is 24 hours not counting weekends, but “99.5 percent” of paper filings are docketed the day that the court receives them); D.S.C.; D. Utah (goal is to enter paper documents within 24 hours, excluding holidays and weekends).

See also D.D.C. (for filings in an existing case; listed here as a “see also” because D.D.C. apparently does not exempt paper filers from serving those who get NEFs).

26 D. Ariz. (goal is same day or next day; in context I think “business day” was implicit); S.D.N.Y. (48 hours – not counting weekends – from stamping the document received to docketing on CM/ECF).

27 E.g., D. Ariz.; N.D. Ill. (local provision points out that the NEF for a sealed filing does not count as service); W.D. Mo. CM/ECF Admin. Manual at 8; W.D. Pa.; D. Utah ECF Admin. Procedural Manual 21, 28-29.

means.²⁸ In other districts, it is possible to set the restrictions for the CM/ECF filing so that the document is viewable both by the court and the other parties.²⁹

It appeared that some but not all of the districts had thought about how to treat the calculation of time periods measured from service when the service is effected through CM/ECF but the filing was filed other than through CM/ECF. An interviewee in one district reported that this issue does not come up, but thought that a sensible way to approach this question is to count the date of entry in the CM/ECF docket (i.e., the date of the NEF) as the date of service.³⁰ An interviewee in another district stated that the issue has not arisen in their experience, perhaps because the clerk's office tends to get paper filings up onto CM/ECF pretty quickly.³¹ An interviewee in a third district also reported that the issue has not come up, probably because briefing schedules are typically set by the judge.³² An interviewee in another district treats the date of entry into CM/ECF (that is, the date of the NEF) as the relevant starting point for response periods that run from service.³³ Two districts apparently treat the date the court receives the filing (not the date of entry into CM/ECF) as the relevant starting point for response periods that run from service, and do not accord the responding party three extra days for the response.³⁴

II. Access to CM/ECF for self-represented litigants

When interviewing personnel from districts that provide CM/ECF access to non-incarcerated self-represented litigants (either across the board or by permission), we asked a number of questions about how that is working. Since this suite of questions concerned experience with CM/ECF access for self-represented litigants, we posed these questions only to those from districts that provide that access to some degree.³⁵ Among the districts encompassed

28 D. Ariz. (“attorneys are often worse” than self-represented litigants about separately serving sealed documents on the other parties); N.D. Ill (“attorneys get into trouble on this”); W.D. Mo. (noting that the other party would know of the filing’s existence based on the NEF, so they would know to follow up with the filer if the document were not separately served on them as required by the local provision).

29 S.D.N.Y. ECF Rules & Instructions 6.9 (“The filing party has the ability to designate which case participants will have access by selecting the appropriate Viewing Level for the document from the list below.”); D.S.C.

30 N.D. Ill.; see also S.D.N.Y. (interviewee stated that the date of entry stated on the NEF would be considered to be the date of service).

31 W.D. Mo.; see also supra note 25 regarding typical time interval in W.D. Mo. between receipt of paper filing and entry in CM/ECF.

32 W.D. Pa.

33 D.S.C.

34 D. Ariz.; D. Utah.

35 The D.S.C. does not permit any self-represented litigants to use CM/ECF. An interviewee

in our interviews, the districts that provide access to all self-represented litigants (at the litigant's option) without the need for special permission are:

- District of Kansas (where an interviewee reports that “one or two percent of our [CM/ECF] filers are pro se users”).
- Western District of Missouri (where an interviewee estimates that there are about 20 to 25 self-represented litigants currently using CM/ECF).³⁶
- Western District of Pennsylvania (where an interviewee estimates that there are “maybe a couple of dozen” self-represented litigants using CM/ECF at any given time).³⁷

The districts that provide access to self-represented litigants with court permission are:

- District of Arizona³⁸ (where an interviewee reports that CM/ECF participation by self-represented litigants is “not rare”).
- District of the District of Columbia (where an interviewee reports “a lot of pro se filers on CM/ECF”).
- Northern District of Illinois.
- Southern District of New York (where the interviewee reports that it is unusual for a self-represented litigant to use CM/ECF; those who do are usually pro se attorneys).

from that district volunteered that she would oppose any rule amendment that required a district to allow such litigants to access CM/ECF. I responded that the proposals currently under consideration would, at most, foreclose a district from having a blanket ban on CM/ECF access [see Suggestion No. 20-CV-EE (John Hawkinson)]. The interviewee stated that a blanket ban is necessary in her district because the court wishes to treat all pro se litigants uniformly.

³⁶ The district initially provided access based on permission from the judge (starting in about 2009), but five years ago it changed its approach and the clerk's office grants access “on a routine basis.”

³⁷ See W.D. Pa. ECF Policies & Procedures at 2-3: “A person who is a party to an action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. If during the course of the action the person retains an attorney who appears on the person's behalf, the attorney must advise the clerk to terminate the person's filing privileges as a Filing User upon the attorney's appearance.

When registering, an individual must certify that ECF training has been completed, and then requests a CM/ECF account for the Western District of Pennsylvania through PACER. Once the request is processed by the clerk, the Filing User will receive notification that the request was approved.”

³⁸ See D. Ariz. Pro Se Handbook at 15-16.

Uniformly, the interviewees reported that there was no difficulty in keeping track of self-represented litigants on CM/ECF.³⁹ You will recall that this question arose in committee discussions because self-represented litigants, unlike lawyers, do not have attorney ID numbers. Interviewees in two districts stated that their court wouldn't keep track of attorneys on CM/ECF via their attorney ID numbers.⁴⁰ Several interviewees noted that each CM/ECF registrant (whether or not they are a lawyer) has a "PRID" number⁴¹ – which is a unique personal identifier – though one of those interviewees observed that their court hardly ever uses the PRID, because they can usually just look up a self-represented litigant using their name.⁴² One interviewee noted that the CM/ECF system will have an email address on file for the litigant.⁴³

Interviewees from a number of districts reported that their staff do quality control on all CM/ECF filings, whether made by self-represented litigants or by attorneys.⁴⁴ Two interviewees mentioned that the filings made on behalf of attorneys are often made – in actuality – by paralegals;⁴⁵ one of these interviewees reported that mistakes occur about equally frequently by attorneys and by self-represented litigants,⁴⁶ and the other reported that their office finds far more errors by lawyers, especially by attorneys who usually practice in state court.⁴⁷ One interviewee reported that, in the course of their quality control, they will correct a wrong event choice (or the like) whether made by an attorney or by a self-represented litigant.⁴⁸ Interviewees from three districts reported that they might need to do more review for quality control and make corrections more frequently for self-represented litigants.⁴⁹ An interviewee from another district

39 D. Ariz.; D.D.C.; W.D. Mo.; W.D. Pa.; S.D.N.Y.

40 D.D.C. (attorney bar numbers are not listed in the docket); N.D. Ill. (interviewee noted that staff are not going to call up a state bar to verify attorney's bar ID number).

41 D.D.C.; W.D.Mo.; S.D.N.Y.; see also D. Kan. (interviewee stated that pro se litigants have personal ID numbers that will show in the system).

42 D.D.C.; see also D. Kan. (interviewee noted that NextGen suggests matches for a person's name, which helps with "matching" a person if they have filed more than one case in the district; "at any given moment, we have ten to 15 electronic filers that we are relatively familiar with, and they tend to be repeat litigants").

43 D. Ariz.

44 D.D.C.; N.D. Ill.; D. Kan.; S.D.N.Y.

45 N.D. Ill. (estimating that nine out of ten attorneys have a paralegal do the filing).

46 D.D.C.

47 N.D. Ill.

48 D.D.C. Compare S.D.N.Y. (court flags the error for the litigant to correct, and the litigant can call the help desk for further explanation).

49 D. Ariz. (but this interviewee also noted that a lot of self-represented litigants "actually do a pretty good job," and that "attorneys are terrible at [choosing the right events when filing], too"); D. Kan. (interviewee noted that some self-represented litigants "are better than some paralegals, because we are in better communication with them," while other self-represented litigants are

reported that problems with the format of PDFs are more frequent in attorney filings than self-represented litigants' filings,⁵⁰ and an interviewee from a third district reported that attorneys use the wrong event more often than self-represented litigants do.⁵¹ An interviewee from another district reported that their office does quality control by checking for legibility and use of the right event, and does correct errors, but stated that "if anything" the only "appreciable burden" is the time spent on the phone with the self-represented litigants who are getting used to the system.⁵²

Among the seven relevant districts, one requires training for both attorneys and self-represented users of CM/ECF,⁵³ while (probably) two require training only for the self-represented users⁵⁴ and three do not require training for either group.⁵⁵ One district requires that the self-represented litigant certify completion of the training as part of their application for permission to use CM/ECF.⁵⁶ Training and/or information varied among the districts that provide it, with written training materials being the most common but with some districts providing video training modules⁵⁷ and one district providing a particularly helpful step-by-step

much less functional; "overall we spend a little more time on quality control with the pro se's, but not a lot more"); W.D. Pa. (there might be additional quality control that needs to be done and quality-control messages that need to go out a little more frequently – for example, if the litigant selects the wrong event or fails to separate documents – but some of the self-represented litigants are just as good as the attorney filers).

50 D.D.C. (attorneys sometimes file fillable PDF forms without first "printing" them to PDF; self-represented litigants are less likely to do this because they are more likely to file PDFs created by scanning).

51 N.D. Ill.

52 W.D. Mo.

53 N.D. Ill.

54 S.D.N.Y. is in this category. See S.D.N.Y. Motion for Permission for Electronic Case Filing. D.D.C. appears to also fall in this category, see D.D.C. Local Civil Rules 5.4(b)(1) (no mention of training requirement for lawyers) & (2) (self-represented applicant to use CM/ECF must certify "that he or she either has successfully completed the entire Clerk's Office on-line tutorial or has been permitted to file electronically in other federal courts").

55 D. Ariz.; D. Kan. (training is "offered and encouraged" but not required; self-represented litigants must have a conversation with an Administrative Specialist at the court before they receive CM/ECF credentials); W.D. Mo.

In the Western District of Pennsylvania, the ECF Policies & Procedures state that when registering for CM/ECF one "must certify that ECF training has been completed," but our interviewees stated that training resources were offered but not required.

56 D.D.C. (see D.D.C. Local Civil Rule 5.4(b)(2)).

57 D. Kan. (one civil-case video module accessible at <https://www.ksd.uscourts.gov/cmecf>); S.D.N.Y. (selected videos at <https://nysd.uscourts.gov/programs/ecf-training>).

I do not count the Western District of Missouri's video on case-opening procedures because self-represented litigants are not permitted to open cases via CM/ECF.

interactive automated training.⁵⁸

Interviewees reported favorably on their court's experience with CM/ECF access for self-represented litigants.⁵⁹ The most commonly noted benefit (to the court)⁶⁰ of CM/ECF access for self-represented litigants was the decrease in the volume of paper filings.⁶¹ A number of our interviewees pointed to a huge savings in court time – that is, opening mail, sorting it, scanning it, and uploading the electronic version to the docket.⁶² Some also like not having to handle tangible papers that might be hard to scan, fragmentary, or odorous.⁶³ Because CM/ECF access also includes electronic noticing via the NEF, interviewees also strongly praised the saving in court time spent on sending notice of court orders – printing, mailing, and re-sending the mailings that are returned by the Post Office – and also the savings on mailing costs.⁶⁴ A number of interviewees also praised the benefits of the electronic record, which averts disputes with the litigant concerning what the litigant filed and when⁶⁵ and what orders the court sent out and when.

The interviewees had a range of views about the burdens on the clerk's office occasioned by self-represented litigants' access to CM/ECF.⁶⁶ One interviewee noted that sometimes a self-represented litigant might complain that they had a problem with their “one free look” at a filing via the NEF.⁶⁷ An interviewee from another district reported no extra burdens occasioned

58 This is the D.D.C. See <https://media.dcd.uscourts.gov/ecf2d/>. They acquired these training modules from another court. The District of Kansas website describes a similar training system, but when I clicked the link to access it, <https://ecf-test.ksd.uscourts.gov/>, I received an error message. Similarly, I could not get the Western District of Pennsylvania's training module, available via <https://www.pawd.uscourts.gov/cm-ecf-training>, to work for me.

59 N.D. Ill. (“The benefits outweigh the risks”).

60 It is notable that a number of our interviewees also expressed the importance of striving for equality of court access for self-represented litigants. See D.D.C. (noting convenience to litigants of ability to file after hours).

61 N.D. Ill.; W.D. Pa.

62 D. Ariz. (not having to scan the paper documents); D.D.C. (same); W.D. Mo. (same; interviewee noted that due to the combined effect of CM/ECF access and EDSS access, court staff time on processing and scanning paper filings was about 30 minutes per day, down from a couple of hours per day).

63 D. Ariz.

64 D. Ariz. (printing court orders, time and cost of mailing them); S.D.N.Y. (mailing costs).

65 D.D.C. (clerk's office need not worry whether it correctly scanned all the pages of a filing); N.D. Ill. (electronic filing avoids the risk that an unethical filer might say that a paper filing scanned by the court differed from the original document).

66 See above for discussions of whether there was an increased need for quality control for self-represented CM/ECF users' filings.

67 D. Ariz.

by self-represented litigants' CM/ECF access.⁶⁸ Interviewees from another district noted that they will check whether a litigant is subject to a filing restriction, and that occasionally the court has removed the CM/ECF privileges of a problem filer (with the problematic filings in such cases typically being problematic because of their volume, that is, too many filings); but these interviewees reported (respectively) no “undue stress on the system” and that “overall [the access] is probably helpful”.⁶⁹

On the question of inappropriate filings, the overall view was that these could present problems whether filed in paper or electronically, and that either way the burden on the court was manageable.⁷⁰ One interviewee observed that self-represented litigant CM/ECF privileges did open the possibility that an inappropriate filing would be viewable on CM/ECF until court staff had a chance to review it; on the other hand, this interviewee observed that the staff in their district – when scanning in a paper filing – check only the caption, case number, and signature, but not every page of the document.⁷¹ This interviewee could only think of one self-represented litigant, in the course of a decade, who filed an inappropriate item in CM/ECF; staff spotted the filing (a document containing inappropriate images) while auditing and immediately restricted access to it, and revoked the petitioner's CM/ECF privileges.⁷² In another district, the interviewees could not think of an instance of inappropriate language or images filed via CM/ECF, though they could think of one involving a paper filer.⁷³ And in a third district, the interviewee noted that court personnel will simply restrict access to a problematic filing when necessary, and that even those filings tend to be made in good faith (e.g., pictures relating to a surgery or an injury);⁷⁴ this interviewee could think of only one self-represented litigant who made “scandalous” filings, and observed that the court promptly handled that situation by order.⁷⁵ In another district, the interviewee did note that services such as Lexis and Westlaw

68 N.D. Ill.

69 D. Kan.

70 D. Ariz. (“The vast majority of litigants are trying to get their case heard and are not filing a bunch of inflammatory stuff and clerk’s offices are good at reacting quickly if something should be sealed and it hasn’t been a burden to do that.”); W.D. Mo (“litigants aren’t attaching deliberately scandalous material, just sensitive information about themselves”); W.D. Pa. (generally the pro se filer who is technically savvy enough to use CM/ECF is not among the pro se litigants who are submitting problematic materials); S.D.N.Y. (“I would rather have frivolous electronic filings than frivolous paper filings.”).

71 N.D. Ill.

72 N.D. Ill. The interviewee also noted an instance where a self-represented litigant’s filing in a state (not federal) court contained the home addresses of judicial personnel.

73 D. Kan. (noting a litigant who brought the court “boxes full of porn”).

74 W.D. Mo. (interviewee noted options of restricting access to parties only or court only).

75 W.D. Mo. (“that was a bit of an ordeal when it was happening, but the judge acted quickly, and there was no public interest in the documents”; the court set up immediate notifications to chambers when this litigant made a filing, so that the court could quickly review them and decide whether to restrict electronic access).

scan the court’s electronic dockets constantly and will download new filings right away.⁷⁶ Multiple interviewees observed that rescinding CM/ECF privileges is always an option.⁷⁷

None of the districts in question uses a “gating” system (that is, holding self-represented litigants’ court filings for clerk’s office review after a document is filed in CM/ECF and before it is made viewable by people other than court personnel). A number of our interviewees noted that it would be possible to configure CM/ECF so that it worked this way (for example, by creating a separate user group for self-represented litigants and then only giving that user group access to events that would be restricted to court viewing only).⁷⁸ But two interviewees observed that their district hadn’t felt the need to adopt such a practice.⁷⁹ One interviewee observed that it would take valuable clerk’s office time to engage in such a review.⁸⁰ And another interviewee suggested that the relevant court of appeals would look askance at the constitutionality of restricting (even temporarily) who could view a litigant’s filings.⁸¹

We asked about inappropriate sharing of CM/ECF credentials, and among our interviewees, only one cited an example involving a self-represented litigant – specifically, a case in which a mother was the listed plaintiff in a case but her son would use her PACER account to file documents.⁸² But the interviewee who provided that example also stated that they “had not seen a huge problem,” and that the “majority of mistakes concerning sharing of credentials come from law firms.”⁸³ A number of interviewees observed that, because access to NextGen CM/ECF entails linking the person’s PACER account with the particular case, sharing credentials would mean sharing the PACER login – and there is a built-in disincentive to share the PACER login because that would enable the other person to run up PACER bills on the person’s PACER account.⁸⁴ Also, a number of these districts restrict a self-represented litigant’s CM/ECF access to only those cases in which the self-represented litigant is a party,⁸⁵

76 S.D.N.Y.

77 D. Ariz.; D.D.C. (interviewee noted that in a few instances the court had rescinded access); N.D. Ill. (interviewee noted that the court had revoked an attorney’s CM/ECF privileges too); D. Kan.; W.D. Pa.

78 D.D.C.; D.Kan.; S.D.N.Y.

79 D. Ariz. (interviewee noted that court could simply rescind CM/ECF access if necessary); D. Kan. (same).

80 D. Kan.

81 N.D. Ill.

82 D. Kan.

83 D. Kan. See also S.D.N.Y. (interviewee noted that a lot of lawyers share their credentials, and asked why credential sharing would be a bigger deal when done by a pro se litigant).

84 D.D.C.; W.D. Mo.

85 D. Ariz.; D.D.C. (access is granted on a per-case basis); D. Kan. (interviewee stated that “you have to be associated with the case, and there is a mechanism within the profile for that case, where we have to turn on their e filing privileges”); W.D. Mo.; W.D. Pa.; S.D.N.Y.

which by definition limits the incentive to share the credentials with some other person for reasons unrelated to the litigant’s case.

All but one of these districts require the self-represented litigant to initiate their case by other means; so CM/ECF access for self-represented litigants in these districts occurs only once the case has gotten started.⁸⁶ (By contrast, in some of these districts lawyers can initiate a case via CM/ECF, while in others even lawyers cannot do so.) In one district, new cases can be initiated electronically in a “shell case,” and then the clerk’s office moves the case over in a real case docket; and this process is available to self-represented litigants who are registered in CM/ECF; but only a handful of self-represented litigants have used this method.⁸⁷

We also asked these interviewees what resources a court would find necessary or useful if it were to permit or expand CM/ECF access for self-represented litigants. Here are their suggestions:

- Learn from your peers in other courts.⁸⁸
- Use a pilot program, take things one step at a time, and see how a new program goes.⁸⁹
- Involve your pro se law clerks in drafting your CM/ECF rules and procedures.⁹⁰
- Plan how you will rescind CM/ECF access if necessary.⁹¹

By contrast, our interviewee from the Northern District of Illinois asserted that it is not technically possible to limit access to just one case. I now think that what he may have meant is that if you grant a litigant access to CM/ECF for one of their cases, and they have multiple cases in the district, the grant of access operates across all of their cases. We certainly did hear from other districts that it was possible to limit access such that the self-represented litigant could not file in cases to which they are not a party.

⁸⁶ D. Ariz. (interviewee noted that, for IFP cases, this effectively means no CM/ECF filing access until after the case has survived the initial IFP case review); D.D.C. (interviewee noted that “case initiating filings are the most likely to be problematic”); N.D. Ill. (interviewee noted that this helps the court to know who a litigant is); D. Kan. (see <https://www.ksd.uscourts.gov/filing-without-attorney/faq>); W.D. Mo. CM/ECF Admin. Manual at 17; S.D.N.Y. ECF Rules & Instructions 14.2.

⁸⁷ See W.D. Pa. CM/ECF Version 6.2 Attorney User Guide at 19.

⁸⁸ D.D.C. (interviewee advocated use of listserves that have been set up by someone in EDNY – such as a listserve for ECF coordinators – and observed that these listserves have searchable archives); N.D. Ill. (suggestions included convening a seminar at which courts that don’t yet allow self-represented litigants to use CM/ECF can learn peer-to-peer (chief judge to chief judge, clerk to clerk) how it works in the districts that have been doing it for a while); W.D. Mo. (interviewee suggested consulting personnel in districts that are similar in size or within the same circuit).

⁸⁹ D.D.C.

⁹⁰ S.D.N.Y.

⁹¹ N.D. Ill.

- Build a very simple menu in CM/ECF for the pro se filers, with only a few simple events, so as to limit the options that they will see when they use the system.⁹²
- Put together a training on CM/ECF (which the court should already have done for their attorney filers).⁹³
- Have good instructional documentation online.⁹⁴
- Make sure that your help-desk staff can explain how the system works, especially how to select the right event when filing.⁹⁵
- Make clear to the would-be self-represented CM/ECF filer that the court will not provide remedial technical support such as teaching them how to make PDFs or how to troubleshoot their wi-fi connectivity.⁹⁶
- In one district, the interviewees were equivocal as to whether staffing would be a consideration.⁹⁷ In another district,⁹⁸ interviewees emphasized the need for proper staffing – both having someone on staff who knows how to configure the system for use by self-represented litigants and having adequate personnel to do quality control.

III. Alternative (non-CM/ECF) modes of electronic access

A number of these districts provide alternative methods of access for self-represented litigants – both for filing their own papers and for receiving others’ filings in the case. As to those districts, we had a set of questions for the interviewees. The districts (in our interview set) that provide alternative electronic filing access⁹⁹ are:

92 S.D.N.Y.

93 N.D. Ill.

94 D. Kan.

95 D. Kan.

96 S.D.N.Y.

97 D. Kan. (one interviewee first advised, “make sure you have the manpower to handle what might be a huge influx,” but then stated that self-represented access to CM/ECF “does not seem like that big of a deal”; a second interviewee noted that their district had not seen a flood of self-represented litigants on CM/ECF and predicted that a court won’t necessarily have to increase its staffing but instead should just make sure its existing staff are trained and prepared).

98 W.D. Pa.

99 I am omitting the D.D.C. from this list, because although the court accepted email filings in civil cases during COVID, it no longer does so (though it is still accepting email filings in criminal cases).

For similar reasons, I am omitting the District of South Carolina. The D.S.C. permitted pro se email submissions during COVID, but ended that program in June 2021. The interviewee from the D.S.C. explained that few litigants were using it, and those who were using it made some frivolous filings, so this mode of access was being used “improperly or not much.”

I am also omitting the Western District of Pennsylvania, which allows certain sealed filings to be submitted by email, but does not otherwise allow alternative means of electronic submission.

- Northern District of Illinois (upload via Box.com; court previously had a temporary email address for pro se filings)
- District of Kansas (email)
- Western District of Missouri (upload) (interviewee estimates that around 50 self-represented litigants are using the EDSS system, up from half that number the previous year)¹⁰⁰
- Southern District of New York (email, including to start a new case)
- District of Utah (email; interviewee stated that probably 70 percent of non-incarcerated self-represented litigants are filing by email)

The districts (in the interview set) that provide an electronic noticing program¹⁰¹ are:

- District of Arizona
- District of the District of Columbia
- Northern District of Illinois
- District of Kansas (an interviewee reported that this is “more popular than electronic filing”)
- Western District of Missouri (only if the litigant signs up for EDSS)
- Southern District of New York
- District of Utah

The interviewees from districts that permit email or portal submissions did not report any significant difficulties with virus scanning,¹⁰² file size,¹⁰³ or other technical problems.

As noted above in the section concerning CM/ECF access, the key benefit of electronic

100 <https://www.mow.uscourts.gov/content/electronic-document-submission-system> .

101 In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish.

102 A D.D.C. interviewee expressed confidence in the fact that the court’s IT department keeps their virus protections up to date.

A District of Kansas interviewee noted that court personnel will send any questionable-looking file to their IT department for review, but also noted that they knew of no malicious submissions; “the biggest problem is that they’ll scan in something you can barely read.”

A Western District of Missouri interviewee reported that the court’s IT department set up the court’s security system, which the interviewee presumes addresses any virus issues.

The Southern District of New York interviewee stated that, nationwide, the AO has provided all districts with a version of Outlook that blocks attachments that appear malicious.

The District of Utah interviewee stated that viruses have not been a concern.

103 D. Kan. (people will usually file multiple attachments rather than trying to consolidate all of them into one big file); W.D. Mo.

submission methods, from the clerk’s office perspective,¹⁰⁴ is the avoidance of the need to handle paper filings.¹⁰⁵ Some interviewees also noted the benefit of an electronic trail concerning what was filed and when.¹⁰⁶ And one interviewee noted that unlike paper filings scanned by the court, some electronic submissions are native PDF files that are text searchable.¹⁰⁷

Our interviewees did not note many difficulties or burdens associated with their programs. An interviewee in one district reported that occasionally a litigant will email the court a complaint without including contact info besides their email.¹⁰⁸ In another district, the interviewee noted one problematic litigant with seven cases before the court who was abusive in interactions with court staff, but that situation was handled by the judge and was “a rarity” because most EDSS users “file on time and properly and do well.”¹⁰⁹ The interviewee in another district stated that there is “a love/hate relationship” with the court’s email filing program: on one hand, some email submissions are crazy and abusive, but on the other hand, abuse can be submitted via paper as well, and with email submissions, the court avoids the need to deal with paper filings.¹¹⁰ In another district the interviewee noted that the main challenges were making sure that a litigant submitted the required form to register for email filing¹¹¹ and that litigants sometimes make improperly formatted or too-frequent submissions; but this interviewee reported that most self-represented email filers do well, and that it is faster to deal with electronic submissions than paper submissions.

In districts that provide an alternative electronic submission method (email or portal), we asked whether such filings qualified for the same time-computation treatment as CM/ECF filings – that is, would a filing submitted at 11:30 pm on Tuesday be counted as filed on Tuesday? The

104 As with CM/ECF, so too here, some personnel also noted benefits to the litigant. E.g., W.D. Mo. (interviewee stated that access to the EDSS system gives litigant greater control over their case).

105 N.D. Ill. (avoidance of need to scan paper filing, audit scanned e-copy, retain paper copy for a period of time); D. Kan. (avoidance of need to scan paper filing); W.D. Mo. (same).

106 N.D. Ill. (contrasting this with the disputes that can arise with respect to what a litigant filed via a physical drop box).

107 S.D.N.Y.

108 D. Kan. (interviewee added, “but that’s a handful of noncompliant people,” and overall the email filing program saves the court a “tremendous” amount of effort).

109 W.D. Mo.

110 S.D.N.Y. This interviewee stated uncertainty as to whether the court would continue its email submission program.

111 D. Utah. Some litigants submit by email without first filling out the form, which sets out the ground rules for the program, see D. Utah Email Filing & Electronic Notification Form for Unrepresented Parties.

answer in all five districts is yes.¹¹²

In the districts that provide an electronic noticing program, the electronic noticing programs all work the same basic way: The system is set to generate an email notice of electronic filing (NEF) to those litigants who are enrolled in the electronic noticing program just as it generates a NEF to those litigants who are on CM/ECF. So the electronic noticing works similarly for its enrollees as for CM/ECF participants: the email notice includes a link to the underlying filing (whether it be a litigant's filing or a court order)¹¹³ and the person gets "one free look" by which to view and download the document (after that one free look, any applicable PACER fees would be incurred by subsequent "looks").

Our interviewees noted a few minor issues with their court's electronic noticing system: the need to alert litigants to its limitations,¹¹⁴ the occasional user who messes up their "one free look,"¹¹⁵ the occasional typo in an email address or change in email address.¹¹⁶ They tended to stress the benefit to the court of avoiding the need to mail court orders¹¹⁷ as well as having an electronic record of what the litigant received.¹¹⁸ A number of interviewees observed that their court encourages self-represented litigants to sign up for electronic noticing.¹¹⁹

In at least one instance, we also obtained details on how electronic noticing works for

112 N.D. Ill.; D. Kan.; W.D. Mo. (answer provided by W.D. Mo. EDSS Admin Procedure III.B); S.D.N.Y.; D. Utah Local Civil Rule 5-1(b)(1)(A)(iv).

113 N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; D. Utah.

An interviewee from D.D.C. pointed out an exception to this: the documents cannot be accessed electronically in Social Security or immigration cases. (This may be specific to the way in which the email noticing program is set up. Compare Civil Rule 5.2(c)(1) (presumptively allowing "remote electronic access to any part of the case file" for "the parties and their attorneys" in Social Security and immigration cases).

114 A D.D.C. interviewee stressed the need to make sure that litigants understand the lack of electronic access to documents in Social Security and immigration cases.

115 D.D.C. (interviewee noted that the court will generate a new NEF for the person so long as it's not always the same person having this difficulty). Compare D. Kan. (interviewee noted that this issue arises much more frequently with attorneys than with self-represented litigants).

116 N.D. Ill. (interviewee noted that this problem arises "more frequently with attorneys" than with self-represented litigants); D. Utah (interviewee noted the need to keep the email addresses up to date and monitor for bouncebacks).

117 D. Kan. (interviewee noted that for many self-represented litigants, their email address may be more stable over time than their physical address); S.D.N.Y. (between CM/ECF access and electronic noticing program, court is avoiding the need to mail out about 3,000 orders per week); D. Utah (savings on printing and postage and trips to the mail drop).

118 D. Utah.

119 D. Ariz.; D.D.C. (courtroom deputies boosted awareness of the program by sending flyers to self-represented litigants); N.D. Ill.; D. Kan.

incarcerated litigants.¹²⁰ In the interests of brevity, I am omitting from this memo that and other details specific to incarcerated litigants, but that will be useful information for future work on that topic.

120 D. Ariz.

TAB 2C

MEMORANDUM

DATE: December 1, 2023
TO: Standing Committee on Rules of Practice and Procedure
FROM: Catherine T. Struve
RE: E-Filing Deadlines Joint Subcommittee

As detailed in the enclosed memo, the E-Filing Deadlines Joint Subcommittee recommended this fall that no action be taken on the suggestion to amend the national time-computation rules to set a presumptive electronic-filing deadline earlier than midnight. At their fall 2023 meetings the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees all endorsed the recommendation to take no action on the suggestion.

Encl.

MEMORANDUM

DATE: August 24, 2023

TO: Judge John D. Bates
Standing Committee on Rules of Practice and Procedure
Reporters and Advisory Committee Chairs

CC: H. Thomas Byron III

FROM: Judge Jay S. Bybee
Catherine T. Struve

RE: E-Filing Deadlines Joint Subcommittee

We write on behalf of the E-Filing Deadlines Joint Subcommittee to summarize the Subcommittee's recommendations concerning Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U. Those docket numbers refer to a 2019 proposal by now-Chief Judge Michael Chagares that the national time-counting rules¹ be amended to set a presumptive electronic-filing deadline earlier than midnight.²

1 Civil Rule 6(a)(4) is representative of the operative portions of the national time-counting rules. It provides in relevant part:

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time....

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

Bankruptcy Rule 9006(a)(4) and Criminal Rule 45(a)(4) are materially similar. Appellate Rule 26(a)(4) is slightly more complicated (in part because it addresses electronic filings in both the district court and the court of appeals) but, like the other three rules, it sets a presumptive deadline of midnight for electronic filings.

2 Chief Judge Chagares summarized his proposal thus:

The subcommittee requested information from the Federal Judicial Center (“FJC”) about actual filing patterns by time of day. The FJC released two studies in 2022 – one concerning e-filing in federal court,³ and another concerning e-filing in state courts.⁴ The study of federal-court filings included a survey component, but that survey was truncated due to challenges arising from the pandemic.⁵ The study also included a quantitative analysis of more than 47 million docket entries made in 2018 in the federal bankruptcy courts, district courts, and courts of appeals. That analysis enabled the researchers to reach this estimate: “About four out of five attorney filings in all three types of courts were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before 8:00, about one in six was made after 5:00, and about one in ten was made after 6:00.”⁶

This year, the Third Circuit adopted (effective July 1, 2023) a new local rule that moves the presumptive deadline for most electronic filings in that court of appeals from midnight to 5:00 p.m.⁷ The Standing Committee asked the subcommittee to update its consideration of the

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk’s office closes in the respective court’s time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

The full proposal is enclosed.

3 See Tim Reagan et al., *Electronic Filing Times in Federal Courts* (FJC 2022), available at <https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingDeadlineStudy.pdf>.

4 See Marie Leary & Jana Laks, *Electronic Filing Deadlines in State Courts* (FJC 2022), available at <https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingStateCourts.pdf>.

5 See Reagan et al., *supra* note 3, at 1 (“We planned to ask a random sample of judges and attorneys about their practices and preferences, but we brought the survey to a close during its pilot phase because of the still-present COVID-19 pandemic.”).

6 See *id.* at 4.

7 Third Circuit Local Appellate Rule 26.1 provides:

26.1 Deadline for Filing

(a) Unless a different time is set by a statute, local rule, or court order:

(1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;

(2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and

2019 proposal in the light of that development.

The subcommittee met by Zoom on August 21, 2023. All members participated, as did the Rules Committee Secretary and reporters from all four of the relevant advisory committees. Subcommittee members gave consideration to the Third Circuit's stated reasons for its new local rule, and also to reported comments concerning that local rule. It was noted that the local rule proposal had evoked strong negative reactions from the bar. An internal DOJ survey of attorneys concerning the idea of moving the presumptive e-filing deadline earlier than midnight had also elicited negative comments about that idea. A subcommittee member reported a similar reaction from members of a law firm.

After careful discussion, the subcommittee voted unanimously to recommend that no action be taken on Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U, and that the subcommittee be disbanded.⁸

Encls.

(3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

(b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.

(c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:

(1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or

(2) a party is providing paper copies of previously filed electronic briefs and appendices.

(d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

The Third Circuit's Public Notice dated May 2, 2023 is enclosed.

⁸ It was noted that the Appellate Rules Committee currently has before it a suggestion from Howard Bashman, Esq., proposing various possible responses by the Appellate Rules Committee to the Third Circuit's local rule. See Suggestion 23-AP-F. The Appellate Rules Committee, however, has not yet discussed that proposal, which remains for future consideration by that advisory committee.

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk’s office closes in the respective court’s time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

“Last Day” Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court’s time zone; and

(B) for filing by other means, when the clerk’s office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk’s office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the “Delaware Bar Report”) and found at:

<https://courts.delaware.gov/forms/download.aspx?id=105958>. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that “[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not “more junior lawyers and support staff”], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day.” Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries “sandbagging” each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted “[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by ‘holding’ briefs for filing until midnight themselves as a response, even when their brief was done.” Delaware Bar Report 33-34.¹

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline “will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day.” Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association’s Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline “has provided a healthier work-life balance” and that the order “has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country.”). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court’s time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court’s time zone>. Another

¹ The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing “does not promote the submission of carefully considered and edited filings,” id. at 32, and that quality “is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable,” id. at 39-40.

approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

“Last Day” Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk’s office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.



Public Notice – May 2, 2023

The United States Court of Appeals for the Third Circuit has adopted amendments to its Local Appellate Rules (L.A.R.), creating a new L.A.R. 26.1 and modifying L.A.R. Misc. 113.3(c). The amended rules create a uniform 5:00 p.m. E.T. deadline for filings (electronic and otherwise) and will become effective on July 1, 2023. The Clerk’s Office will apply the 5:00 p.m. E.T. deadline to deadlines set on or after July 1, 2023, and also observe a grace period until December 31, 2023, for papers mistakenly filed after 5:00 p.m. E.T. The amendments are below.

By way of background, Federal Rules of Appellate Procedure 25(a) and 26(a) create two general presumptive filing deadlines, with electronically filed documents due at midnight and documents filed otherwise (such as paper filings) due when the Clerk’s Office closes. The hours of the Clerk’s Office in the Court of Appeals for the Third Circuit are 8:30 a.m. to 5:00 p.m. E.T.

Rule 26(a)(4) also authorizes courts to establish their own deadlines by court order or local rule. The Court consulted its Lawyers Advisory Committee, which studied and approved the proposed rule changes. The Court then determined that it would solicit comments from the public about the proposed new local rule and conforming amendment. A Public Notice encouraging comments was issued on January 17, 2023. The period for public comment closed on March 3, 2023.

The Court received wide variety of comments from a diverse group of entities and people, including senior attorneys, junior attorneys, pro se litigants, professors, paralegals, and legal assistants. “The Court is grateful for all of the comments received and they were quite helpful in our decision-making. As a matter of fact, several modifications to the proposed rules were made because of suggestions made in the comments, such as excepting filings initiating cases in the Court, like petitions for review,” stated Chief Judge Michael A. Chagares. Further, the Court took notice of the successes of the United States District Court for the District of Delaware and state courts of Delaware, which relied principally on work/life balance and quality of life concerns in similarly modifying their filing deadlines years ago. Other courts have also rolled back their deadlines.

Reasons supporting the Court’s adoption of the amendments include, in no particular order:

- permitting the Court’s Helpdesk personnel to assist electronic filers with technical and other issues when needed during regular business hours and permitting other Clerk’s Office personnel to extend current deadlines (the average non-extended filing period is thirty days) in response to a party’s motion or for up to fourteen days by telephone, during regular business hours. In addition, the amendments permit judges to read and consider filings at an earlier hour.
- insofar as over half of the Court’s litigants are pro se, many of whom cannot or will not use the Court’s CM/ECF system (and attorneys must use the system), the rule largely equalizes the filing deadlines for pro se litigants and attorneys.
- consistent with the collegiality and fairness the Court encourages, the rule ends the practice by some of unnecessary late-night filings intended to deprive opponents from hours that could be used to consider and formulate responses to such filings. Further, the rule obviates the need by opposing counsel to check whether opposing papers were filed throughout the night. About one-quarter of the Court’s filings are currently received after business hours.
- alleviating confusion by equalizing the filing deadlines for electronically filed and non-electronically filed documents in most cases.

While the new rule sets a 5:00 p.m. E.T. deadline for filing, parties reserve the autonomy to prepare their papers whenever they choose, and as Chief Judge Chagares notes, “the virtual courthouse remains open twenty-four hours a day for electronic filing.”

The Clerk’s Office will proactively advise and remind parties of the new deadline in, for instance, scheduling orders.

L.A.R. 26.0 COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

- (a) Unless a different time is set by a statute, local rule, or court order:
 - (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
 - (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and
 - (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

- (b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.
- (c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
 - (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
 - (2) a party is providing paper copies of previously filed electronic briefs and appendices.
- (d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as “midnight in the time zone of the circuit clerk’s principal office” for electronic filing and “when the Clerk’s office is scheduled to close” for other means of transmission of documents to the clerk’s office. This rule applies “[u]nless a different time is set by statute, local rule, or court order.” L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

....

(c) ~~Except as stated in L.A.R. 26.1, F~~iling must be completed by ~~midnight on the last day Eastern Time~~ 5:00 p.m. Eastern Time on the last day to be considered timely ~~filed that day~~.

....

Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

TAB 2D

Report on Redaction of Social-Security Numbers

Item 2D will be an oral report.

TAB 2E

Update on 2024 Report to Congress on the Adequacy of the Privacy Rules

Item 2E will be an oral report.

TAB 3

TAB 3A

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

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 6, 2023

I. Introduction

The Advisory Committee on Appellate Rules met on Thursday, October 19, 2023, in Washington, DC. The draft minutes from the meeting accompany this report.

The Advisory Committee has no action items for the January 2024 meeting.

Proposed amendments to Rule 39, dealing with costs on appeal, and to Rule 6, dealing with appeals in bankruptcy cases, have been published for public comment.

The text of those proposed amendments, with Committee Notes, are included in the 2023 Preliminary Draft of Proposed Amendments found at [this link](#). The Advisory Committee expects to present both proposed amendments for final approval at the June 2024 meeting. (Part II of this report.)

It also expects in June 2024 to ask the Standing Committee to publish two proposed amendments for public comment. The first involves Rule 29, dealing with amicus briefs. The second involves Form 4, the form used for applications to proceed in forma pauperis. (Part III of this report.)

Other matters under consideration (Part IV of this report) are:

- creating a rule dealing with intervention on appeal;
- requiring disclosure of third-party litigation funding;
- expanding electronic filing by self-represented litigants; and
- providing greater protection for Social Security numbers in court filings.

The Committee also considered four items and removed them from the Committee’s agenda (Part V of this report):

- making the deadline for electronic filing earlier than midnight;
- a related new suggestion to restore uniformity among courts of appeals by establishing a nationwide filing deadline of 5:00 p.m.;
- a new suggestion regarding Civil Rule 11; and
- a new suggestion to amend Appellate Rule 17 to require the filing of certain material from an agency record.

II. Items Published for Public Comment

A. Costs on Appeal (21-AP-D)

Rule 39 governs costs on appeal. Some costs are taxable in the court of appeals, while others are taxable in the district court. In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court held that Rule 39 does not permit a district court to alter a court of appeals’ allocation of costs, even those costs that are taxed by the district court. The Court also observed that “the current Rules and the relevant

statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals.” *Id.* at 1638.

The proposed amendment to Rule 39 is designed to codify the holding in *Hotels.com* while providing a clearer procedure. It does not, however, establish a mechanism to ensure that the judgment winner in district court is aware of the cost of the supersedeas bond early enough to ask the court of appeals to reallocate the costs. At the request of the Appellate Rules Committee, the Civil Rules Committee is considering an amendment to Civil Rule 62 requiring disclosure of that cost.

At the time the Advisory Committee met in October, no comments had been received. Since then, a single comment, addressed to the allocation of costs to indigent litigants, has been received. The Advisory Committee will consider this comment, and any additional comments received, at its April 2024 meeting. It expects to seek final approval, taking into account public comment, at the June 2024 meeting of the Standing Committee.

B. Appeals in Bankruptcy Cases

Rule 6 governs appeal in bankruptcy cases. The proposed amendment to Rule 6 clarifies the time for filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. It also clarifies the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2).

No comments have been received. At its April 2024 meeting, the Advisory Committee will consider any comments it receives. It expects to seek final approval, taking into account public comment, at the June 2024 meeting of the Standing Committee.

III. Possible Amendments for Publication at June 2024 Meeting

A. Amicus Disclosures—FRAP 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-E)

In October 2019, after learning of a bill introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists, the Advisory Committee appointed a subcommittee to address amicus disclosures. In February of 2021, after correspondence with the Clerk of the Supreme Court, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to

respond that the Advisory Committee on Appellate Rules had already established a subcommittee to do so.

Appellate Rule 29(a)(4)(E) currently requires that most amicus briefs include a statement that indicates whether:

- (i) a party's counsel authored the brief in whole or in part;
- (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
- (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

Notably, the existing rule requires disclosure of contributions by nonparties (other than the amicus itself, its members, or its counsel) if those contributions are earmarked for an amicus brief.

After several years of deliberation, the Advisory Committee expects to seek, at the June 2024 meeting of the Standing Committee, publication for public comment of a proposed amendment to Rule 29.

There were three issues discussed at the June 2023 meeting of the Standing Committee that the Advisory Committee has considered further. These are: 1) the appropriate look-back period for party contributions; 2) the exclusion of party contributions made in the ordinary course of business; and 3) the exclusion of earmarked contributions made by members of an amicus.

Look-back period. The Standing Committee discussed competing concerns in choosing between a calendar year and a prior 12-month look-back period. On the one hand, it would be easier to administer a rule that required an amicus to review only its prior calendar year contributions. On the other hand, such a disclosure rule might be too easy to evade and would fail to capture contributions that are of most concern: those made right at the time that the amicus brief is filed.

The Advisory Committee believes that it has found a solution. First, to minimize the burden, use fiscal years rather than calendar years. Second, and more importantly, use the prior fiscal year to determine the disclosure threshold, but the 12-month period before filing the brief to determine what contributions need to be disclosed. Under this approach, an amicus would look at its revenue for the prior fiscal year, calculate 25% of that amount, and then see whether a party has contributed more than that amount in the 12 months before filing the brief.

Ordinary course of business. Prior working drafts excluded from disclosure “amounts unrelated to the amicus curiae’s amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business.” Discussion at the June 2023 meeting of the Standing Committee suggested that this provision was confusing. The Advisory Committee thinks it best to drop this provision. It was derived from the AMICUS Act, which set a disclosure threshold at 3%. However sensible the exclusion might be with a 3% threshold, it seems unnecessary with a 25% threshold. Not only is the burden of disclosure much less with the higher threshold, but the reason for the exclusion is also much less.

Earmarked contributions by members of an amicus. It is important to emphasize that the current rule requires disclosure of any contribution earmarked for a particular brief—no matter how small the amount—unless the contributor is the amicus itself, its members, or its counsel. That is, the current rule broadly requires the disclosure of earmarked contributions, even by a nonparty, while also protecting from disclosure all earmarked contributions by members of an amicus (other than by a party or its counsel).

At the June 2023 meeting of the Standing Committee, the Advisory Committee presented two different options. One option was essentially the same as the current rule in that it would require disclosure of any contribution earmarked for a particular brief—no matter how small the amount—unless the contributor is the amicus itself, its members, or its counsel. The second option would set a dollar threshold for disclosure of earmarked contributions, thereby compensating to some extent for the elimination of the exception for members and enabling anonymous crowdfunding of an amicus brief.

The Advisory Committee thinks that the best solution is to set a dollar threshold and retain the member exclusion, but to limit the member exclusion to those who have been members for at least 12 months. In effect, such a rule would treat recent members as nonmembers, thereby blocking the easy evasion of the current rule. A newly created amicus would not have to reveal its members but would have to state the date of its creation.

A clean version of a working draft along these lines follows. The Advisory Committee particularly welcomes comments from the Standing Committee whether the approaches to these three issues appropriately resolve the competing concerns.

1 **Rule 29. Brief of an Amicus Curiae**

2 **(a) During Initial Consideration of a Case on the Merits.**

3 (1) **Applicability.** This Rule 29(a) governs amicus filings during
4 a court’s initial consideration of a case on the merits.

5 (2) **When Authorized.** An amicus curiae brief that brings to the
6 court’s attention relevant matter not already brought to its
7 attention by the parties may be of considerable help to the court.
8 An amicus curiae brief that does not serve this purpose burdens
9 the court, and its filing is not favored.

10 (3) **Striking a Brief.** A court of appeals may strike an amicus
11 brief that would result in a judge’s disqualification.

12 (4) **Contents and Form.** An amicus brief must comply with Rule
13 32. In addition to the requirements of Rule 32, the cover must
14 identify the party or parties supported and indicate whether the
15 brief supports affirmance or reversal. An amicus brief need not
16 comply with Rule 28, but must include the following:

17 (A) if the amicus curiae is a corporation, a disclosure
18 statement like that required of parties by Rule 26.1;

19 (B) a table of contents, with page references;

20 (C) a table of authorities — cases (alphabetically arranged),
21 statutes and other references to the pages of the brief
22 where they are cited;

23 (D) a concise description of the identity, history,
24 experience, and interests of the amicus curiae, together
25 with an explanation of how the brief and the perspective of
26 the amicus will be helpful to the court;

27 (E) unless the amicus is the United States or its officer or
28 agency or a state, the disclosures required by Rule 29(b)
29 and (d);

30 (F) an argument, which may be preceded by a summary
31 and which need not include a statement of the applicable
32 standard of review; and

33 (G) a certificate of compliance under Rule 32(g)(1), if length
34 is computed using a word or line limit.

35 (5) **Length.** Except by the court's permission, an amicus brief
36 may be no more than one-half the maximum length authorized by
37 these rules for a party's principal brief. If the court grants a party
38 permission to file a longer brief, that extension does not affect the
39 length of an amicus brief.

40 (6) **Time for Filing.** An amicus curiae must file its brief no later
41 than 7 days after the principal brief of the party being supported
42 is filed. An amicus curiae that does not support either party must
43 file its brief no later than 7 days after the appellant's or
44 petitioner's principal brief is filed. A court may grant leave for
45 later filing, specifying the time within which an opposing party
46 may answer.

47 (7) **Reply Brief.** Except by the court's permission, an amicus
48 curiae may not file a reply brief.

49 (8) **Oral Argument.** An amicus curiae may participate in oral
50 argument only with the court's permission.

51 **(b) Disclosing a Relationship Between the Amicus and a Party.**
52 An amicus brief must disclose:

53 (1) whether a party or its counsel authored the brief in whole or
54 in part;

55 (2) whether a party or its counsel contributed or pledged to
56 contribute money intended to fund—or intended as compensation
57 for—preparing, drafting, or submitting the brief;

58 (3) whether a party, its counsel, or any combination of parties and
59 their counsel has a majority ownership interest in or majority
60 control of a legal entity submitting the brief; and

61 (4) whether a party, its counsel, or any combination of parties and
62 their counsel has, during the 12-month period before the brief was
63 filed, contributed or pledged to contribute an amount equal to or
64 greater than 25% of the gross revenue of the amicus curiae for the
65 prior fiscal year.

66 (c) **Identifying the Party or Counsel; Disclosure by a Party or**
67 **Counsel.** Any disclosure required by paragraph (b) must name the
68 party or counsel. If the party or counsel knows that an amicus has failed
69 to make the disclosure, the party or counsel must do so.

70 (d) **Disclosing a Relationship Between the Amicus and a**
71 **Nonparty.** An amicus brief must name any person—other than the
72 amicus, or its counsel—who contributed or pledged to contribute more
73 than \$1000 intended to fund (or intended as compensation for)
74 preparing, drafting, or submitting the brief. But an amicus brief need
75 not disclose a person who has been a member of the amicus for the prior
76 12 months. If an amicus has existed for fewer than 12 months, an amicus
77 brief need not disclose contributing members, but must disclose the date
78 of creation of the amicus.

79 (e) **During Consideration of Whether to Grant Rehearing.**

80 (1) **Applicability.** Rule 29(a) through (d) govern amicus filings
81 during a court’s consideration of whether to grant panel rehearing
82 or rehearing en banc, except as provided in 29(e)(2) and (3), and
83 unless a local rule or order in a case provides otherwise.

84 (2) **Length.** The brief must not exceed 2,600 words.

85 (3) **Time for Filing.** An amicus curiae supporting the petition for
86 rehearing or supporting neither party must file its brief no later
87 than 7 days after the petition is filed. An amicus curiae opposing
88 the petition must file its brief no later than the date set by the
89 court for the response.

Two other issues arose at the October meeting of the Advisory Committee. The Advisory Committee will consider these further in the spring but would welcome any comments now.

First, there is some question whether—and how far—the Appellate Rules should follow the Supreme Court in permitting amicus briefs. The current Appellate Rule requires most amici (other than the United States or a state) to obtain either leave of court or consent of the parties. The Supreme Court has recently amended its Rule 37 to eliminate the requirement that an amicus obtain either leave of court or consent of the parties. When the Advisory Committee first discussed this development, it saw no reason not to follow the Supreme Court’s lead. But at its October 2023 meeting, new concerns were raised, particularly the risk that an amicus brief filed at the petition for rehearing stage could require the recusal of a judge and

that the provision to strike such a brief doesn't solve the problem because there is a window of time—after the panel decision but before en banc review is granted—when there is no entity in a position to strike such a brief. For this reason, the Advisory Committee is considering leaving the current requirements in place, at least at the rehearing stage.

We note for the Committee's information that, subsequent to the October meeting of the Advisory Committee, the Supreme Court promulgated its Code of Conduct. It provides, "Neither the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae* requires a Justice's disqualification." Canon 3B(4). This provision of the Supreme Court's Code does not match current Appellate Rule 29(a)(2), which empowers a court of appeals to strike or prohibit the filing of an amicus brief that would result in a judge's disqualification. The Supreme Court explained this provision of its Code of Conduct this way:

In contrast to the lower courts, where filing of *amicus* briefs is limited, the Supreme Court receives up to a thousand *amicus* filings each Term. In some recent instances, more than 100 *amicus* briefs have been filed in a single case. The Court has adopted a permissive approach to *amicus* filings, having recently modified its rules to dispense with the prior requirement that *amici* either obtain the consent of all parties or file a motion seeking leave to submit an *amicus* brief. In light of the Court's permissive *amicus* practice, *amici* and their counsel will not be a basis for an individual Justice to recuse. The courts of appeals follow a similar approach to ameliorating any risk that an *amicus* filing could precipitate a recusal. Federal Rule of Appellate Procedure 29(a)(2) states that "a court of appeals may prohibit the filing of or may strike an *amicus* brief that would result in a judge's disqualification."

Code of Conduct Commentary at 11-12.

Second, a question arose whether the term "revenue" adequately captures how nonprofits are funded. Research by the Reporter after the October 2023 meeting reveals that tax forms use either "total revenue" (for non-profits) or "total income" (for business corporations, partnerships, individuals, and trusts and estates). The Advisory Committee will further consider the most appropriate term or terms.

B. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The Advisory Committee has been considering suggestions to establish more consistent criteria for granting IFP status and to revise the FRAP Form 4 to be less intrusive. It focused its attention on the one aspect of the issue that is clearly within

the purview of the Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

The Advisory Committee has developed a working draft of a simplified Form 4 and expects to seek publication for public comment at the June 2024 meeting of the Standing Committee.

IV. Other Matters Under Consideration

A. Intervention on Appeal (22-AP-G; 23-AP-C)

The Advisory Committee has begun to work on the possibility of a new Federal Rule of Appellate Procedure governing intervention on appeal. About a dozen years ago, the Advisory Committee explored the issue and decided not to take any action. Since then, the Supreme Court has observed that there is no appellate rule on this question. *Cameron v. EMW Women’s Surgical Ctr.*, 142 S. Ct. 1002, 1010 (2022). Twice in recent years it has granted cert to address intervention on appeal, but both cases became moot. An academic brief in one of those cases suggested rule making and included a list of items that rule makers might consider. The issue does not seem to be going away.

Initially, the Advisory Committee is looking to follow the general approach of the courts of appeals and limit intervention on appeal to exceptional cases for imperative reasons. It does not want to encourage circumvention of district court discretion or the standard of review. And it does not want to replicate the ambiguity of Civil Rule 24—or take a position on the proper interpretation of that Rule.

B. Third-Party Litigation Funding (22-AP-C; 22-AP-D)

The Advisory Committee on Civil Rules has been looking into the issue of third-party litigation funding for years. The Advisory Committee on Appellate Rules does not think that there is anything for it to do at this point. As before, it will await further developments from Civil.

C. Social Security Numbers in Court Filings (22-AP-E)

Previously, the Advisory Committee on Appellate Rules, like other Advisory Committees, have let the Bankruptcy Rules Committee—where the issue is most serious—take the lead. It now appears unlikely that the Bankruptcy Rules Committee will propose amendments requiring full redaction of social security numbers. For that reason, the Advisory Committee on Appellate Rules will address whether the value of consistency across the various sets of rules outweighs the value of requiring full redaction in the Civil, Criminal, and Appellate Rules. Because

Appellate Rule 25 incorporates the other rules, it may not be necessary to amend the Appellate Rules. On the other hand, if there are few if any appellate cases in which it would be necessary for a publicly filed brief or appendix to include a social security number, perhaps the Appellate Rules should broadly require full redaction.

D. Unrepresented Parties; Filing and Service

The Advisory Committee defers to the Reporter for the Standing Committee for any update regarding the joint project dealing with electronic filing and service by unrepresented parties.

E. Comment on Amicus Disclosures (23-AP-E)

A comment on the amicus disclosure project has been submitted by People United for Privacy Foundation. (Agenda book page 203). Because no proposal has yet been published for public comment, this has been docketed as a new suggestion and referred to the amicus subcommittee.

V. Items Removed from the Advisory Committee Agenda

A. Earlier Deadlines (19-AP-E)

The Advisory Committee defers to the Reporter for the Standing Committee for the general update regarding the recommendations of the joint subcommittee dealing with the suggestion that the midnight deadline for electronic filing be moved to an earlier time than midnight.

It adds that, in keeping with the recommendations of that joint subcommittee, the Advisory Committee, without dissent, removed this item from its agenda.

B. Nationwide Filing Deadline (23-AP-F)

Closely related to but distinct from the suggestion just discussed, the Advisory Committee received a new suggestion in response to the adoption of a local rule setting a 5:00 p.m. deadline for filing in the Court of Appeals for the Third Circuit. This suggestion, submitted by Howard Bashman, suggested establishing a nationwide filing deadline of 5:00 p.m. to restore uniformity among courts of appeals. Alternatively, he suggested that the Committee examine the authority of the Court of Appeals for the Third Circuit to have established a 5:00 p.m. deadline in that circuit or that the Committee recommend that it reinstate the midnight deadline.

The Advisory Committee, without dissent, removed this item from its agenda.

C. Civil Rule 11 (23-AP-G)

The Advisory Committee received a new suggestion by Andrew Straw, who disagrees with a passage contained in the Spring 2023 agenda book of the Civil Rules Committee.

The Committee, without dissent, voted to remove the suggestion from the agenda.

D. Record in Agency Cases—Rule 17 (23-AP-H)

The Advisory Committee received a new suggestion by Thomas Dougherty, who suggests the Rule 17 be amended to require an agency, if it cites a page of its record in a brief, to file the pages of the full section or titled portion containing that page, as well as any pages that are cross-referenced on that cited page. Such a rule would require the inclusion of completely unnecessary material. In addition, it is not clear why the existing rule—which requires that any part of the record must be sent to the court if the court or a party so requests—is inadequate.

The Committee, without dissent, voted to remove the suggestion from the agenda.

TAB 3B

Minutes of the Spring Meeting of the
Advisory Committee on Appellate Rules

October 19, 2023

Washington, DC

Judge Jay Bybee, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 19, 2023, at approximately 9:00 a.m. EDT.

In addition to Judge Bybee, the following members of the Advisory Committee on Appellate Rules were present in person: George Hicks, Professor Bert Huang, Judge Carl J. Nichols, Judge Sidney Thomas, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Linda Coberly and Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Committee on the Rules of Practice and Procedure (Standing Committee); H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Alison Bruff, Counsel, RCS; Shelly Cox, Management Analyst; Bridget M. Healy, Counsel, RCS; Zachary Hawari, Rules Law Clerk, RCS; Professor Catherine T. Struve, Reporter, Standing Committee; and Professor Edward A. Hartnett, Reporter, Advisory Committee on Appellate Rules.

Judge Daniel Bress, Member, Advisory Committee on Bankruptcy Rules and Liaison to the Advisory Committee on Appellate Rules; Andrew Pincus, Member, Standing Committee, and Liaison to the Advisory Committee on Appellate Rules; Molly Dwyer, Clerk of Court Representative; Professor Daniel R. Coquillette, Consultant, Standing Committee; and Tim Reagan, Federal Judicial Center, attended via Teams.

I. Introduction and Preliminary Matters

Judge Bybee opened the meeting and welcomed everyone, particularly the new members of the Committee, Judge Sidney Thomas, George Hicks, and Linda Coberly, and the new Rules Law Clerk, Zachary Hawari. He noted that Justice Leandra Kruger was unable to attend and was excused. He also welcomed the observers, both those in person and those online. He also gave special thanks to Danielle Spinelli, whose term has expired, for her many contributions.

Judge Bybee stated that Tab 1 of the agenda book included various background materials. He noted that Tab 2 included the minutes and report of the Standing

Committee meeting in June 2023, and called attention to pages 46-53 of the agenda book, which contains the minutes of that meeting that involved the Appellate Rules. He reported that this Advisory Committee brought three action items to the Standing Committee and that all three were approved: Amendments to Rules 35 and 40 (dealing with rehearing) were given final approval, and amendments to Rule 39 (dealing with costs) and to Rule 6 (dealing with bankruptcy appeals) were approved for publication.

II. Approval of the Minutes

The minutes of the March 29, 2023, Advisory Committee meeting (Agenda book page 110) were approved.

III. Discussion of Joint Committee Matters

Professor Struve presented an update regarding two joint committee matters, electronic filing and service for unrepresented parties (Agenda book 132) and establishing an earlier deadline for electronic filings. (Agenda book 152).

A. Unrepresented Parties; Filing and Service

The working group considering the issue of electronic filing and service for unrepresented parties has been focused on both the issue of increasing access to some kind of electronic filing (CM/ECF or an alternative) and the issue of reducing the burden of serving documents (other than process). Interviews with district court employees from nine districts informed the discussion. The consensus of the working group is that there is no need for unrepresented litigants to serve paper copies on other parties because those other parties receive a notice of electronic filing (NEF) once the papers filed by an unrepresented litigant are placed on CM/ECF. Professor Struve is not presenting a sketch of what a rule change implementing this idea would look like at this meeting. That's because the working group is considering a broader revision that would reflect the reality that pretty much everything is being served electronically today. A sketch will follow at a later meeting. As for access to electronic filing, there are varied reactions. One possibility for a national rule would be to require that all districts at least allow for reasonable exceptions to any general bar on electronic filing by unrepresented litigants. The courts of appeals nationally are further along in permitting electronic filing and may not take this approach. Professor Struve asked anyone with suggestions for drafting to send them to her, noting that the true skeptics of broader access are not on this committee.

Mr. Freeman wondered whether the working group was considering the systems that are replacing CM/ECF in some courts, prompting questions about the new systems. Ms. Dwyer stated that they are working on it in the Ninth Circuit. She added that she doesn't understand the reluctance in some district courts to electronic filing. She noted that they have not had problems with it in the Ninth Circuit.

B. Earlier Deadlines (19-AP-E)

Professor Struve thanked Judge Bybee for chairing the joint subcommittee dealing with the suggestion that the midnight deadline for electronic filing be moved to an earlier time than midnight. The Federal Judicial Center conducted two terrific studies compiling data regarding time of filing. In addition to this research, there is a recent development: In July of 2023, the Court of Appeals for the Third Circuit promulgated a local rule establishing a 5:00 p.m. deadline. Taking all this into consideration, the joint subcommittee recommends that no action be taken and that it be disbanded. The Bankruptcy and Civil Rules Committees have removed the suggestions from their agenda. A new and distinct suggestion regarding the deadline for electronic filing in the courts of appeals is later on the agenda.

Judge Bybee noted that the recommendation that the joint subcommittee be disbanded is directed to the Standing Committee. He invited a motion to remove suggestion 19-AP-E from this committee's agenda. That motion was made and approved unanimously. Judge Bybee voiced his approval of this experiment in inter-circuit federalism; we will see how it works out.

C. Social Security Numbers in Court Filings (22-AP-E)

Mr. Byron provided an oral update regarding the suggestion by Senator Wyden that courts require the complete redaction of social security numbers, not simply redaction of all but the last four digits. This poses the most serious issue in bankruptcy, and other advisory committees have to date allowed the Bankruptcy Rules Committee to take the lead. At this point, however, it appears unlikely that the Bankruptcy Rules Committee will propose amendments requiring full redaction, raising the question of whether the value of consistency across the various sets of rules outweighs the value of proposing amendments that would require full redaction in the Civil, Criminal, and Appellate Rules. Because Appellate Rule 25 incorporates the other rules, it is probably not necessary to amend the Appellate Rules.

The Reporter added that he had been unable to imagine an appellate case in which it would be necessary for a publicly filed brief or appendix to include a social security number. He invited committee members to let him know if they imagined such a case. He noted that in the rare case where it might be necessary for the judges to know the social security number, it could be filed under seal.

IV. Discussion of Matters Published for Public Comment

The Reporter provided a report about two matters that have been published in August of 2023 for public comment: proposed amendments to Rule 6 (dealing with bankruptcy appeals) and Rule 39 (dealing with costs). (Agenda book page 165).

No comments have been received yet. The comment period will be open until February of 2024 and comments are likely to be submitted and considered by the relevant subcommittees before the spring meeting. Because Danielle Spinelli's term has expired, a new member of the Bankruptcy Appeals Subcommittee is needed. Judge Bybee appointed George Hicks.

In response to a question from the Reporter, Mr. Byron noted that the Civil Rules Committee briefly considered this Committee's request that Civil Rule 62 be amended to complement the proposed amendment to Appellate Rule 39. On the one hand, there was some skepticism of the need for such an amendment because the issue rarely arises. On the other hand, it was also recognized that even if the issue arises rarely, there is value in making a simple change that is not likely to have adverse unintended consequences. Mr. Byron added that, from his perspective, it would be useful to provide guidance or feedback about why it might be valuable. Judge Bates added that while the issue does seem to be rare, there does seem to be an easy fix. He suggested that it would be helpful for the reporters for the Appellate and Civil Rules Committees to talk further about the need for an amendment.

V. Discussion of Matters Before Subcommittees

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Judge Bybee presented the report of the amicus disclosure subcommittee. (Agenda book page 168). He noted that we have been working on this for several years and called attention to the minutes of the discussion of the issue at the June 2023 Standing Committee meeting. (Agenda book 49-52). The subcommittee met and had a vigorous and extensive discussion.

The first issue on the table involves working draft Rule 29(b) on page 174 of the agenda book. Draft 29(b)(1) and (b)(2) are basically in the existing rule. Draft 29(b)(3) is new but has not provoked much controversy. Draft 29(b)(4) is new and requires the disclosure of certain contributions by parties to an amicus. The current focus is on the look-back period for determining what needs to be disclosed. Using a 12-month period before the filing of the brief could be burdensome, but using the prior year could miss the very sort of contributions of most concern.

The subcommittee believes that it has found an elegant solution: use the prior fiscal year to determine the disclosure threshold, but the 12-month period before filing the brief to determine what contributions need to be disclosed. An amicus looks at its revenue for the prior fiscal year, calculates 25% of that amount, and then sees whether a party has contributed more than that amount in the 12 months before filing the brief. Both periods are used, but in different ways. The math is pretty simple, even if it sounds more complicated in the form of a story problem.

A judge member asked whether the term “revenue” adequately captured how nonprofits are funded, raising a concern about whether contributions count as revenue for tax reporting. The Reporter stated that he thought that the term “gross revenue” in the working draft included contributions. A liaison member stated that from an accounting perspective, contributions are revenue and suggested that the Committee Note make clear that this is the sense in which the term is used. A lawyer member said that IRS Form 990 used the term “gross receipts” and that this might be a broader term; it would be helpful to consult tax folks and clarify in the Committee Note. An academic member asked if this excluded endowment income; the Reporter answered that the subcommittee had not thought about that question. Judge Bybee observed that this could vastly increase the denominator, and the academic member added that this would be true for a small number of amici.

A lawyer member asked if the Standing Committee had commented on the question of how prevalent a problem there is, especially with regard to parties. The Reporter stated that the issue of whether there is a sufficient problem to warrant a rule change has been a recurrent issue at every step of the process. A liaison member added that while the problem does not really occur with parties, it would be odd to have a rule that addresses nonparties and not say anything about parties. Judge Bates agreed with the Reporter that the broad question of whether there is a sufficient problem to warrant a rule change has been with us at every step, but not focused exactly the way that the lawyer member did.

A judge member stated that he had raised the question when he first joined the Committee. He found that there was broad agreement that we would not want parties funding an amicus without judges knowing about it, but less broad agreement regarding nonparties. There is a disconnect: There may not be an actual problem with party behavior, but agreement that we should know if it does happen; there may be more of an issue with nonparty behavior, but less agreement about what to do about it. Judge Bates added that the current rule addresses both parties and nonparties.

A judge member stated that he liked the concept of the two different look back periods. The right language needs to be found to cover profits, nonprofits, endowments.

Judge Bybee then turned to a different topic: the relationship between a nonparty and an amicus. The current rule exempts all members of an amicus from the need to disclose earmarked contributions. This opens a loophole: someone can join an amicus at the last minute to avoid disclosure. The current rule also has no dollar threshold; all earmarked contributions by nonmembers must be disclosed.

The draft rule sets a \$1000 threshold for disclosure, thereby enabling crowd funding. It also retains the member exception—but limits that exception to those who have been members for at least 12 months, thereby closing the loophole. That approach raises a new issue: What if the amicus is not that old? Rather than subject

a new amicus to the 12-month membership requirement, and lose all member protection, a new amicus need not disclose contributing members, but must disclose the date it was created. This dovetails with the new requirement in draft Rule 29(a)(4)(D) to describe the history of an amicus. In response to a question by Judge Bates, Judge Bybee agreed that a trade association that is totally funded by its members would not have to disclose its members.

A lawyer member raised a concern about recently joined members not having the protection of members, noting that a trade association might want broader participation but that what acts as a trigger for some to join is an amicus brief. They might not join in order to fund the brief, but the brief might be what leads them to join the association. The Reporter responded that this draft rule requires the disclosure only of earmarked contributions. A liaison member stated that the draft rule provides a pretty elegant solution to the member problem, avoiding the problem that eliminating the member exclusion would disadvantage certain kinds of organizations that have to pass the hat for amicus briefs. As a drafting matter, it should be “fewer” than 12 months.

A judge member agreed that the approach in the working draft makes sense. An academic member urged further thought to the astro-turfing problem in that founding members are never disclosed. A lawyer member responded that the rule has been limited to earmarked contributions.

A liaison member observed that an amicus has an incentive to show a broad base so that if, in its self-description, it failed to say anything about how many members it had, that would raise a red flag. He also thought that the \$1000 threshold was too high, and perhaps there should be different thresholds for members and nonmembers. A lawyer member agreed that the amount should be lower.

The Reporter asked for suggested dollar amounts. Judge Bates asked how much more disclosure would be captured by drawing a distinction between members and nonmembers and whether it would produce drafting problems in a rule that is already long and complicated. Judge Bybee observed that the draft effectively treats recent members as non-members. A lawyer member suggested \$100 or \$500 as a threshold.

Judge Bates urged the Committee, when presenting a proposal to the Standing Committee, to address First Amendment concerns as carefully as possible. The Reporter noted that the subcommittee has kept those concerns in mind at every step and agreed that a proposal should be explicit about addressing these concerns.

Judge Bybee then turned to working draft Rule 29(a)(2) which largely follows a recent amendment to the Supreme Court’s rules in eliminating the requirement of a motion (or party consent) to the filing of an amicus brief. At the last meeting of this Committee, a concern was raised that allowing an amicus brief to be filed so long as

it brings to the court's attention "relevant matter" that the parties did not would run the risk of inviting amicus briefs raising waived or forfeited issues. To meet this concern, the working draft adds the requirement that the matter not only be relevant but that it be "properly considered by the court." The Reporter explained that the idea was to avoid trying to specify in the rule text what was and was not properly considered, but mention things such as waiver, forfeiture, judicial notice, and legislative facts in the Committee Note.

Mr. Freeman said that he was skeptical of the utility of the subcommittee's addition and feared that it would invite motions to strike. He also wondered how it would apply to a classic Brandeis brief. While he has some concerns about the language from the Supreme Court rule ("relevant matter"), he would not add anything further. A lawyer member stated that the subcommittee's language would create more problems than it would resolve and risk weaponizing motions to strike. Judge Bates added that judges might disagree about what is properly considered.

Judge Bybee suggested, as a drafting matter, that (a)(3) might be folded into (a)(2).

A judge member noted that he was late to the game but feared that allowing the filing of amicus briefs without either a motion or consent would force the recusal of lots of judges, particularly at the petition for rehearing en banc stage. He feared that an amicus could target a filing so as to require recusal. Striking the brief later is not a remedy; when a petition for rehearing en banc has been filed, there is no entity to strike the brief. The case is in between the panel and the en banc court and neither is in a position to strike the brief.

Mr. Freeman noted that the existing rule, which permits filing on consent, would seem to present the same problem. The judge member responded that he would prefer to eliminate that option as well, requiring leave of court in all instances, but that consent filing poses less of a problem. He also noted two other kinds of problematic amicus briefs: 1) a letter to the editor style of amicus brief from a concerned citizen and 2) a brief submitted by lawyers for marketing purposes so they can say on their website that their amicus briefs were accepted in various courts.

Mr. Freeman suggested that a distinction could be drawn between the panel stage and the en banc stage. A liaison member agreed, noting that in most circuits the identity of the panel isn't revealed in time to file an amicus brief. The judge member acknowledged that the problem was mostly at the en banc stage, but that it can happen at the panel stage, such as when a panel takes a comeback case.

A different judge member stated that in 20 years he hasn't had a problem at the panel stage, while there have been some at the en banc stage, although not targeted. He preferred the existing rule; there is no trouble; why is there a need to change it?

In response to a question from Mr. Byron, the judge who first raised this concern explained that the real problem is the netherworld: once the court calls for a response to a petition for rehearing en banc, it waits for the en banc vote. A panel would not act on a motion. For that reason, empowering the court to prohibit a filing wouldn't help; there is no entity to do it. The way it works now is that no one acts on the motion until the en banc court is assembled. Then leave can be denied.

Judge Bates noted that it is worthwhile to look at this issue again. There seems to be a difference between the en banc and panel stages. The judge who raised the issue agreed, adding that the only reason to change is conformity to the Supreme Court; there is no great need. It's not a big deal to grant leave, and it would be nice to be able to reject letters to the editor. Ms. Dwyer agreed that the current rule does not present a problem, but there would be a problem with the proposed change. The rest of the proposal is complicated enough; don't change this.

A liaison member noted that there is a difference between filing an amicus brief in the Supreme Court and in the court of appeals. In the Supreme Court, the brief must be printed. That speed bump does not exist in the court of appeals.

The judge who raised the issue emphasized the need, at the minimum, to leave the existing procedure at the rehearing stage.

Judge Bybee then stated that the subcommittee had considered whether to address amicus briefs at other stages, such as stay applications, but decided not to do so. Mr. Freeman noted that this consideration was in response to his comment at the last meeting and that he does not disagree with the subcommittee's conclusion. Mr. Byron asked if the subcommittee had considered amicus briefs after a petition for rehearing en banc is granted; the Reporter answered no. A lawyer member noted that if the rule is not going to address amicus briefs at the stay stage, it should not address amicus briefs after rehearing en banc is granted. Judge Bybee agreed that we should not start down the road of all permutations.

The amicus subcommittee also needs a new member because of the departure of Danielle Spinelli. Judge Bybee appointed Linda Coberly.

The Committee then took a short break before resuming at approximately 11:00 a.m.

B. Intervention on Appeal (22-AP-G; 23-AP-C)

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 177). He thanked the Reporter for the memo and draft rule, which provides a good basis for discussion.

Mr. Freeman explained that the problem is that there is no existing Federal Rule of Appellate Procedure governing intervention on appeal, unlike the Federal Rules of Civil Procedure which treat intervention as of right and permissive intervention separately in Civil Rule 24. FRAP 15(d) refers to intervention on appeal obliquely but provides no standard. In the absence of a governing Federal Rule of Appellate Procedure, most courts reason by analogy to Civil Rule 24. But the analogy is imperfect. Plus, Civil Rule 24 is ambiguous in key respects, particularly regarding what “interests” are sufficient to support intervention. There is a wide variety of views. If we tracked Rule 24, we would duplicate that ambiguity.

Why address this issue now? The Supreme Court has specifically noted that no Appellate Rule governs intervention on appeal. Twice in recent years it has granted cert to address intervention on appeal, but both cases mooted out for different reasons. An academic brief filed in the *Mayorkas* case suggested rule making and included a list of items that rule makers might consider.

The philosophy of the subcommittee is to avoid encouraging circumvention of district court discretion or the standard of review, to not replicate the ambiguity of Civil Rule 24, and to track the existing gestalt of court of appeals decisions. Those decisions, going back to the 1962 *McKenna* decision in the Fifth Circuit, speak at a high level of generality, reserving intervention on appeal to exceptional cases for imperative reasons. A rule could usefully provide more content.

Mr. Freeman then turned to the working draft on page 182 of the agenda book. It is not clear where a new rule governing intervention should go; the working draft numbers it Rule 7.1, placing it with other rules governing preliminary stages. It is designed to narrowly permit intervention on appeal without replicating the ambiguity in Civil Rule 24 or taking a position on the proper interpretation of Civil Rule 24.

Draft Rule 7.1(a) makes intervention as a party disfavored, preferring amicus status. It requires that a motion to intervene be filed promptly, show that the requirements of (b) are met, and explain the movant’s legal interest required by (c). Rule 7.1(b) tracks some of the requirements in Civil Rules 19 and 24; it also requires that intervention not create a problem with diversity jurisdiction under section 1367. Rule 7.1(c) addresses what interests support intervention and draws from an article written by Professor Caleb Nelson, an article that was addressed to intervention in district court. Rule 7.1(c)(3) and (4) address the most traditional interests: claiming an interest in property and situations where a claim is being litigated on behalf of the proposed intervenor in a representative capacity. Rule 7.1(c)(1) and (2) are more different; a proposed intervenor cannot rely simply on the precedential effect of a decision but must have an existing claim or defense or contingent claim. Rule 7.1(d) contains special provisions for governments, permitting intervention to defend a law or government action, and permitting agencies or officers to do so where authorized by law. These intervenors need not comply with the other provisions of the Rule,

except as to timeliness. Rule 7.1(e) permits the court to transfer the motion to the district court to address contested factual issues and provides that if the court grants the motion to intervene, the intervenor becomes a party for all purposes, unless the court orders otherwise. Finally, it makes clear that denial of intervention does not preclude the filing of an amicus brief.

Judge Bates asked if the reason the Committee previously decided against creating such a rule was the risk of unintended consequences. Mr. Freeman stated that his recollection was that there was a fear that a rule would encourage more motions to intervene. He noted that the government was internally riven because some still have that fear. Mr. Byron added that the genie is out of the bottle; the Supreme Court has granted cert on the issue.

Professor Struve thanked the subcommittee and the Reporter for sorting through the questions. She thought it made sense to decouple intervention on appeal from Civil Rule 24, but also thought that the Committee Note should make clear that someone is better off trying in the district court and appealing rather than simply seek to intervene on appeal. An analogy could be made to the need to seek a stay in the district court before seeking one in the court of appeals. She also suggested that federally recognized Indian tribes be included in 7.1(d); the definition of “state” in FRAP 1(b) does not include tribes.

Judge Bates asked if a motion transferred to the district court under 7.1(e) would be governed by FRAP 7.1 and not Civil Rule 24. Mr. Freeman said yes and added that there is a mandate issue to be addressed.

A liaison member echoed prior comments that this is a terrific effort to identify the issues. He stated that the language in Rule 7.1(c) is difficult to parse and wants it to be clear that where a private party saw no need to appeal because it was fully represented by the government but then this was no longer true, intervention would be permitted.

A different liaison member asked what was meant by the provision in Rule 7.1(e) that intervention would be for all purposes unless the court orders otherwise. Mr. Freeman stated that it preserved the discretion of the court to allow intervention for a limited purpose, such where a party’s interest is limited to an injunction (and not damages) or to a constitutional issue (but not a statutory issue). The Reporter added that it is designed to establish a clear default rule that, unless the court orders otherwise, intervention on appeal carries over to the case on remand.

Mr. Freeman turned to the issue raised by the liaison member about changes in the government’s position. He observed that most recent cases are like that, but they aren’t the only ones. It is commonplace for the favored party in an administrative proceeding to intervene on appeal to defend the agency action. Are the standards in (c) adequate for that situation, or do we need different standards in such cases?

Timeliness may be different under different statutory schemes. In addition, there are also some statutes that mandate intervention, such as 35 U.S.C. § 143. Language should be added like intervention as of right under Civil Rule 24(a). There are also situations where foreign sovereigns are sued, and the United States intervenes to protect the foreign policy interests of the United States. If a new rule is created, we need to be aware of this.

A judge member asked what is meant by “promptly” in Rule 7.1(a). Mr. Freeman responded that there were two notions of timeliness in the working draft. Rule 7.1(a) focused on timeliness from the docketing of the appeal; Rule 7.1(b)(1) focused on timeliness in the overall litigation. The judge member suggested specifying a specific time after a specific event, such as 30 days after docketing or 7 days after the principal brief. It shouldn’t be allowed so late that it would enable someone to intervene after the panel decision in order to petition for cert independent of the parties. A liaison member suggested that timeliness could be measured from a change in circumstances. An academic member suggested after both briefs are filed. A lawyer member suggested that timeliness is captured by (b)(1) and that (a)(1) may not be needed. Another lawyer member agreed that (b)(1) can do some work and noted that Civil Rule 24 has a timeliness requirement. Perhaps it can run from the moment when one’s rights are not being protected. And perhaps an end date rather than a start date is necessary, such as in no event after oral argument so that someone can’t intervene just to petition for cert.

Judge Bybee asked about a case where a party orally argues an appeal and then withdraws? The lawyer member responded that, apart from FRAP 28(j), parties are done after oral argument. There is no need for a new view from appellees once an appeal is argued. For appellants, existing rules govern dismissal of appeals. Mr. Freeman suggested that there has to be something about what triggers the time, such as the first time that an Act of Congress is called into question. A judge member wondered how this worked with being a party for all purposes: If someone intervenes right before argument, do they have the right to file a brief and participate in oral argument? Mr. Freeman stated that an intervenor should be a party for all purposes: cert, remand, discovery. The burdens of party status have to come along with the benefits. An academic member suggested flipping the default, so that an intervenor was a party only for the specific purposes designated by the court.

Judge Bates wondered if there was a reason (c)(1) includes defenses but (c)(2) does not. He also suggested that “the legality of” in (d) is superfluous.

Mr. Freeman noted that (c) is dense and hard to track. Perhaps it would be better to look at circumstances in which courts of appeals have permitted intervention and describe them. He added that the focus seems to be on civil cases, not criminal cases; perhaps that should be explicit. There might be cases, such as a federal prosecution for a state offense, where intervention might be appropriate.

A liaison member wondered about the consequences of (e) if intervention on appeal is allowed for an interlocutory appeal. Mr. Byron suggested that the “legality of” provision of (d) could be viewed as a corollary to the statutory power to intervene to defend the constitutionality of a statute. [28 U.S.C. § 2403(b).] Mr. Freeman suggested that Civil Rule 24 tracks it more closely.

The Reporter observed that (d) leaves to the underlying federal or state law who is empowered to defend its law, and that Judge Bates may be right that the phrase “legality of” is redundant. He added that (e) sets a default rule, leaving the court of appeals with discretion to limit the scope of the intervention. Mr. Freeman emphasized that intervention should carry over: An intervenor is bound by the judgment and should be subject to discovery. A lawyer member added that this helps maintain the distinction between an amicus and an intervening party.

A judge member stated that the working draft correctly incentivizes seeking intervention as early as possible or warranted, so readers will see that they can’t sit on their rights and then seek to intervene because they would not be able to satisfy the new rule. In response to a question from the Reporter, this judge member stated that the benefit of a new rule would outweigh the cost of more motions.

Judge Bybee asked if anyone thought that the project was not worth pursuing. A lawyer member said that clients ask about intervention on appeal and there needs to be some guidance. It would be very useful to put some stakes in the ground and establish a high bar. Mr. Freeman said that it depends on how we work through some of these issues. Rule 7.1(c) is the hardest. It is drawn from Professor Nelson’s article but may not work in the court of appeals. It would be a big mistake to encourage more intervention. What happens in an APA case involving an agency rule? If the challenge to a rule wins, then there may be a case against the government if its new rule comes out the other way. Does (c) mean that advocacy groups on both sides can intervene? The lawyer member added that the introduction could be sharper, and (b) made clearer whether all seven items must be shown and, if so, whether allowing intervention remains discretionary. And if it does remain discretionary, does (c) have to be so granular?

A judge member observed that Rule 7.1 would in some respects be more prescriptive than Civil Rule 24 and wondered whether district judges might look to it with regard to Civil Rule 24. Mr. Freeman emphasized that we are not looking to take a view about how Civil Rule 24 should operate in district court.

A different judge member suggested that the Committee Note indicate that a motion to intervene be made as soon as possible because of the effect on the parties, especially after briefing. A liaison member suggested that a new rule might encourage people to file motions out of an abundance of caution because they could at least say that they tried. He acknowledged, as a judge member noted, that people have always had the ability to move to intervene, but worried that there may be more pressure to

do so. The judge member suggested framing the new rule as recognizing that this has always been allowed, that it isn't creating a new mechanism but codifying and clarifying an existing one. In response to a question by Judge Bybee about intervention in the Supreme Court, the Reporter stated that while there was intervention in original cases in the Supreme Court, he did not recall one way or the other about intervention in other cases. A lawyer member recalled that it may have happened in rare circumstances.

The Committee took a lunch break of approximately one-half hour.

After the lunch break, the Reporter sought to gauge the Committee's view of the status of the amicus project. Coming into this meeting, he had hoped that we would be on track to ask the Standing Committee, at its June 2024 meeting, to publish a proposed rule for public comment. Today's meeting raised some questions, including about the right term to use to measure revenue and how to deal with endowment income. Assuming we can resolve those issues, is it possible to seek publication in 2024? A judge member responded that conceptually there is no real concern, that it's a matter of getting the technical questions right, and that we are still on track.

Judge Bybee confirmed that, with regard to intervention on appeal, the subcommittee had sufficient guidance from the Committee to do further work in the spring.

VI. Discussion of Recent Suggestions

A. Contempt Procedures (23-AP-D)

The Reporter presented a suggestion by Joshua Carback to create a new Appellate Rule 42 to deal with contempt procedures. (Agenda book page 187). This suggestion is a small part of a large proposal to reform contempt procedures that involves statutory changes as well as amendment to the Federal Rules of Bankruptcy Procedure, Civil Procedure, and Criminal Procedure. The proposed Federal Rule of Appellate Procedure would simply piggyback on the Civil and Criminal Rules.

The memo in the Agenda book suggests tabling this suggestion pending action by other Advisory Committees. The Civil Rules Committee removed the item from its agenda, so perhaps this Committee would consider doing so as well. The Committee decided, without objection, to retain the suggestion on its agenda pending action by other Advisory Committees.

B. Nationwide Filing Deadline (23-AP-F)

The Reporter presented a suggestion by Howard Bashman to establish a nationwide filing deadline of 5:00 p.m. to restore uniformity among courts of appeals.

Alternatively, he suggests that the Committee examine the authority of the Court of Appeals for the Third Circuit to have established a 5:00 p.m. deadline in that circuit or recommend that it reinstate the midnight deadline. While this is closely related to the matter discussed earlier that had been handled by a joint subcommittee, it is possible that the Advisory Committee might want to take different action on this suggestion.

A judge member stated that the Third Circuit is entitled to do what it wants. It wouldn't work in the Ninth Circuit with its five time zones. Judge Bates noted that Judge Chagares (the Chief Circuit Judge in the Third Circuit) agreed that it would not work for the Ninth Circuit.

The Committee, without dissent, voted to remove the suggestion from the agenda.

C. Civil Rule 11 (23-AP-G)

The Reporter presented a suggestion by Andrew Straw, who disagrees with a passage contained in the Spring 2023 agenda book of the Civil Rules Committee. (Agenda book page 226). It is not clear what he wants this Committee to do.

Judge Bates suggested that perhaps he envisions this Committee as having appellate review power over the Civil Rules Committee.

The Committee, without dissent, voted to remove the suggestion from the agenda.

D. Record in Agency Cases—Rule 17 (23-AP-H)

The Reporter presented a suggestion by Thomas Dougherty, who suggests the Rule 17 be amended to require an agency, if it cites a page of its record in a brief, to file the pages of the full section or titled portion containing that page, as well as any pages that are cross-referenced on that cited page. (Agenda book page 231). Such a rule would require the inclusion of completely unnecessary material. In addition, it is not clear why the existing rule—which requires that any part of the record must be sent to the court if the court or a party so requests—is inadequate.

The Committee, without dissent, voted to remove the suggestion from the agenda.

VII. Review of Impact and Effectiveness of Recent Rule Changes

Judge Bybee directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 236). He called for any comments or concerns about these recent amendments. The Committee did not raise

any particular concerns, but Professor Struve noted that there is some case law praising the new Rule 3.

VIII. New Business

Judge Bybee asked if anyone had anything else to raise for the Committee. No one did.

IX. Adjournment

Judge Bybee announced that the next meeting will be held on April 10, 2024, with the location to be determined.

He thanked everyone, noting that at every meeting he says that a lot of people with a lot of important things to do have put in a lot of time to prepare and participate. Even small changes to court rules can make significant improvements. If we can make such improvements, our time is well worth it.

The Committee adjourned at approximately 1:20 p.m.

DRAFT

TAB 4

TAB 4A

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

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 6, 2023

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on Sept. 14, 2023. Four Committee members attended remotely; the rest of the Committee met in person. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to seek publication for comment of proposed amendments to Bankruptcy Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), Bankruptcy Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed), and Official Form 410S1 (Notice of Mortgage Payment Change).

Part II of this report presents those action items.

The Advisory Committee also approved for publication amendments to Rules 1007(c)(4) and 5009(b), which deal with an individual debtor's demonstration that he or she has satisfied the requirement for completion of a course on personal financial management while in bankruptcy. Because the Forms Subcommittee is still considering whether to recommend any related form amendments, the Advisory Committee will wait until the June Standing Committee meeting to present these items.

Part III of this report presents six information items. The first concerns reconsideration of the proposed Rule 3002.1 sanctions provision. The second item concerns proposals to require redaction of the entire social security number from public court filings, including the last four digits of the number. The third is a proposal to eliminate the requirement that all notices given under Rule 2002 comply with the caption requirements set forth in Rule 1006. The fourth concerns proposals dealing with remote testimony in contested matters. The final two information items concern proposed amendments to Director's Form 1340 and a suggestion about contempt proceedings.

II. Action Items

Items for Publication

The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2024. Bankruptcy Appendix A includes the rules and form that are in this group.

Action Item 1. Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed). Bankruptcy Judge Catherine Peek McEwen made a suggestion to require the reporting of a debtor's acquisition of postpetition property in the chapter 11 case of an individual or in a chapter 12 or 13 case. Judge McEwen noted that Rule 1007(h) (Interests Acquired or Arising After Petition) requires the filing of a supplemental schedule only for property covered by § 541(a)(5)—that is, property acquired within 180 days after the filing of the petition by bequest, devise, or inheritance; as a result of a property settlement with a spouse or a divorce; or as beneficiary of a life insurance policy. Not included within Rule 1007(h) are other postpetition property interests that become property of the estate under § 1115, 1207, or 1306, each of which includes property that “the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted” and “earnings from services performed by the debtor” during that period.

In some circuits there is a well-developed body of judicial estoppel law that is driven by non-disclosure in chapter 13 cases. Debtors lose the right to pursue undisclosed claims, and creditors lose the benefit of those claims. The issue often arises from the nondisclosure of personal injury and employment discrimination cases. Judge McEwen suggested that an amendment to Rule 1007(h) would help bring to the attention of debtors' counsel the importance of disclosure, since failure to do so could end up hurting their clients if they later sought to pursue such claims outside bankruptcy.

Caselaw and commentary are mixed on whether a debtor has a statutory duty, absent a request from the court, the United States Trustee, or any party in interest, to disclose property that comes into the estate by virtue of § 1115, 1207, or 1306. Without such a duty, a failure to disclose a postpetition claim does not trigger the application of judicial estoppel. In jurisdictions that have not found a statutory duty to disclose postpetition claims, the imposition of such an obligation under the rules would provide a basis for applying judicial estoppel that does not currently exist.

The differing impact of a national rule on bankruptcy courts led the Advisory Committee to conclude that the issue should continue to be left to local regulation. Attempting to strike a middle ground, the Advisory Committee approved for publication an amendment to Rule 1007(h) that would explicitly allow the court to require the debtor to file a supplemental schedule to list property or income that becomes property of the state under § 1115, 1207, or 1306.

Action Item 2. Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed). The National Bankruptcy Conference has proposed an amendment to Rule 3018(c) to authorize courts to treat as an acceptance or rejection of a plan in a chapter 9 or a chapter 11 case a statement of counsel or other representative that is part of the record in the case, including an oral statement at a confirmation hearing. Under the current rule, only an acceptance or rejection on a written ballot submitted by the deadline set by the court suffices.

The problem prompting the suggestion is the failure of the IRS and certain other federal and state agencies that participate in bankruptcy cases to submit ballots either accepting or rejecting a proposed plan, even when they have no objection to it. Courts differ on whether the failure to reject the plan may be deemed an acceptance. In jurisdictions where a ballot must be cast, the failure to vote impacts confirmation, particularly in small business cases under subchapter V of chapter 11. In that type of case, if a creditor in an impaired class by itself does not submit a ballot, the plan becomes nonconsensual even if the nonvoting creditor supports confirmation. The plan then must be confirmed under § 1191(b), which delays the discharge until completion of plan payments and requires the subchapter V trustee to serve as disbursing agent throughout the term of the plan. By contrast if the plan is confirmed as a consensual plan, the discharge occurs immediately, and the subchapter V trustee does not serve as disbursing agent for the plan. (§§ 1192, 1194.)

Although the Advisory Committee is doubtful that the proposed amendment will solve the problem of the disinclination of federal and state agencies to vote on plans, by a 12-to-1 vote it approved an amendment to Rule 3018(c) for publication, which would authorize the court to allow an acceptance (or the change or withdrawal of a rejection) to be made in a statement on the record, including an oral statement at the confirmation hearing or a stipulation, if made by an attorney for or an authorized agent of the creditor or equity security holder. The Advisory Committee concluded that it is possible that the amendment will lead to voting by government agencies, at least in some cases, and it will apply more broadly to creditors whose negotiations lead to their support of plans they previously rejected or failed to accept.

Action Item 3. Official Form 410S1 (Notice of Mortgage Payment Change). After publication in 2021 of proposed amendments to Rule 3002.1 and implementing forms, the National

Consumer Law Center (“NCLC”) filed a comment suggesting an amendment to existing Form 410S1. The amendment would reflect the proposed provisions in the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit (“HELOCs”). The NCLC suggested changes to the form to include disclosure of the one-time next payment that includes the reconciliation amount under Rule 3002.1(b)(3)(C) and a separate disclosure of the new payment amount without reconciliation under Rule 3002.1(b)(3)(D). The Advisory Committee treated the comment as a suggestion.

The current Form 410S1 has three parts plus a signature box – Part 1: Escrow Account Payment Adjustment; Part 2: Mortgage Payment Adjustment; and Part 3: Other Payment Change. The Advisory Committee recommends for publication amendments modifying the form by creating a new Part 3 for the Annual HELOC Notice. Existing Part 3 would become Part 4. At the top of the form, the following direction would be added under “New total payment”: “For HELOC payment amounts, see Part 3.”

Because the process for amending official forms is one year shorter than the period for amending rules, the amendment to Official Form 410S1 could be published for comment in 2024 and, if approved, go into effect at the same time as the proposed amendments to Rule 3002.1, which were published for comment in 2023.

III. Information Items

Information Item 1. Reconsideration of the Proposed Sanctions Provision in Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor’s Principal Residence). At the June meeting, the Standing Committee approved for republication amendments to Bankruptcy Rule 3002.1 with one deletion. In subdivision (h), the proposed amendments would have expressly authorized courts to award “in appropriate circumstances, noncompensatory sanctions.” The impetus for the inclusion of the amendment was the Second Circuit’s 2-1 decision in *PHH Mortg. Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2021), in which the court held that “[p]unitive sanctions do not fall within the ‘appropriate relief’ authorized by Rule 3002.1.” Several bankruptcy courts have disagreed with the Second Circuit and, following the *Gravel* dissent, have concluded that the existing rule does authorize the award of punitive damages. After lengthy discussions, Judge Connelly suggested that the Advisory Committee should further consider the sanctions provision and withdrew that amendment and the related portion of the Committee Note. The Standing Committee approved the remainder of Rule 3002.1 for republication.

After reconsideration at the fall meeting, the Advisory Committee decided to keep the issue on its agenda but to wait and see how the case law develops, rather than seeking to reintroduce an additional sanction provision to subdivision (h).

Information Item 2. Suggestion to Remove Redacted Social Security Numbers from Filed Documents. Senator Ron Wyden of Oregon sent a letter to The Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be “scrubbed of personal information before they are publicly available.” Portions of his letter, suggesting that the

rules committees reconsider a proposal to redact the entire social security number (“SSN”) from court filings, have been filed as a suggestion with each of the advisory committees.

To a limited extent, the requirement that social security numbers be included on bankruptcy documents, either in whole or in redacted form, is set forth in the Bankruptcy Code. Section 342(c)(1) provides that notices required to be given by a debtor to a creditor must contain the last 4 digits of the taxpayer identification number of the debtor. Section 110 requires disclosure of the complete social security number of a bankruptcy petition preparer (“BPP”) on documents, such as the petition and schedules, prepared by the BPP. Changing those requirements must be left to Congress.

As to other situations in which the debtor’s SSN (or a truncated version) is used on bankruptcy filings, the Advisory Committee has been informed that the Committee on Court Administration and Case Management of the Judicial Conference of the United States has requested the Federal Judicial Center (“FJC”) to design and conduct studies regarding the inclusion of sensitive personal information in court filings and in social security and immigration opinions. Those studies will update the 2015 FJC privacy study and gather information about compliance with privacy rules and the extent of unredacted SSNs in court filings.

Although that study will not (and could not) address the extent to which SSNs that are disclosed in publicly-filed documents lead to identity fraud, the Advisory Committee thinks that the FJC privacy study may be useful in determining the extent to which disclosure of SSNs actually occurs and whether those disclosures are made in the bankruptcy forms themselves or in documents that are attached to the forms by debtors, creditors, and their attorneys. The Advisory Committee also wants to determine whether creditors actually need the last four numbers of the redacted SSN on all court filings where that partial redaction is currently required by rule, but not by statute. The Advisory Committee further wants to consider whether there are benefits to the debtor if some bankruptcy filings, such as the discharge form, include the truncated SSN. The Advisory Committee will be continuing to gather information to inform a recommendation on the suggestion at a future meeting.

Information Item 3. Eliminate Requirement that All Notices Given under Rule 2002 Comply with Caption Requirements in Rule 1005. A suggestion was made by the Clerk of Court for the Bankruptcy Court for the District of Minnesota, which was joined by clerks of court for eight other bankruptcy courts in the Eighth Circuit. They suggested that Rule 2002(n) (restyled Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005.¹ The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the first one.

The clerks of court stated that the caption requirements “are substantial and can add a significant amount of length, and therefore cost, to a Rule 2002 notice,” and they noted that

¹ Rule 1005 requires the caption to include the following information about the debtor: name, employer identification number, last four digits of the SSN or individual debtor’s taxpayer identification number, any other federal taxpayer-identification number, and all other names used within eight years before the filing of the petition.

bankruptcy courts in the Eighth Circuit routinely provide the Rule 1005 caption only on the Notice of Bankruptcy Case (Official Forms 309A-I) and thereafter use the shorter caption.

The same concern about the length of the caption was expressed at the time the rule was amended in 1991. The Advisory Committee at its meeting of March 15-16, 1990, unanimously declined to provide for Rule 2002 notices to use the short caption rather than the Rule 1005 caption, agreeing with the reporter that “some creditors rely on the social security number to identify the debtors.”

No empirical research was done at that time, and if creditors have no need for the full caption after the notice of the meeting of creditors, the suggestion might have merit. A consumer debtors’ attorney on the Advisory Committee offered to create a survey (with the help of the FJC) to canvas some creditor groups to try to ascertain whether they need the full caption on all Rule 2002 notices. After the Advisory Committee receives the results of that survey, it will consider the suggestion further.

Information Item 4. Remote Testimony in Contested Matters. The National Bankruptcy Conference submitted proposals to amend Rules 9014 and 9017 and to create a new Rule 7043 addressing a court’s decision to allow remote testimony in contested matters in bankruptcy cases.

The suggestion proposes to eliminate the incorporation by reference in Rule 9017 of Fed. R. Civ. P. 43 (which generally requires witnesses’ testimony to be taken in open court unless the court permits remote testimony “for good cause in compelling circumstances and with appropriate safeguards”). Instead, new Rule 7043 would make Civil Rule 43 applicable in adversary proceedings. Rule 9014, dealing with contested matters (commonly motions, confirmation hearings, and objections to proofs of claim), would be amended in two respects. First, it would make Civil Rule 43(d) (dealing with interpreters) applicable to contested matters and insert language identical to Civil Rule 43(c) (dealing with evidence on a motion). Second, it would delete the language requiring that testimony in a contested matter be taken in the same manner as testimony in an adversary proceeding and instead insert language that requires a court to find cause² and appropriate safeguards without requiring it to find “compelling circumstances” to permit remote testimony in a non-trial proceeding.

At the request of Judge Bates, the Advisory Committee agreed to defer consideration of the amendments until its spring meeting to permit coordination with the Committee on Court Administration and Case Management, a subcommittee of which is looking more broadly at the issue of remote access to court proceedings.

Information Item 5. Consideration of Proposed Amendments to Director’s Form 1340. The Unclaimed Funds Expert Panel of the Financial Managers Working Group submitted a suggestion for amendments to Form 1340 (a Director’s Form by which an applicant may seek payment of unclaimed funds) and to the instructions accompanying that form. The concern

² The use of “cause” rather than “good cause” conforms to the usage of that term throughout the restyled Bankruptcy Rules. It is not intended to be a substantive change.

expressed by the Expert Panel was that fraudulent applications may be filed by persons who assert that they are a successor claim holder when in fact they are not. The proposed amendments would, among other things, require notice to be given to the owner of record and all other prior owners of the claim when the claim has been transferred, assigned, purchased, obtained by merger or acquisition, or another means of succession.

Acting on the recommendations of the Forms Subcommittee and some additional suggestions of Professor Cathie Struve, the Advisory Committee approved several changes to the form and accompanying instructions. Because this is a Director's Form and its use is permissive under Rule 9009, the Advisory Committee's role was to review the suggestions and to make recommendations for proposed changes to the Administrative Office. It has done so.

Information Item 6. Consideration of Suggestion Regarding Contempt Proceedings.

An attorney submitted a suggestion to the Advisory Committee "for reforming judicial rules governing contempt proceedings." With respect to the bankruptcy courts, he proposed that § 105 of the Bankruptcy Code be amended to expressly authorize those courts to issue orders for civil and criminal contempt. If that change were made, he suggested, Bankruptcy Rule 9020 should be amended to make his suggested civil and criminal rules on contempt applicable in bankruptcy cases.

Because the Advisory Committee is not the proper venue for proposals to amend the Bankruptcy Code, and all the proposed rule amendments are dependent on a statutory change to the Code, the Advisory Committee decided to take no further action on the suggestion.

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

1 **Rule 1007. Lists, Schedules, Statements, and Other**
2 **Documents; Time to File¹**

3 * * * * *

4 **(h) Interests in Property Acquired or Arising After a**
5 **Petition Is Filed.**

6
7 **(1) Property Described in § 541(a)(5).** After the petition
8 is filed in a Chapter 7, 11, 12, or 13 case, if the debtor
9 acquires—or becomes entitled to acquire—an
10 interest in property described in § 541(a)(5), the
11 debtor must file a supplemental schedule and include
12 any claimed exemption. Unless the court allows
13 additional time, the debtor must file the schedule
14 within 14 days after learning about the property
15 interest. This duty continues even after the case is
16 closed but does not apply to property acquired after
17 an order is entered:

18 **(+A)** confirming a Chapter 11 plan (other than one
19 confirmed under § 1191(b)); or

20 **(2B)** discharging the debtor in a Chapter 12 case, a
21 Chapter 13 case, or a case under Subchapter
22 V of Chapter 11 in which the plan is
23 confirmed under § 1191(b).

24 **(2) Property That Becomes Estate Property Under §**
25 **1115, 1207, or 1306.** The court may also require the
26 debtor to file a supplemental schedule to list property
27 or income that becomes property of the estate under
28 **§ 1115, 1207, or 1306.**

29 * * * * *

¹ The changes indicated are to the version of Rule 1007 on track to go into effect December 1, 2024.

2

FEDERAL RULES OF BANKRUPTCY PROCEDURE

30

Committee Note

31

Subdivision (h) is amended to clarify that a court may require an individual chapter 11 debtor or a chapter 12 or chapter 13 debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 1115, 1207, or 1306.

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34

35

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

1 **Rule 3018. Chapter 9 or 11—Accepting or Rejecting a**
2 **Plan¹**

3 **(a) In General.**

4 * * * * *

5 (3) *Changing or Withdrawing an Acceptance or*
6 *Rejection.* After notice and a hearing and for cause,
7 the court may permit a creditor or equity security
8 holder to change or withdraw an acceptance or
9 rejection. The court may also do so as provided in
10 (c)(1)(B).

11 * * * * *

12 **(c) ~~Form~~ Means for Accepting or Rejecting a Plan;**
13 **Procedure When More Than One Plan Is Filed.**

14 (1) ~~Form~~ Alternative Means.

15 (A) In Writing. Except as provided in (B), An an
16 acceptance or rejection must:

17 (A*i*) be in writing;

18 (B*ii*) identify the plan or plans;

19 (C*iii*) be signed by the creditor or equity
20 security holder—or an authorized
21 agent; and

22 (D*iv*) conform to Form 314.

23 (B) As a Statement on the Record. The court may
24 also permit an acceptance—or the change or
25 withdrawal of a rejection—in a statement that
26 is:

¹ The changes indicated are to the version of Rule 3018 on track to go into effect December 1, 2024.

2

FEDERAL RULES OF BANKRUPTCY PROCEDURE

27 (i) part of the record, including an oral
 28 statement at the confirmation hearing
 29 or a stipulation; and

30 (ii) made by an attorney for—or an
 31 authorized agent of—the creditor or
 32 equity security holder.

33 (2) ***When More Than One Plan Is Distributed.*** If more
 34 than one plan is sent under Rule 3017, a creditor or
 35 equity security holder may accept or reject one or
 36 more and may indicate preferences among those
 37 accepted.

38 * * * * *

39 **Committee Note**

40 Subdivision (c) is amended to provide more
 41 flexibility in how a creditor or equity security holder may
 42 indicate acceptance of a plan in a chapter 9 or chapter 11
 43 case. In addition to allowing acceptance or rejection by
 44 written ballot, the rule now authorizes a court to permit a
 45 creditor or equity security holder to accept a plan by means
 46 of its attorney's or authorized agent's statement on the
 47 record, including by stipulation or by oral representation at
 48 the confirmation hearing. This change reflects the fact that
 49 disputes about a plan's provisions are often resolved after the
 50 voting deadline and, as a result, an entity that previously
 51 rejected the plan or failed to vote accepts it by the conclusion
 52 of the confirmation hearing. In such circumstances, the court
 53 is permitted to treat that change in position as a plan
 54 acceptance when the requirements of subdivision (c)(1)(B)
 55 are satisfied.

56 Subdivision (a) is amended to take note of the
 57 additional means in (c)(1)(B) of changing or withdrawing a
 58 rejection.

59 Nothing in the rule is intended to create an obligation
 60 to accept or reject a plan.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2
(Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410S1

Notice of Mortgage Payment Change

12/25

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: _____

Date of payment change:
Must be at least 21 days after date of this notice _____ / _____ / _____

New total payment: \$ _____
Principal, interest, and escrow, if any
For HELOC payment amounts, see Part 3

Part 1: Escrow Account Payment Adjustment

1. Will there be a change in the debtor's escrow account payment?

- No
- Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: \$ _____ New escrow payment: \$ _____

Part 2: Mortgage Payment Adjustment

2. Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable-rate account?

- No
- Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____ % New interest rate: _____ %

Current principal and interest payment: \$ _____ New principal and interest payment: \$ _____

Part 3: Annual HELOC Notice

3. Will there be a change in the debtor's home-equity line-of-credit (HELOC) payment for the year going forward?

- No
- Yes.

Current HELOC payment: \$ _____

Reconciliation amount: + \$ _____ or
- \$ _____

Debtor 1 _____
First Name Middle Name Last Name

Case number (if known) _____

Amount of next payment (including reconciliation amount) \$ _____

Amount of the new payment thereafter (without reconciliation amount) \$ _____

Part 4: Other Payment Change

4. Will there be a change in the debtor's mortgage payment for a reason not listed above?

- No
- Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (Court approval may be required before the payment change can take effect.)

Reason for change: _____

Current mortgage payment: \$ _____ New mortgage payment: \$ _____

Part 5: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

X _____ Date ____/____/____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

City State ZIP Code

Contact phone (____) ____-____ Email _____

Committee Note

Official Form 410S1, *Notice of Mortgage Payment Change*, is amended to provide space for an annual HELOC notice. As required by Rule 3002.1(b)(2), new Part 3 solicits disclosure of the existing payment amount, a reconciliation amount representing underpayments or overpayments for the past year, the next payment amount (including the reconciliation amount), and the new payment amount thereafter (without the reconciliation amount). The sections of the form previously designated as Parts 3 and 4 are redesignated Parts 4 and 5, respectively.

TAB 4B

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of Sept. 14, 2023
Washington, D.C. and on Microsoft Teams

The following members attended the meeting in person:

Circuit Judge Daniel A. Bress
Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Bankruptcy Judge Michelle M. Harner
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
District Judge Marcia Krieger
Bankruptcy Judge Catherine Peek McEwen
Jeremy L. Retherford, Esq.
Damian S. Schaible, Esq.
District Judge George H. Wu

The following members attended the meeting remotely:

District Judge Jeffery P. Hopkins
Debra L. Miller, Esq.
Professor Scott F. Norberg
District Judge J. Paul Oetken

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
Senior District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure
(the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Circuit Judge William J. Kayatta, liaison from the Standing Committee
H. Thomas Byron III, Administrative Office
S. Scott Myers, Esq., Administrative Office
Shelly Cox, Administrative Office
Bridget M. Healy, Administrative Office
Allison A. Bruff, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Zachary Hawari, Rules Law Clerk

Carly E. Giffin, Federal Judicial Center
Nancy Whaley, incoming Committee member
Rebecca Garcia, National Association of Chapter 13 Trustees

The following persons also attended the meeting remotely:

Professor Daniel R. Coquillette, consultant to the Standing Committee
District Judge Joan H. Lefkow, incoming Committee member
Bankruptcy Judge Laurel M. Isicoff, Liaison to the Committee on the Administration of the
Bankruptcy System
Susan A. Jensen, Administrative Office
Teri Johnson, Law Office of Teri E. Johnson
Crystal Williams

Discussion Agenda

1. Greetings and Introductions

Judge Rebecca Connelly, chair of the Advisory Committee, first introduced Senior Inspector Dante Salazar of the Judicial Security Division, who provided a brief security announcement. Judge Connelly then welcomed the group and thanked everyone for joining this meeting, including those attending virtually. She thanked the members of the public attending in person or remotely for their interest. Two members of the Committee are attending their last meeting of the Committee, and Judge Connelly thanked District Judge Marcia Krieger and Debra Miller for their service. Joining the Committee as new members at the next meeting will be District Judge Joan H. Lefkow and Nancy Whaley, and she welcomed them. She also acknowledged the presence of observers both in person and remotely.

Judge Connelly then reviewed the anticipated timing of the meeting and stated that there would be a mid-morning break and another break for lunch. In-person participants were asked to turn on their microphones when they spoke and state their name before speaking for the benefit of those not present. Remote participants were asked to keep their cameras on and mute themselves and use the raise-hand function or physically raise their hands if they wished to speak. She noted that the meeting would be recorded.

2. Approval of Minutes of Meeting Held on March 30, 2023

The minutes were approved.

3. **Oral Reports on Meetings of Other Committees**

(A) ***June 6, 2023, Standing Committee Meeting***

Judge Connelly gave the report.

(1) **Joint Committee Business**

(a) ***Pro Se Electronic-Filing Project***

Professor Catherine Struve provided the Standing Committee a status report on inquiries made by Dr. Tim Regan of the Federal Judicial Center and herself with 17 court personnel in nine districts that had broadened electronic access for self-represented litigants. One of the primary areas of inquiry was whether there is any reason to require traditional service by self-represented litigants on other litigants who already receive notices of electronic filing. The districts that exempt self-represented litigants from paper service found that it added no additional burden on the courts' clerk's offices. Interviewees were also asked whether and how self-represented litigants obtain access to CM/ECF, and Professor Struve reported on the results of that question. The general consensus was that the benefits outweighed the risks.

(b) ***Presumptive Deadline for Electronic Filing***

Judge Bates provided the Standing Committee a status report on consideration of a suggestion to change the filing deadline from midnight local time to an earlier time. The Standing Committee has reconstituted a joint subcommittee that previously considered this suggestion some years ago to consider it again in light of the decision by the Third Circuit to adopt a local rule making the deadline earlier in the day.

(c) ***District-Court Bar Admission Rules***

Judge Bates reported on this item. Several of the advisory committees received a proposal on a unified bar-admission rule. A joint subcommittee – which includes representation from the Bankruptcy Rules Committee -- has been formed to review the proposal over the next year or two.

(2) **Bankruptcy Rules Committee Business**

The Standing Committee gave final approval to the Restyled Bankruptcy Rules and three other rules and one form, and approved two rules and six official forms for publication.

Final Approval

Restyled Bankruptcy Rules

The Standing Committee gave final approval to the fully restyled bankruptcy rules.

Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), and conforming Amendments to Rules 4004, 5009, and 9006, and Abrogation of Form 423

The Standing Committee gave final approval to amended Rule 1007 which replaces the requirement that an individual debtor in Chapter 7 and Chapter 13 cases file a statement on an official form (Form 423) describing completion of a course in personal financial management with a requirement that the course provider's certificate of course completion be filed. Amendments to Rules 4004, 5009, and 9006 to replace references to a "statement" of completion with references to a "certificate" of completion were also approved. Official Form 423 was abrogated because it no longer served any purpose.

Rule 7001 (Types of Adversary Proceedings)

The Standing Committee gave final approval to the amendment to Rule 7001 to exclude from the list of adversary proceedings actions filed by individual debtors to recover tangible personal property under section 542(a) of the Bankruptcy Code.

Rule 8023.1 (Substitution of Parties)

The Standing Committee gave final approval to new Rule 8023.1 which governs the substitution of parties when a bankruptcy case is on appeal to a district court of BAP.

Official Form 410A (Mortgage Proof of Claim Attachment)

The Standing Committee gave final approval to an amendment that requires that the principal amount be itemized separately from interest.

Approval for Publication for Public Comment

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case)

The Standing Committee approved for publication for public comment amendments to the rule that are responsive to the public comments made on proposed amendments published for comment in 2021. A judge member of the Standing Committee raised concerns about the revised provision for noncompensatory sanctions in (h)(2). After much discussion, Judge Connelly agreed to delete that provision and take it back to the Advisory Committee for further consideration. The third sentence in the last paragraph of the committee note was also struck for purposes of publication.

Rule 8006(g) (Request for Leave to Take a Direct Appeal to the Court of Appeals After Certification)

The Standing Committee approved for publication for public comment an amendment to Rule 8006(g) to make clear that any party to an appeal may request direct appeal to a court of appeals.

Official Forms Related to Rule 3002.1

The Standing Committee approved for publication for public comment Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, which are the companion official forms to proposed amended Rule 3002.1.

Information Items

Judge Connelly, Professor Gibson, and Professor Bartell also reported on four information items.

- (a) Update concerning suggestion to require complete redaction of social security numbers from filed documents.
- (b) Update concerning suggestion to adopt a national rule addressing debtors' electronic signatures.
- (c) Update on suggestions regarding the deadline for filing a certificate evidencing completion of the required course of personal financial management
- (d) Update on proposed amendment to Rule 1007(h) to require disclosure of postpetition assets

(B) Meeting of the Advisory Committee on Appellate Rules

The Advisory Committee on Appellate Rules is scheduled to meet on Oct. 19, 2023.

(C) Meeting of the Advisory Committee on Civil Rules

The Advisory Committee on Civil Rules is scheduled to meet on Oct. 17, 2023.

(D) June 8-9, 2023, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")

Judge Isicoff provided the report.

The Bankruptcy Committee met in June in Boston. The next meeting will be in December in Washington, D.C.

(1) Changing in Personnel.

Judge Connelly has been replaced as liaison from the Advisory Committee, and the Bankruptcy Committee looks forward to working with the new liaison. In addition Judge Darrow will be stepping down as chair of the Bankruptcy Committee on September 30. Judge Darrow, like her predecessors, has been a tremendous advocate for the Bankruptcy System. District Court Judge William Osteen will be taking over as chair of the Bankruptcy Committee on October 1. Judge Osteen has been a member of the Bankruptcy Committee for several years and the committee looks forward to his leadership.

(2) Legislative Proposal Regarding Emergency Authority and Proposed Rule 9038

The Bankruptcy Committee has been updated on the status of Rule 9038, the rule that will address emergency measures that may be taken by the courts and is on track to go effective on December 1. The Bankruptcy Committee appreciates the Rules Committee's work on this important effort.

Just as the Rules Committee was considering rules amendments under the CARES Act to deal with future emergencies, in spring 2020, the Bankruptcy Committee developed a legislative proposal to extend statutory deadlines and toll statutory time periods during the pandemic, which the Judicial Conference adopted. Unfortunately, Congress did not take any action on the legislative proposal, and on recommendation from the Bankruptcy Committee, the Conference rescinded the legislative proposal in March 2021.

Now that the national emergency related to COVID-19 has ended and many bankruptcy courts have resumed full, unrestricted operational status, the Bankruptcy Committee will consider a broader legislative proposal, which would provide a permanent grant of authority to extend statutory deadlines and toll statutory time periods during an ongoing emergency and could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. Just like the narrower proposal that was tied to the COVID-19 emergency, the permanent grant of authority would not extend to the Bankruptcy Rules.

At its June meeting, the Bankruptcy Committee directed staff to further research and analyze the issues related to this potential legislative proposal so that the Committee can consider the proposal at the December meeting and determine whether to recommend that the Judicial Conference pursue it in Congress. If the Committee moves forward with this proposal, it will coordinate closely with the Rules Committee to ensure that there is no conflict or overlap.

(3) Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

On recommendation of the Bankruptcy Committee, the Judicial Conference approved a proposal to seek legislation to amend the Bankruptcy Code to (1) make chapter 7 debtors' attorney fees due under a fee agreement nondischargeable; (2) add an exception to the automatic stay to allow for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees. This legislative proposal seeks to address concerns about access to justice and access to the bankruptcy system related to the compensation of chapter 7 debtors' attorneys. The AO transmitted the legislative proposal to Congress in November 2022 and again in July 2023 to coincide with the start of the new Congressional session.

The proposal continues to be reviewed by Congressional staff, and several members of the Bankruptcy Committee have met with members of Congress to answer questions raised in connection with this proposal. If Congress enacts amendments to the Code based on this position, it is anticipated that, at a minimum, conforming changes to the Bankruptcy Rules would be required.

(4) Proposed Rule Amendments Related to Remote Public Access to Witness Testimony

The Bankruptcy Committee continues to monitor the status of the work of the Committee on Court Administration and Case Management (CACM) on remote public access to court proceedings.

This week the Judicial Conference approved a policy to expand remote audio access beyond the pre-Covid policy. It permits judges presiding over civil and bankruptcy cases to provide the public live audio access to non-trial proceedings that do not involve witness testimony. CACM recommended this revised policy change with the endorsement of the Bankruptcy Committee and the Committee on the Administration of the Magistrate Judges System. The Bankruptcy Committee stands by to assist the Rules Committee on any rule changes or modifications that such policy change might warrant.

The Bankruptcy Committee is interested to see how the Advisory Committee proceeds with the suggestion from the National Bankruptcy Conference to change the standard for allowing remote testimony in contested matters. The Bankruptcy Committee is very interested in the future of remote public access to court proceedings and remote witness testimony in certain types of proceedings.

(5) Potential Comment to Tab 5B (Application for Payment of Unclaimed Funds)

At its June meeting, the Bankruptcy Committee approved revisions to its best practices relating to unclaimed funds, also proposed by the Unclaimed Funds Expert Panel, along the same lines as the revisions made as a suggestion to the Advisory Committee and on the agenda for the meeting. A new best practice is intended to reduce fraudulent applications filed by persons who

assert that they are a successor claim holder—when in fact they are not—by encouraging bankruptcy courts to require proof that the application was sent to any previous owners of the claim. This will help ensure that the previous owner of a claim has an opportunity to dispute the claimant’s ownership interest and that the bankruptcy court is not forced to investigate ownership issues.

The Bankruptcy Committee tweaked the new best practice, by adding language to the provision stating that if the applicant didn’t send a copy of the application to previous owners, the applicant must have “enclosed a statement explaining why Applicant was not able to do so.” There are scenarios where a bankruptcy judge might determine that service is not necessary, even though the applicant was *able* to do so. For example, where succession is based on a merger, and there are documents that show that the old entity (old-co) is now a new entity (new-co) by reason of the merger, the judge might determine that it’s not necessary to serve old-co (because new-co is essentially the same entity as old-co, just with a new name). Therefore, they added the language “or an explanation why doing so is not necessary” after the phrase “not able to do so.”

The Bankruptcy Committee suggests making a similar tweak in the suggested modifications to Form 1340 being considered by the Advisory Committee and to Section II.C.d of the Instructions in the new certificate of service section.

The Bankruptcy Committee looks forward to continuing to collaborate and work together with the Advisory Committee in the future.

Judge Connelly thanked Judge Isicoff, and announced to the Advisory Committee that Judge Harner would be the new liaison to the Bankruptcy Committee.

Subcommittee Reports and Other Action Items

4. Report by the Consumer Subcommittee

(A) *Reconsideration of Proposed Rule 3002.1 Sanctions Provision*

Judge Harner and Professor Gibson provided the report.

At the spring Advisory Committee meeting, amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor’s Principal Residence) were approved for republication. The recommendation was presented to the Standing Committee at its June meeting, and the Standing Committee approved the amendments for republication with one deletion. In subdivision (h), the proposed amendments would have expressly authorized courts to award “in appropriate circumstances, noncompensatory sanctions.” The impetus for the inclusion of the amendment was the Second Circuit’s 2-1 decision in *PHH Mortg. Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2021), in which the court held that “[p]unitive sanctions do not fall within the ‘appropriate relief’ authorized by Rule 3002.1.” Several bankruptcy courts have disagreed with the Second Circuit and have concluded that the rule does authorize the award of punitive damages. After lengthy discussions, Judge Connelly suggested that the

Advisory Committee should further consider the sanctions provision and withdrew that amendment, and the related committee note. The Standing Committee approved the remainder of Rule 3002.1 for republication.

The Subcommittee was asked to reconsider the noncompensatory sanctions provisions in light of the Standing Committee comments, and did so at its August 7 meeting. The Subcommittee decided to keep the issue on its agenda, but wait and see how the case law develops rather than seeking to reintroduce an additional sanction provision to subdivision (h). The Subcommittee does not see any urgency about consideration of this issue, and immediate amendment to subdivision (h) would likely require yet another republication of all of Rule 3002.1, which the Subcommittee considers undesirable.

There were no comments or questions from the Advisory Committee.

(B) *Continued consideration of proposed amendment to Rule 5009(b) (Suggestions 22-BK-D and 23-BK-K)*

Judge Harner and Professor Gibson provided the report.

Last summer the Subcommittee began considering a suggestion submitted by Professor Laura Bartell (22-BK-D) to change the timing of the notice to chapter 7 and 13 debtors under Rule 5009(b), which reminds them of their need to file a statement of completion of a course on personal financial management. Since that time Tim Truman, a chapter 13 trustee, has submitted a related suggestion (22-BK-K) to change the deadline for chapter 13 debtors to file the statement.

The Subcommittee received feedback on those suggestions at last spring's Advisory Committee meeting, and took those comments into consideration in arriving at its recommendation.

The Subcommittee recommends an amendment to Rule 1007(c) to eliminate the deadline for filing a certificate of course completion issued by the provider of a course in personal financial management. The Bankruptcy Code requires only that the course be taken before a discharge can be issued. The Subcommittee does not want debtors to be denied a discharge merely because they do not meet a deadline imposed by the rules for submitting their certificate.

Second, assuming that amendment is approved, references to the deadline would be deleted in amendments to Rule 9006(b) and (c).

Professor Struve raised a question of whether, by removing the deadline, we are allowing courts to adopt a local rule imposing a deadline. Professor Gibson said that if the national rule has removed any deadline, it would be inconsistent with the national rule for a court to impose a deadline by local rule, but she does not know what the enforcement mechanism would be for eliminating conflicting local rules. Professor Coquillet said that the issue of inconsistency

between a local rule and national rule has been addressed before. He said that imposing a deadline when the national rule has none creates an inconsistency. There have been such situations, and local rules have been abrogated as a result. Challenges have been brought by a judge within that district or circuit.

Judge Harner said that perhaps there should be a deadline, i.e., the closing of the case. Professor Struve supported a linkage between Rules 1007(c)(4) and 5009, by requiring that debtor must file the certificate within the time specified in any notice under Rule 5009(b). Judge McEwen said that there is a deadline imposed by the Code for closing the case. Judge Connelly said that the rule does not tell the court when to close the case, only what the condition is to close the case. Ken Gardner said there is no requirement to close the case but that is a procedural matter. If there is an extension of time to file the certificate, the case would not be closed. Judge Harner asked if we linked the deadline to the notice in 5009, would that provide adequate certainty to the clerks for closing the case. Ken Gardner said it would. Professor Bartell expressed the view that imposing any deadline was inconsistent with the decision of the Subcommittee.

Professor Gibson then described the proposed amendments to Rule 5009(b) approved by the Subcommittee to require two reminder notices rather than just one and setting the dates for sending those notices for Chapter 7 cases (45 days after the petition is filed and 90 days after the petition is filed) and for Chapter 13 cases (45 days after the petition is filed and 60 days before the case will be closed). The second notice would state that the case can be closed without entering a discharge if the certificate is not filed within 30 days after the notice's date (for a Chapter 7 case) or within 60 days after the notice's date (for a Chapter 13 case)

Professor Gibson first noted that she had made a change in the first paragraph of the committee note to the proposed amended Rule 5009(b). Instead of the words "must get the case reopened," she inserted "must seek to have the case reopened" to reflect the fact that some courts do not permit reopening cases to file a certificate of course completion.

Professor Harner expressed discomfort with the timing of the second notice for chapter 13 cases (60 days before the case closing), suggesting that it should be sent if the certificate had not been filed by the time of plan completion. There was discussion of that suggestion, and concern expressed by Jenny Dolan and others that whether a plan had been completed might trigger litigation. Judge Kahn thought a better objective standard would be the filing of the trustee's final report. The Advisory Committee agreed to replace "at least 60 days before the case closing" with "at the time the chapter 13 trustee has filed a final report and final account" in revised Rule 5009(b)(3)(B).

Judge Kahn suggested that the notices contemplated by Rule 5009(b) might be appropriate for a bankruptcy form. Judge Harner agreed that the Forms Subcommittee should consider that suggestion.

Judge Connelly asked whether the timing for the second notice in a chapter 7 case (90 days after the petition is filed) would work in a case in which the Section 341 meeting of

creditors is held 21 days after the petition is filed (as permitted by Rule 2003(a)) and the 60 day period after that date expires under Rule 4004(a) so that the court is directed to grant a discharge under Rule 4004(c)(1). This could be fewer than 90 days after the filing date. Ken Gardner said that it is extremely unlikely that a meeting of creditors would be held 21 days after filing, but there is nothing in the proposed rule that precludes the clerk from sending the second notice earlier than 90 days after the filing date. In those rare cases, the clerk's office could so. Ramona Elliott expressed the view that the rule would work better if the period was tied to the date of the meeting of creditors because tying it to the petition date may make the period too long.

Judge Harner suggested adding the words “and the clerk has not yet sent a second notice” after the words “within 90 days after the petition is filed” in proposed Rule 5009(b)(3)(A). Ken Gardner supported that addition.

Judge Harner suggested that, rather than deleting Rule 1007(c)(4), language stating that there is no deadline for the filing of a financial management certificate might be inserted, but the case may be closed without discharge if the certificate is not filed within the periods specified in Rule 5009(b)(3).

Judge Kahn expressed concern about cases being left open indefinitely, but Ken Garner said that the case will be closed if the conditions for discharge are not met. The court retains discretion on how quickly that will happen. He emphasized that closing is not the issue – the issue is discharge.

It was suggested that instead of simply eliminating Rule 1007(c)(4), the provision be shown as “Abrogated” to make clear the intention to remove the deadlines for filing the financial management certificate. There was support for this approach, because it avoids having to renumber subsequent sections of Rule 1007(c). There was also discussion of making it clear in the committee note that the decision to eliminate the deadlines was intentional; subsequent discussion resulted in proposed language to be inserted in the last sentence of the committee note to Rule 1007(c)(4) that reads “..., but the rule no longer imposes—and the Committee rejected—an earlier deadline for doing so.”

With those changes, the Advisory Committee recommended the revised Rules to the Standing Committee for publication.

(C) *Continued consideration of proposed amendments to Rule 1007(h) (Suggestion 22-BK-H)*

Judge Harner and Professor Gibson provided the report.

Judge Catherine McEwen has submitted a suggestion to require the reporting of a debtor's acquisition of postpetition property in the chapter 11 case of an individual or in a chapter 12 or 13 case. Judge McEwen noted that Rule 1007(h) (Interests Acquired or Arising After Petition) requires the filing of a supplemental schedule only for property covered by § 541(a)(5)—that is, property acquired within 180 days after the filing of the petition by bequest,

devise, or inheritance; as a result of a property settlement with a spouse or a divorce; or as beneficiary of a life insurance policy. Not included within Rule 1007(h) are other postpetition property interests that become property of the estate under § 1115, 1207, or 1306.

This suggestion was considered by the Subcommittee last winter, and at the spring Advisory Committee meeting, the Subcommittee recommended that no action be taken on it. Following the Advisory Committee's discussion of the suggestion, it was referred back to the Subcommittee for further consideration.

The Subcommittee now recommends to the Advisory Committee an amendment to Rule 1007(h) that would explicitly allow the court to require the debtor to file a supplemental schedule to list property or income that becomes property of the estate under § 1115, 1207, or 1306. The subcommittee declined to recommend a national rule that would impose a duty of disclosure.

Judge McEwen proposed that the last sentence of the committee note be eliminated, because it expressed views on the types of rules a court should adopt. Judge Harner agreed – she thought the rule should permit the law to develop, and the less direction given the better for that process. Professor Gibson agreed to remove the last sentence of the committee note.

Judge Bates suggested that the first sentence of the committee note should be modified to change “amended to authorize a court to require” to “amended to clarify that a court may require” to avoid suggesting that the courts do not currently have that authority. His suggestion was adopted.

The Advisory Committee approved the proposed amendments to Rule 1007(h) for publication.

(D) *Consider Suggestion 23-BK-B to require disclosure of corporate ownership statements in contested matters.*

Judge Harner and Professor Bartell provided the report.

Michael Gieseke, Staff Attorney for the Office of Chapter 12 & 13 Bankruptcy Trustee Kyle L. Carlson in Barnesville, MN, suggested adoption of a new rule requiring all non-governmental corporations in contested matters to make the same disclosures with respect to their corporate ownership as is currently required for a corporation that is a party to an adversary proceeding in Rule 7007.1.

Rule 7007.1 was intentionally limited to adversary proceedings because of the difficulties that would be created were it applicable to contested matters. In addition, the presiding judge may direct that Rule 7007.1 should apply in any particular contested matter in which disclosures are warranted.

The Subcommittee recommended that no action be taken in response to this suggestion and the Advisory Committee decided to take no action.

5. Report by the Forms Subcommittee

(A) *Consider Comment BK-2021-002-0022 concerning amendment to Official Form 410S1 (Notice of Mortgage Payment Change)*

Judge Kahn and Professor Gibson provided the report.

After publication in 2021 of proposed amendments to Rule 3002.1 and implementing forms, John Rao filed a comment suggesting an amendment to existing Form 410S1. The amendment would reflect the proposed provisions in the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit (“HELOCs”). He suggested changes to include disclosure of the one-time next payment that includes the reconciliation amount under Rule 3002.1(b)(3)(C) and a separate disclosure of the new payment amount without reconciliation under Rule 3002.1(b)(3)(D). The comment was treated as a suggestion and was considered by the Subcommittee at its summer meeting.

The current Form 410S1 has three parts plus a signature box – Part 1: Escrow Account Payment Adjustment; Part 2: Mortgage Payment Adjustment; and Part 3: Other Payment Change. The Subcommittee recommends for publication amendments modifying the form by creating a new Part 3 for the Annual HELOC Notice. It would solicit the information required by proposed Rule 3002.1(b)(2). The following direction would be added under “New total payment” at the top of the form: “For HELOC payment amounts, see Part 3.” Existing Part 3 would become Part 4.

Because the process for amending official forms is one year shorter than the period for amending rules, the amendment to Official Form 410S1 could be published for comment in 2024 and, if approved, go into effect at the same time as the proposed amendments to Rule 3002.1, which were published for comment in 2023. The Advisory Committee approved the amendments for publication.

(B) *Consider Endorsement of Proposed Changes to Director’s Form 1340 (Suggestion 23-BK-1)*

Judge Kahn and Professor Bartell provided the report.

The Unclaimed Funds Expert Panel of the Financial Managers Working Group submitted a suggestion for amendments to Form 1340 (a Director’s Form by which an applicant may seek payment of unclaimed funds), and to the instructions accompanying that form. The concern expressed by the Expert Panel was that fraudulent applications may be filed by persons who assert that they are a successor claim holder when in fact they are not. The proposed amendments would, among other things, require notice to be given to the owner of record and all other prior owners of the claim when the claim has been transferred, assigned, purchased, obtained by merger or acquisition, or another means of succession.

There were five changes suggested to the Form itself, and four suggested changes to the instructions. The Subcommittee accepted some of the proposed changes and rejected others, and recommended the revised form to the Advisory Committee for its approval and submission to the Administrative Office to make the changes.

Professor Cathie Struve suggested another change to the form and one to the instructions. In Part 2 of the form, second bullet point, she suggested adding the word “other” before the words “previous owner(s)” to be consistent with the instructions. In Part 2 of the form, third bullet point, and in the instructions, paragraph II(d)(2) on certificate of service, she suggested adding the word “Applicant” before “has enclosed a statement.” She also noted duplicate language in the second bullet point of Part 2 of the form and suggested deleting “the names of” before “the Owner of Record.”

Judge Isicoff had previously reported that the Bankruptcy Committee recommended a small change to the form and instructions to insert the words “or an explanation why doing so is not necessary” after the words “was not able to do so” in part 2, third bullet point, of the form and in paragraph II(d)(2) on certificate of service in the instructions. The Advisory Committee agreed to those changes.

Judge McEwen asked why there is a notary form rather than an option to make a declaration under penalty of perjury. Professor Bartell and Judge Kahn noted that this is not a change in the amended form, and they are not in a position to address why the original form was drafted in that manner.

The Advisory Committee approved the revised form and instructions and directed the Administrative Office to implement them.

(C) *Possible reconsideration of Proposed Amendments to Official Forms 309A and 309B*

Professor Gibson provided the report.

At its fall meeting in 2022, the Advisory Committee approved for publication an amendment to part 9 (Deadlines) in Form 309A and 309B to set out the deadline to file the financial management course certificate and alert the debtor that the debtor must take an approved course about personal financial management and file with the court the certificate showing completion of the course unless the provider has done so.

Because the Consumer Subcommittee was considering whether the deadline in Rule 1007(c)(4) for filing the certificate of course completion should be eliminated, the Advisory Committee did not seek publication for public comment in June 2023. The Consumer Subcommittee has now recommended, and the Advisory Committee has approved, amendments to rule 1007(c)(4) eliminating a deadline for filing the certificate. As a result, the Subcommittee must consider whether to recommend withdrawal of the proposed amendments to Forms 309A and 309B or recommend a revision of the proposed amendment that eliminates any reference to a

deadline. The Subcommittee will make its recommendation at the spring 2024 meeting of the Advisory Committee.

6. Report of the Technology, Privacy and Public Access Subcommittee

(A) *Continued Consideration of Suggestion 22-BK-I to Require Redaction of the Entire Social Security Number from Public Court Filings, Including the Last Four Digits of the Number*

Professor Bartell provided the report.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be “scrubbed of personal information before they are publicly available.” Portions of this letter, suggesting that the Rules Committees reconsider a proposal to redact the entire social security number (“SSN”) from court filings, have been filed as a suggestion with each of the Rules Committees. The Bankruptcy Rules suggestion has been given the label of 22-BK-I.

At its last meeting the Advisory Committee agreed with the recommendation of the Subcommittee to defer consideration of the suggestion until the Federal Judicial Center completed its pending studies that would update the 2015 FJC privacy study and gather information about compliance with privacy rules and the extent of unredacted SSNs in court filings.

Since the last Advisory Committee meeting, the FJC has informed the Subcommittee that the privacy study will be limited to an examination of whether filings are complying with existing privacy rules. They will not study whether there have been any privacy breaches based on the redacted SSN because such a study is not feasible. In light of that information the Subcommittee still thinks the FJC privacy study may be useful in determining the extent to which disclosure of SSNs actually occurs, and whether those disclosures are made in the bankruptcy forms themselves or in documents that are attached to the forms by debtors, creditors and their attorneys. The Subcommittee also wishes to consider whether creditors actually need the last four number of the redacted SSN on all court filings where it is currently required by rule but not by statute.

Some information is going to be solicited in connection with Suggestion 23-BK-D regarding the need for full captions on Rule 2002 notices. The Subcommittee also wishes to consider whether there are benefits to the debtor if some bankruptcy filings, such as the discharge form, include the truncated SSN. The Subcommittee will be continuing to gather information to inform a recommendation on the suggestion at a future meeting.

Deb Miller stated that she had already begun the process of reaching out to various creditor groups, and they are looking forward to providing information.

(B) *Consideration of Suggestions 23-BK-D and 23-BK-J to amend restyled Rule 2002(o) (currently 2002(n)) to eliminate the requirement that all notices given under Rule 2002 comply with the caption requirements set forth in Rule 1005*

Professor Bartell provided the report.

A suggestion was made by the Clerk of Court for the Bankruptcy Court for the District of Minnesota, in which clerks of court for eight other bankruptcy courts in the eighth Circuit joined, suggesting that Rule 2002(n) (restyled Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the first one.

The clerks of court stated that the caption requirements “are substantial and can add a significant amount of length, and therefore cost, to a Rule 2002 notice” but also noted that bankruptcy courts in the Eighth Circuit routinely only provide the Rule 1005 captions only on the Notice of Bankruptcy Case (Official Forms 309A-I) and thereafter use the shorter caption.

The same concern was expressed at the time the rule was amended in 1991, and the Advisory Committee at its meeting of March 15-16, 1990, unanimously declined to provide for Rule 2002 notices to use the short caption rather than the Rule 1005 caption, agreeing with the reporter that “some creditors rely on the social security number to identify the debtors.”

But no empirical research was done at the time, and if creditors have no need for the full caption after the notice of meeting of creditors, the suggestion might have merit. Deb Miller offered to create a survey (with the help of Jenny Doling) to canvas some creditor groups to try to ascertain whether they need the full caption on all Rule 2002 notices. After the Subcommittee receives the results of that survey, it will consider the suggestion further.

(C) *Consider suggestion 23-BK-C from the National Bankruptcy Conference dealing with remote testimony in contested matters*

Professor Bartell provided the report.

The National Bankruptcy Conference submitted proposals to amend Rules 9014 and 9017 and create a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases.

The suggestion proposes to eliminate the incorporation by reference in Rule 9017 of Fed. R. Civ. P. 43 (which generally requires witnesses’ testimony to be taken in open court unless the court permits remote testimony “for good cause in compelling circumstances”), so it would no longer be applicable “in a bankruptcy case.” Instead, new Rule 7043 would make Civil Rule 43 applicable in adversary proceedings. Rule 9014, dealing with contested matters, would be amended in two respects. First, it would make Civil Rule 43(d) (dealing with interpreters) applicable to contested matters and insert language identical to Civil Rule 43(c) (dealing with evidence on a motion). Second, it would delete the language requiring that testimony in a

contested matter be taken in the same manner as testimony in an adversary proceeding and instead insert language that mirrors Civil Rule 43(a) with the exception that the standard for allowing remote testimony would be “cause” rather than “good cause in compelling circumstances.”

Professor Struve pointed out that in the committee note the words “advisory proceedings” should be “adversary proceedings.”

Tom Byron questioned whether some mention of the change from “good cause” to “cause” should be made in the committee note. This is a restyling convention, and is not intended to change the meaning of the phrase. After some discussion, it was agreed that the following language should be inserted in the committee note: “Consistent with the other restyled bankruptcy rules, the phrase “good cause” used in Fed. R. Civ. P. 43 has been shortened to “cause” in Rule 9014(d)(1). No substantive change is intended.”

The Advisory Committee supported the proposed amendments as a substantive matter. But Judge Bates asked if this is the first step towards a broader push for remote hearings in bankruptcy cases. Several Advisory Committee members stated that it was not. Rather, it is a carefully tailored response to a serious issue of access to justice, especially for pro se litigants and small business owners who must provide information in connection with a bankruptcy case and cannot afford to take off from work or to travel long distances to the court. There is no suggestion that the rule would be expanded to adversary proceedings. Even for contested matters, the presumption is that all testimony will be live and in court, and any change from that requires a request and judicial permission.

Judge Bates noted that there is pressure by some parties to expand video conferencing in federal court, and a CACM subcommittee is looking at the issue more broadly and will be reporting at its meeting in December. He suggested that the proposed rule amendments not be presented to the Standing Committee at its January meeting, but instead be held until the Advisory Committee can coordinate with CACM and get input as to whether these amendments cause any problems. Tom Byron stated that he has already been consulting with CACM staff, and the coordination can continue in preparation for the December CACM meeting.

Judge Bates also asked whether the Advisory Committee anticipates public reaction to these amendments saying that they do not go far enough to provide remote opportunities to the litigants. Judge Kahn thought there might be such a reaction, although the Judge Connelly was not so sure. Most bankruptcy practitioners recognize that evidence must be taken in a courtroom. This rule does not change that; it addresses a discrete problem. Judge Krieger agreed that in bankruptcy there is not a big appetite for remote hearings. The bankruptcy courts are likely to let other courts take the lead on this issue.

Dave Hubbard cautioned that the amended rules make it very important to determine whether a particular proceeding is an adversary proceeding or a contested matter. He said that sometimes parties bring an action as a contested matter when it actually should be an adversary proceeding, and if this rule becomes effective the agencies are not likely to let that slide.

Judge Harner suggested approving the proposed amendments, subject to coordination with CACM. Judge Krieger suggested deferring consideration of the amendments until the spring meeting, given that they could still be published if they are presented to the Standing Committee at its June meeting and delay would help with coordination efforts. The Advisory Committee voted to defer consideration of the amendments until its spring meeting.

7. Report of the Business Subcommittee

(A) *Consider Suggestion 23-BK-F from the National Bankruptcy Conference regarding the method of voting in Chapter 9 and 11 cases under Rule 3018(c)*

Professor Gibson provided the report.

The National Bankruptcy Conference (NBC) proposes an amendment to Rule 3018(c) to authorize courts to treat as an acceptance or rejection of a plan in chapter 9 and chapter 11 cases a statement of counsel or other representatives that is part of the record in the case, including an oral statement at a confirmation hearing.

The problem addressed by the suggestion is the failure of the IRS and certain other federal and state agencies that are repeat players in bankruptcy cases to submit ballots either accepting or rejecting a proposed plan, even when they have no objection to the plan. Courts differ on whether failure to reject the plan is a deemed acceptance. The problem is particularly acute in Subchapter V cases, because if a creditor in an impaired class by itself does not submit a ballot, the plan becomes nonconsensual even if the nonvoting creditor supports confirmation. The plan then must be confirmed under § 1191(b) with a less favorable discharge available under § 1192.

The Subcommittee considered why the IRS and other agencies decline to vote. It is thought that the process for determining how a federal agency will vote on a reorganization plan is a complex one. For example, under § 1126(a) of the Bankruptcy Code, the decision whether to accept or reject the plan on behalf of the United States when the United States is a creditor or equity security holder must be made by the Secretary of the Treasury. Obtaining that decision might be time-consuming, especially if there is more than one federal agency involved in the case. The agency may also be reluctant to take a position on the plan as a whole rather than just its own treatment, so may be willing only to say that it does not oppose confirmation rather than stating that it supports the plan.

If the federal government is not willing to accept the plan at any time, including orally at the confirmation hearing, the proposed amendment may not make any difference. But the Subcommittee did agree with the NBC that if a nonvoting creditor stated on the record or stipulated its acceptance of the plan, even if it did not submit a ballot by the deadline for voting, its action should constitute a valid acceptance. It is possible that courts may view the statements made by the representatives of federal agencies to constitute acceptances under the amended

rule. Therefore, the Subcommittee recommended an amendment to Rule 3018(c) for publication which would allow an acceptance (or the change or withdrawal of a rejection) to be made in a statement on the record, including an oral statement at the confirmation hearing or a stipulation, made by an attorney for or an authorized agent of the creditor or equity security holder.

Judge McEwen agreed that the reasons suggested why agencies do not vote on plans is probably accurate. Dave Hubbard agreed that the current rule is too formalistic, but expressed worry about the impact of the amended rule in non-subchapter V cases, especially when there are last minutes changes to the plan of reorganization that might have serious consequences, such as third-party releases and exculpatory clauses. He emphasized that creditors are not legally required to vote, and they may have good reasons for declining to do so.

Ramona Elliott stated that the proposal is animated by subchapter V cases. Subchapter V has a mechanism for confirmation without acceptance, and the ABI Task Force on Subchapter V is looking at this very issue. There may be other available approaches to solving the problem. But this amendment is not likely to do so. Government agencies may still decline to accept a subchapter V plan.

Damian Schaible stated that he understands why creditors should be able to change their votes, and he supports that. But he doesn't think this is going to change agency policy. The merit of the proposed amendments is to permit a change of vote on the record as part of settlements at the confirmation hearing without further formal proceedings. This would not eliminate the requirements for revoting if there was a material change to the plan.

Judge McEwen stated that this amendment gives courts the flexibility to do what they are doing now. If there was a substantive change to the plan, there would be reballoting.

Judge Isicoff noted that the issue arises not only in subchapter V cases. She said she has these issues in single asset real estate cases all the time. The bank doesn't oppose the plan but refuses to sign a ballot that votes in favor of the plan. It is not limited to various government agencies. Lawyers have apologetically explained this to her at confirmation hearings.

Judge Kahn noted that Congress explicitly declined to treat failure to vote as an acceptance in the Small Business Reorganization Act, and these amendments do not do that. The amendments allow an affirmative statement on the record that the creditor supports confirmation to be treated as acceptance. Silence is not acceptance, and affirmative refusal to approve is not acceptance.

Mr. Schaible stated that these amendments do not solve the problem that motivated the National Bankruptcy Conference to make the suggestion, but they are useful for other purposes.

Professor Struve suggested a stylistic change. In Rule 3018(c)(1)(B) she suggested changing the words "that is" to "in a statement that is" and deleting the words "in a statement that is" at the beginning of (i).

It was also suggested that the committee note include language stating that “nothing in this rule is intended to create an obligation to accept or reject a plan.”

The Advisory Committee approved both changes, and by a 12-to-1 vote approved the amended Rule 3018(c) for publication for public comments.

8. **Reporter Memo**

(A) ***Recommendation from Professor Bartell concerning Suggestion 23-BK-E recommending legislative and rule amendments to address contempt proceedings***

Professor Bartell provided the report.

An attorney in Baltimore, Maryland, Joshua T. Carback, submitted a “proposal for reforming judicial rules governing contempt proceedings.” He proposed an amendment to Section 105(a) of the Bankruptcy Code to expressly allow bankruptcy courts to issue orders for civil and criminal contempt. If such a statutory change is made, he proposed amendments to Bankruptcy Rule 9020 to incorporate a new Fed. R. Civ. P. 42 governing civil contempt that would be similar to Fed. R. Crim. P. 42, which would also be amended “to eliminate unnecessary criminal contempt statutes and trim unnecessary contempt provisions in other criminal rules.”

Because the Advisory Committee is not the proper venue for proposals to amend the Bankruptcy Code, and all proposed rule amendments are dependent on a statutory change to the Code, Professor Bartell recommended no action on the suggestion.

The Advisory Committee agreed to take no action on the suggestion.

9. **Update on the Work of the E-filing Deadline Joint Subcommittee**

Professor Struve gave the report.

The Joint Subcommittee was tasked with considering a suggestion made in 2019 by now-Chief Judge Michael Chagares of the U.S. Court of Appeals for the Third Circuit (and then chair of the Advisory Committee on Appellate Rules) to all the advisory committees that consideration be given to amending the rules to provide that the current midnight electronic filing deadline be rolled back to an earlier time, such as when the clerk’s office closes in the respective court’s time zone.

The Joint Subcommittee considered information received from the FJC in 2022 about actual filing patterns that shows that about 80% of filings in federal bankruptcy, district and appellate courts were made between 8 a.m. and 5 p.m. The Joint Subcommittee also considered the new Third Circuit rule (effective July 1, 2023) that moved the presumptive deadline for most electronic filings in that court of appeals from midnight to 5 p.m. The new rule evoked strong negative reactions from the bar. An internal Department of Justice survey of attorneys also

elicited negative comments, and one Subcommittee member reported similar reactions within that member's law firm.

After careful discussion at its meeting in August, the Joint Subcommittee unanimously voted to recommend that no action be taken on the suggestion, and that the Joint Subcommittee be disbanded. The Joint Subcommittee has on its docket Suggestion 19-BK-H, and the Advisory Committee must decide what to do with that suggestion.

The Advisory Committee decided to take the suggestion off its agenda.

10. **Update on the Work of the Pro-Se Electronic Filing Working Group**

Professor Struve gave the report.

The working group has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive a notice of electronic filing (NEF) through CM/ECF or a court-based electronic-noticing program. Professor Struve had hoped to be able to circulate a set of proposed rule amendments designed to eliminate the requirement of paper service on those receiving NEFs in time for the fall advisory committee meetings.

When the working group had its virtual meeting last week, the group seemed supportive of the concept. But the group felt that the proposed sketch of the possible amendment that she provided to the working group requires a rather significant re-draft. Therefore she is not circulating anything written to the advisory committees, because further work will be needed before the draft is ready for advisory-committee consideration.

However, the basic ideas that are under consideration among the reporters, as to service and perhaps also as to filing, are the following:

On service, in addition to eliminating the requirement of paper service on those receiving NEFs, the new idea would be to perform a more general overhaul of the service provisions with a view to making some other adjustments to reflect modern practices – in particular, to reorder the treatment of service so as to first discuss service by means of the NEF and then, only after that, to discuss other means of service that would be used when serving people who do not receive NEFs. She suggested that we might also consider a simpler description of service by means of the NEF, that would say something like, “the court’s sending of the NEF counts as service” (precise wording still to be determined). The rules might also address the treatment of documents that are to be served but not filed with the court, perhaps by setting a presumption that service can be done by email to the email address that the court uses for NEFs. Further drafting is necessary before we can proffer these proposals concretely for each advisory committee to consider.

Ken Gardner said that one of the issues he is confronting is regarding the claims docket. The clerk's office gets two addresses on the claims form, one for notice and one for service. When they give the service list to the attorneys to serve anything under Rule 2002, for example, that list is inaccurate in many courts because the BNC has something behind the scenes that allows courts, if there is a nationally-filed address, to reconcile that and send the notice to the correct address. But if there is a different address on the claim form, it is possible that it won't be reconciled with the nationally-filed address because the attorney does not send through the BNC. One could revise the claim form to remove the second address, but otherwise we have to recognize that this is happening for attorneys who are trying to serve something. The BNC software is not shared with the clerks' offices because it is proprietary. This is a big issue for courts that should be considered by the Working Group. The attorneys cannot rely on the creditor matrix.

On filing, the new potential idea would be to consider the possibility of drafting a rule that would disallow districts from adopting blanket bans entirely denying all CM/ECF access to all self-represented litigants. The idea would be that even if a court generally disallows CM/ECF access for self-represented litigants, it should make reasonable exceptions to that policy. This idea is still in the nascent stages, and the reporters still need to hash out how the details might work. It is not clear whether this is an area where a uniform approach should be adopted across all rules, or one Advisory Committee should proceed ahead of the others. But Professor Struve welcomed suggestions on how to draft such a provision that would alleviate the CM/ECF-access skeptics' concerns.

11. **New Business**

There was no new business.

12. **Future Meetings**

The spring 2023 meeting has been scheduled for Apr 11, 2024, in a location to be announced.

13. **Adjournment**

The meeting was adjourned at 2:20 p.m.

TAB 5

TAB 5A

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

H. THOMAS BYRON III
SECRETARY

JAY S. BYBEE
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 8, 2023

Introduction

1
2 The Civil Rules Advisory Committee met in Washington, D.C., on October 17, 2023.
3 Members of the public attended in person, and public on-line attendance was also provided. Draft
4 Minutes of that meeting are included in this agenda book.

5 In August 2023 proposed amendments to Rule 16(b)(3)(B)(iv) and 26(f)(3)(D) dealing with
6 privilege log issues, and a new proposed Rule 16.1 on MDL proceedings, were published for public
7 comment. The first hearing on the proposed amendments and rule was held in Washington, D.C.
8 on Oct. 16, 2023. 24 witnesses signed up to speak at that hearing. Two more hearings are
9 scheduled, both by remote means, on Jan. 16 and Feb. 6, 2024. The public comment period ends
10 on Feb. 16, 2024.

11 This advisory committee has no action items for this meeting.

12 Part I of this report provides information regarding ongoing subcommittee projects:

13 (a) Rule 41(a)(1) Subcommittee: The Rule 41(a) Subcommittee, chaired by Judge Bissoon,
14 is addressing concerns (raised by Judge Furman, a former member of this committee, among
15 others) about possible revisions to that rule to resolve seemingly conflicting interpretations in the
16 courts. The work is ongoing on this topic, and outreach to bar groups has occurred and is
17 continuing. The reports received to date indicate that limiting Rule 41(a) dismissals to dismissals
18 of an entire action can create difficulties. The Subcommittee has not reached consensus, however,
19 on whether an amendment should be proposed, or what one should be if an amendment is pursued.

20 (b) Discovery Subcommittee ongoing projects: Besides producing the privilege log
21 amendments mentioned above, the Discovery Subcommittee, chaired by Chief Judge Godbey, is
22 working on two ongoing projects and has discussed a third that will be taken up by a newly-
23 appointed subcommittee addressing that project. These projects are:

24 (i) Service of subpoena – whether Rule 45(b)(1) should be amended to clarify what
25 methods are required in “delivering a copy [of the subpoena] to the named person,” as the
26 rule directs. Courts have reached different conclusions on whether this rule requires in-
27 person service. As with the Rule 41(a)(1) issues mentioned above, efforts are under way to
28 ascertain from bar groups whether divergent interpretations have caused actual problems
29 in practice. Initial indications are that clarifying amendments would be helpful.

30 (ii) Filing under seal – whether rule changes are warranted with regard to court
31 authorization of filing under seal or the procedures used to obtain such authorization. Some
32 procedural specifics that have been proposed might be seen as intruding on local practice
33 in some districts.

34 (iii) Cross-border discovery – Judge Michael Baylson (E.D. Pa.), and Professor
35 Steven Gensler (Univ. of Oklahoma), both former members of the Advisory Committee,
36 have submitted a proposal that the Civil Rules be amended to provide guidance about
37 appropriate handling of cross-border discovery. This project is likely to take considerable
38 time and work. A new subcommittee, chaired by Judge Manish Shah (N.D. Ill.), has been
39 appointed to undertake this project.

40 (c) Expanded disclosure requirements regarding interests in corporate parties: A Rule 7.1
41 Subcommittee, chaired by Justice Jane Bland (Texas Supreme Court), is exploring whether
42 amendments should require expanded disclosure regarding corporate parties to enable judges to
43 determine whether they might need to recuse.

44 Part II of this report provides information about other ongoing topics:

45 (a) Random assignment of cases: Forum shopping and random assignment of cases have
46 received considerable attention. Nineteen U.S. Senators wrote Judge Rosenberg expressing
47 concern about random assignment. Another submission suggested that the Civil Rules should be
48 amended to reflect the need – in at least certain cases – to ensure that litigants cannot “choose their
49 judge” by filing in certain courts. It is not clear whether Civil Rule amendments are the most
50 appropriate response to these concerns; the existence of single-judge divisions of district courts
51 may largely be a matter of statute, and presently case assignment practices are handled locally as
52 seemingly contemplated by 28 U.S.C. § 137(a). Circumstances may differ considerably in different
53 districts, particularly in large states that are somewhat sparsely populated.

54 (b) Demands for jury trial in removed cases: A style change to Rule 81(c) in 2007 changed
55 verb tense in a way that might confuse some about when a jury trial must be demanded within 14
56 days of removal. This matter was before the Standing Committee at its June 2016 meeting, and
57 prompted two members of the Standing Committee to propose a change to Rule 38 that would
58 have mooted the concern about Rule 81(c). Based in part on FJC research, the Advisory Committee
59 has now dropped that Rule 38 proposal, and it is considering either undoing the 2007 restyling
60 change of verb tense or recommending a more aggressive change to the rule designed to make it
61 clearer.

62 Part III presents information on topics that remain on the Advisory Committee’s agenda
63 but are not presently the subject of ongoing work:

64 (a) Disclosure of premium for a security bond under Rule 62(b): The Appellate Rules
65 Committee has proposed adoption of a new Appellate Rule 39(b) authorizing a motion for
66 reconsideration of the initial cost award by the court of appeals. That amendment proposal was
67 published for public comment in August 2023. The possible issue under Civil Rule 62(b) is that
68 sometimes litigants in the court of appeals will not know the amount of the premium paid for an
69 appeal bond, although having that information would be important to their decision whether to
70 move for reconsideration of the initial cost award. It is uncertain whether such an amendment is
71 needed, and also whether the amendment of Appellate Rule 39(b) will be adopted.

72 (b) Attorney fee awards for Social Security appeals: After extended study, the Advisory
73 Committee developed Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g),
74 which went into effect on Dec. 1, 2022. Among the topics discussed during the work leading to
75 the recommendation to adopt Supplemental Rules was the problem of handling attorney fee awards
76 under 42 U.S.C. § 406(b) when the court remands to the Social Security Administration (SSA) for
77 further proceedings. The amount of a fee award is capped, but the cap depends on the results of
78 the further proceedings before the SSA. Rule 54(d)(2)(B), however, provides generally that
79 motions for attorney fees be made promptly, and long before that disposition by SSA is known.
80 The matter is difficult, and the submission received reported on a local rule addressing the issues
81 raised. Because the results of that local rule effort and the functioning of the new Supplemental
82 Rules are presently uncertain, the Advisory Committee is not presently pursuing this subject.

83 Part IV identifies matters the Advisory Committee has concluded should be removed from
84 its agenda:

85 (a) Revision of Rule 26(a)(1) based on the results of the Mandatory Initial Discovery Pilot,
86 which the Discovery Subcommittee concluded after study, did not provide a firm basis for
87 proposing changes to the existing rules on initial disclosure.

88 (b) Possible revision of Rule 60(b)(1) in light of the Supreme Court’s decision in *Kemp v.*
89 *U.S.*, 142 S.Ct. 1856 (2022), that a “mistake” by the court is a ground for relief under Rule 60(b)(1)
90 and therefore subject to the one-year time limit applicable to motions under Rule 60(b)(1).

91 (c) An amendment to Rule 30(b)(6) closely resembling a proposed amendment to that rule
92 published for comment in 2018 and withdrawn from the amendment package after adverse
93 commentary during the public comment period.

94 (d) An amendment to Rule 11 stating that district courts must impose sanctions if Congress
95 has mandated imposition of sanctions in actions brought under certain federal statutes.

96 (e) An amendment to Rule 53 prescribing that masters are held to fiduciary duty standards.

97 (f) An amendment to Rule 10 requiring that each pleading include a Document of Direction
98 of Claims (DoDoC) to show which parties are asserting claims against which parties.

99 (g) Proposed amendments to the Civil Rules, Criminal Rules, Appellate Rules, Bankruptcy
100 Rules, and Evidence Rules, as well as statutory amendments, all dealing with the handling of
101 contempt.

102 I. ONGOING SUBCOMMITTEE PROJECTS

103 A. Rule 41(a) Subcommittee

104 The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon (W.D. Pa.), is continuing its
105 work to address several conflicting interpretations of the rule. The Subcommittee was formed
106 after the March 2022 Advisory Committee meeting in response to two submissions (21-CV-O,
107 22-CV-J) that pointed out a circuit split regarding whether the rule permits unilateral voluntary
108 dismissal of only an entire “action” or something less, such as all claims against a single
109 defendant, or one of several claims against a defendant.¹

¹ The Second, Sixth, and Seventh Circuits take the view that only an entire action may be dismissed under Rule 41(a); the First, Third, Fifth, Ninth, and Eleventh Circuits take the view that in a multi-defendant case, a plaintiff may dismiss all claims (though not fewer than all claims) against a single defendant under Rule 41. The Eighth and Tenth Circuits have not definitively addressed the issue. The state of play was recently comprehensively summarized in *Interfocus Inc. v. Hibobi Tech. Ltd.*, No. 22-CV-2259, 2023 WL 4137886 (N.D. Ill. June 7, 2023). The Fourth, Tenth, and D.C. Circuits have not explicitly considered the issue, and the district courts within these circuits are split.

110 At the October 2023 Advisory Committee meeting, members discussed the issues and
111 directed the Subcommittee to continue its work. The Subcommittee subsequently met, via Zoom,
112 on November 15. Although there is not yet a firm consensus among the Subcommittee members
113 about whether to pursue an amendment, it has begun the process of developing various options
114 that would expand the flexibility of the rule. The Reporters will develop these possibilities for
115 consideration at the next Subcommittee meeting.

116 Currently, Rule 41(a)(1)(A) allows a plaintiff to “dismiss an action without a court order
117 by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion
118 for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have
119 appeared.” Rule 41(a)(1)(B) provides that such a dismissal is without prejudice unless the
120 plaintiff has “previously dismissed any federal- or state-court action based on or including the
121 same claim,” in which case the “notice of dismissal operates as an adjudication on the merits.”
122 Rule 41(a)(2) provides that “[e]xcept as provided in Rule 41(a)(1), an action may be dismissed at
123 the plaintiff’s request only by court order, on terms that the court considers proper.” Dismissals
124 under Rule 41(a)(2) are presumptively without prejudice unless the court orders otherwise.
125 Notably, Rule 41(c) states that “[t]his rule applies to dismissal of a counterclaim, crossclaim, or
126 third-party claim,” and a claimant may voluntarily dismiss without a court order or consent from
127 other parties before a responsive pleading is served, or, if there is no responsive pleading, before
128 evidence is introduced at a hearing or trial.

129 As noted above, our inquiry began with the circuit split about the meaning of the word
130 “action” in the rule. Some courts have concluded that a plaintiff may dismiss only an entire
131 action (i.e., all claims against all defendants) under Rule 41(a) whether unilaterally prior to an
132 answer or motion for summary judgment, by stipulation, or by court order. Dismissal of anything
133 less, according to these courts, must be accomplished by amending the complaint under Rule 15.
134 This process, however, can be cumbersome, especially if it occurs later in the pretrial process
135 since an amended complaint requires an amended answer. Moreover, a proliferation of pleadings
136 can create confusion and clog the docket.²

137 Additionally, requiring amendment of the complaint can create downstream problems.
138 Consider a plaintiff who has asserted two claims but loses a motion for summary judgment as to
139 one of them. Absent a finding that Rule 54(b) applies, this judgment cannot be immediately
140 appealed. If Rule 41(a) allows only dismissal of an entire action, in order to create an appealable
141 final judgment, the plaintiff would have to amend her complaint to excise the claim. This,
142 however, may be more easily said than done. For instance, the Eleventh Circuit recently held that
143 such an attempt was unsuccessful because the factual allegations supporting the abandoned

² See *Interfocus Inc. v. Hibobi*, No. 22-CV-2259, 2023 WL 4137886, at *2 (N.D. Ill. June 7, 2023)
 (“Amending a complaint again and again can clog up the docket and create confusion about which complaint is the
 operative pleading. Imagine a docket with a sixth amended complaint, followed by a seventh amended complaint,
 followed by an eighth amended complaint, and so on. Heads will start spinning.”)

144 claims remained in the amended complaint. *See GEICO v. Glassco, Inc.*, 54 F.4th 1338, 1344
145 (11th Cir. 2023).

146 In sum, the conflict over Rule 41 boils down to whether the rule’s text requires a narrow
147 application of the rule, or whether the rule’s current text can bear what many courts seem to do
148 with it, which is to narrow the claims and parties throughout the pretrial process.³ Arguably,
149 facilitating such narrowing, including through settlement, is an efficiency-enhancing device that
150 the rule should encourage. As one committee member put it at the last Advisory Committee
151 meeting, the rule in its present form is “clunky,” and perhaps especially so in an era where
152 multiparty, multiclaim litigation is far more prevalent than when the Federal Rules were initially
153 adopted.

154 Indeed, the Rules now contemplate narrowing claims and defenses asserted in the
155 litigation in various places, such as Rule 16(c)(2)(A) (allowing a court to consider and take
156 appropriate action on “formulating and simplifying the issues, and eliminating frivolous claims
157 or defenses”) and Rule 11(b) (authorizing sanctions for “later advocating” a claim that proves to
158 be unwarranted). Notably, Rule 41(c) expressly contemplates dismissal of single counterclaims,
159 crossclaims, and third-party claims, and it is not clear why the plaintiff should not enjoy equal
160 latitude. The Subcommittee’s outreach reveals that judges often use Rule 41 during pretrial
161 proceedings to excise claims that are no longer pertinent without requiring parties to amend the
162 pleading. Ultimately, though, if the text is found to not permit that practice, and such a practice is
163 desirable, perhaps the rule should be amended to make it explicit.

164 Although there are legitimate concerns that amending a longstanding rule, to which the
165 bench and bar have become adjusted, may be unsettling and lead to unanticipated consequences,
166 the Subcommittee’s efforts have increasingly led it to the conclusion that this is a problem that
167 likely can only be solved by an amendment. Over the course of the last year, the Subcommittee
168 has engaged in outreach to several attorney groups (i.e., Lawyers for Civil Justice, the American
169 Association for Justice, and the National Employment Lawyers Association) to determine
170 whether the conflicting interpretations of the rule create a “real-world” problem, and it seems
171 clear that it does, at least when the rule prohibits seamless narrowing of claims and parties. The
172 Subcommittee also sought feedback from federal judges, via a letter to the Federal Judges
173 Association (pg. 207 of the [October 2023 agenda book](#)). The request elicited eight responses.
174 These responses were somewhat ambivalent, as some judges had never encountered the issue and
175 others expressed hesitation about upsetting the applecart with an amendment. It is surely the case
176 that not every conflict among the circuits about the meaning of a rule warrants an amendment.
177 Here, though, the starkly different interpretations of the rule among the circuit and district courts,
178 and the practical effect those differing interpretations can have on the progress of a case, indicate
179 that clarification is a worthy goal.

³ The debate over how to properly interpret the rule is well ventilated in several dueling opinions in a recent *en banc* case in the Fifth Circuit, *Williams v. Seidenbach*, 958 F.3d 341 (5th Cir. 2020).

180 Should the Committee propose to amend the rule, there are several directions it might
181 take, levers it might adjust, and complications it should avoid. Obviously, an amended rule
182 should clarify how much leeway a plaintiff should have to dismiss something less than an entire
183 action, but whether that leeway should extend to individual claims is an open question. Beyond
184 examining whether “action” should be revised to something less, an amendment might also
185 consider (a) the deadline by which a plaintiff may voluntarily dismiss without a stipulation or a
186 court order; (b) who must sign a stipulation of dismissal, as there is also a conflict over whether
187 such a stipulation must be signed by all parties who have ever appeared in the litigation or only
188 those remaining at the time of the stipulation; and (c) which of these dismissals should be
189 presumptively without prejudice, or vice versa.

190 As the Subcommittee moves toward considering possible amendments, Standing
191 Committee feedback on which route seems most fruitful would be helpful.

192 **B. Discovery Subcommittee**

193 The Discovery Subcommittee’s report to the Advisory Committee during the Oct. 17
194 meeting included three items that are the subject of ongoing work. One of those will be handled
195 by a new subcommittee going forward, and the Advisory Committee decided not to proceed with
196 another matter considered by the Discovery Subcommittee which is identified in Part IV below.
197 The ongoing projects are:

198 (1) Manner of service of a subpoena: This topic was brought to the Advisory Committee’s
199 attention by Judge Catherine McEwen, liaison to the Bankruptcy Rules Advisory Committee.
200 Similar concerns have been presented several times over the last 20 years, but the issue was not
201 taken up in the Rule 45 project about a decade ago.

202 Rule 45(b)(1) now specifies that “[s]erving a subpoena requires delivering a copy to the
203 named person and, if the subpoena requires that person’s attendance, tendering the fees for 1 day’s
204 attendance and the mileage allowed by law.” As the submissions we have received on this topic
205 illustrate, there seem to be notable differences in whether this direction is satisfied even though in-
206 person service is not accomplished. Background issues include whether service requirements
207 might be different for nonparty witnesses than for party witnesses, and whether subpoenas to
208 appear and testify in court should be treated as different from subpoenas to produce documents or
209 to appear and testify at a deposition. Trying to break up Rule 45 to provide separately for these
210 somewhat different situations could produce considerable complications, however.

211 At the Subcommittee’s request, Rules Law Clerk Chris Pryby prepared a comprehensive
212 memo dated June 1, 2023, on the requirements of the state courts, which might provide insights.
213 A link to that memo is provided below. It does not show that there is any consistent thread of
214 service requirements in state courts that could provide useful guidance for Rule 45.

215 The Subcommittee concluded that the rule’s ambiguity about service of subpoenas has
216 produced sufficient wasteful litigation activity to warrant an effort to clarify the rule. At the same

217 time, the consensus was also that requiring in-person service in every instance (as some courts
218 have concluded is required under the current rule) would not be a good idea.

219 Instead, after discussion the Subcommittee gravitated toward recognizing several means of
220 service of initial process authorized under Rule 4 and also recognizing that the court (or perhaps,
221 a local rule) could authorize additional means of service. For purposes of discussion, it offered the
222 following sketch of a possible amendment to Rule 45(b)(1):

223 (1) ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years
224 old and not a party may serve a subpoena. Serving a subpoena requires
225 delivering a copy to the named person, including using any means of service
226 authorized under Rule 4(d), 4(e), 4(f), 4(h), or 4(i), or authorized by court
227 order [in the action] [or by local rule] {if reasonably calculated to give
228 notice} and, if the subpoena requires that person’s attendance, tendering the
229 fees for 1 day’s attendance and the mileage allowed by law.

230 This sketch includes choices among means authorized under Rule 4. Some of those selected
231 might be dropped, or others might be added. At least one – waiver of service under Rule 4(d) –
232 likely has timing aspects that would make it inappropriate for service of some subpoenas. It is
233 worth noting, however, that the Committee has received a submission urging that the waiver of
234 service provision in Rule 4(d)(1)(G) be amended explicitly to authorize service of the waiver
235 request by email. See 21-CV-Y, from Joshua Goldblum. (Presently Rule 4(d) requires service “by
236 first-class mail or other reliable means.”)

237 Another point worth noting is that Rule 4(e)(1) permits reliance on state law provisions for
238 service of summons, which might begin to incorporate the various state-law provisions identified
239 in the Rules Law Clerk survey of state practices. The local rule possibility might take account of
240 the wide variety of methods permitted under state law in various states. It could be that a district
241 court would wish to adopt some of those local methods by local rule on the theory that they are
242 familiar to lawyers in the state.

243 One question that has been raised is whether Rule 4(i), dealing with serving the United
244 States, one of its agencies, or a U.S. officer or employee, should be included on the Rule 45(b)(1)
245 list if this amendment approach is adopted. The range of circumstances that emerge for service of
246 a summons and complaint under Rule 4(i) may not work well if transferred to the subpoena setting.

247 The proposed court order authorization may be unnecessary. But Rule 4(f)(3) does
248 explicitly authorize a court order for service by other means when the person is to be served in a
249 foreign country. There is no clear parallel service provision for a court authorizing alternative
250 means of service under Rule 4 on a person to be served inside this country, so perhaps explicit
251 authority in Rule 45 for such a court order would be desirable.

252 More generally, it could be said that the analogy between service of summons and
253 complaint and service of a subpoena is imperfect. A subpoena may be directed to a nonparty and

254 may require very immediate action. For example, it might command a nonparty to testify at a trial
255 or hearing in court on very short notice. Certainly default is a serious consequence that can follow
256 service of initial process if no responsive pleading is filed. But the time to respond may be
257 considerably longer than with some subpoenas. Under Rule 55, moreover, courts are generally
258 fairly liberal in setting aside defaults, particularly if there is some question about the effectiveness
259 of service and the request to set aside the default is made promptly after the defendant becomes
260 aware of the entry of default.

261 At the same time, it is also worth noting that invoking the entirety of Rule 4 in
262 Rule 45(b)(1) would likely be overbroad. For example, Rules 4(a) and (b) (dealing with the
263 contents of the summons and issuance of the summons by the clerk) do not apply in the subpoena
264 setting, since Rule 45(a) has its own pertinent provisions. Rule 4(g) deals with serving a minor or
265 incompetent person and calls for following state law if that person is located within this country.
266 Rule 4(j) deals with serving a foreign, state, or local government. Rule 4(k) deals with the territorial
267 limits of service of a summons, but Rule 45(c) has its own limits on where a response to a subpoena
268 may be required. Rules 4(l), (m) and (n) also seem inapplicable to the Rule 45.

269 The invocation of the due process standard “reasonably calculated to give notice” might be
270 unnecessary, for district courts would presumably have that in mind when asked to authorize
271 additional means of service in a given case, and district courts adopting local rules would similarly
272 be expected to have that in mind. The phrase is derived from *Mullane v. Central Hanover Bank &*
273 *Trust Co.*, 339 U.S. 306 (1950), which held that Due Process requires notice so calculated to give
274 notice. Presumably the Due Process limits would apply by their own force, without the need for
275 inclusion in the rule, and including such a phrase in the rule might suggest that it is independent
276 of, or in addition to, what Due Process requires. If it were adopted, however, the Committee Note
277 should specify that actual notice is not required, but only the use of substitute means reasonably
278 calculated to give notice.

279 Another thing that might be considered would be building in some sort of minimum time
280 requirement. Regarding depositions, Rule 30(b)(1) says the noticing party “must give reasonable
281 written notice to every other party,” but this does not address notice to the nonparty witness. Rule
282 45(a)(4), meanwhile, says that when the subpoena is a documents subpoena the serving party must
283 give notice to the other parties before serving the subpoena. This requirement was designed in part
284 to protect the confidentiality interests of other parties that might be compromised if the nonparty
285 target (e.g., a hospital) produced before the party even learned about the subpoena.

286 If one wanted to build in a notice period, it might be that one would make an exception for
287 testimony at a trial or hearing. Once a trial begins, for example, requiring a significant notice period
288 could present problems, particularly if a jury trial were ongoing.

289 Another notice period feature is that Rule 30(b)(2) says that a subpoena duces tecum is
290 handled under Rule 34, and Rule 45(d)(2)(A) says that if the only thing called for is production of
291 documents or ESI the person need not appear.

292 But it must be remembered that there is no time limit in Rule 45 at present so long as the
293 subpoena does not require production of documents, making the timing requirements of Rule 45
294 applicable. And since some subpoenas may demand attendance at court hearings or trials on short
295 notice care should be taken if a time feature is built into Rule 45.

296 The Discovery Subcommittee is continuing its work on the subpoena-service project and
297 expects to present its further thoughts at the Advisory Committee’s meeting in April 2024. It
298 invites reactions from the Standing Committee on this work.

299 Link to Rules Law Clerk June 1, 2023 memo:

300 [https://www.uscourts.gov/sites/default/files/2023-](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=148)
301 [10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=148](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=148)

302 (2) Filing under seal: The Advisory Committee has received a number of submissions
303 urging that the rules explicitly recognize that issuance of a protective order under Rule 26(c)
304 invokes a “good cause” standard quite distinct from the more demanding standards that the
305 common law and First Amendment require for sealing court files. There seems to be little dispute
306 about the reality that the standards are different, though different circuits have articulated and
307 implemented the standards for filing under seal in somewhat distinct ways. The Subcommittee’s
308 current orientation is not to try to displace any of these circuit standards.

309 Instead, when the issues were first raised, the Discovery Subcommittee focused on making
310 explicit in the rules the differences between issuance of a protective order regarding materials
311 exchanged through discovery and filing under seal. Two years ago, therefore, it presented the full
312 Committee with sketches of rule provisions to accomplish this goal:

313 **Rule 26. Duty to Disclose; General Provisions Governing Discovery**

314 * * * * *

315 (c) **Protective Orders**

316 * * * * *

317 **(4) Filing Under Seal.** Filings may be made under seal only under Rule 5(d)(5).

318 The Committee Note could recognize that protective orders – whether entered on
319 stipulation or after full litigation on a motion for a protective order – ought not also authorize filing
320 of “confidential” materials under seal. Instead, the decision whether to authorize such filing under
321 seal should be handled by a motion under new Rule 5(d)(5).

322 **Rule 5. Serving and Filing Pleadings and Other Papers**

323 (d) **Filing.**

324 * * * * *

325 **(5)** *Filing Under Seal.* Unless filing under seal is directed [or permitted] {authorized}
326 by a federal statute or by these rules, no paper [or other material] may be filed under
327 seal unless [the court determines that] filing under seal is justified and consistent
328 with the common law and First Amendment rights of public access to court filings.⁴

329 This provision could be accompanied by a Committee Note explaining that the rule does
330 not take a position on what exact locution must be used to justify filing under seal, or whether it
331 applies to all pretrial motions. For example, some courts regard “non-merits” or “discovery”
332 motions as not implicating rights of public access comparable to those involved with “merits”
333 motions. Trying to draw such a line in a rule would likely prove difficult, and might alter the rules
334 in some circuits.

335 One starting point is that since 2000 Rule 5(d)(1)(A) has directed that discovery materials
336 not be filed until “used in the proceeding or the court orders filing.” Exchanges through discovery
337 subject to a protective order therefore do not directly implicate filing under seal.

338 Another starting point here is that there are federal statutes and rules that call for sealing.
339 The False Claims Act is a prominent example of such a statute. Within the rules, there are also
340 provisions that call for submission of materials to the court without guaranteeing public access.
341 Rule 26(b)(5)(B) obligates a party that has received materials through discovery and then been
342 notified that the producing party inadvertently produced privileged materials to return or sequester
343 the materials, but also says the receiving party may “promptly present the information to the court
344 under seal for a determination of the [privilege] claim.”

345 There is a lingering issue about what constitutes “filing.” Rule 5(d)(1)(A) says that “[a]ny
346 paper after the complaint that is required to be served must be filed no later than a reasonable time
347 after service.” One would think that an application to the court for a ruling on privilege under Rule
348 26(b)(5)(B) should be served on the party (or nonparty) that asserted the privilege claim. Having
349 given the notice required by the rule, the party claiming privilege protection is surely aware of the
350 contents of the allegedly privileged materials, so service of the motion (including the sealed
351 information) would not be inconsistent with the privilege. And it is conceivable that should the
352 court conclude the materials are indeed privileged its decision could be reviewed on appeal,
353 presumably meaning that the sealed materials themselves should somehow be included in the
354 record. Perhaps they would be regarded as “lodged” rather than filed.

⁴ The bracketed addition “or permitted” was suggested during the Advisory Committee’s October 2023 meeting, to reflect the possibility that federal law might permit such filing without directing that it occur. It might be better to say “authorized,” so that possibility is also included in the above sketch.

355 Rule 5.2(d) also has provisions on filing under seal to implement privacy protections. In
356 somewhat the same vein, Rule 5.2(c) limits access to electronic files in Social Security appeals
357 and immigration cases.

358 Rule 79 also may bear on these issues. Rule 79(d) directs the clerk to keep “records required
359 by the Director of the Administrative Office of the United States Courts with the approval of the
360 Judicial Conference.”

361 Finally, it is worth noting that it appears there are different degrees of sealing. Beyond
362 ordinary sealing, there may be more aggressive sealing for information that is “highly
363 confidential,” or some similar designation. And national security concerns may in exceptional
364 circumstances call for even stricter confidentiality protections. It is not clear that a Civil Rule
365 adopting these distinctions is necessary or appropriate.

366 Uniform procedures for filing under seal and unsealing

367 Many of the submissions to the Committee have gone well beyond urging that the rules
368 recognize the diverging standards for protective orders and filing under seal. Indeed, since most
369 recognize that the courts are already aware of this difference in standards, one might say that the
370 main objective of the current proposals is to promote nationally uniform procedures for deciding
371 whether to authorize filing under seal. At least some judges seem receptive to efforts to standardize
372 the handling of decisions whether to permit filing under seal.

373 These proposals contain a variety of procedures for handling sealed filings. One submission
374 (22-CV-A, from the Sedona Conference) contains a model rule that is about seven pages long.
375 Another (21-CV-T, from the Knight First Amendment Institute at Columbia University) attaches
376 a compilation of local rules regarding sealing from all or almost all district courts that is about 100
377 pages long. Some of the local rules are quite elaborate, and other districts give little or no attention
378 to sealed court filings in their local rules.

379 There does presently seem to be considerable variety in local rules on filing under seal.
380 Adopting a set of nationally uniform procedures could introduce more consistency in the treatment
381 of such issues, but also would likely conflict with the local rules of at least some courts.

382 One more moving part should be noted. Two years ago, the Subcommittee paused its work
383 on the sealing issues because the Administrative Office had inaugurated a project on sealing of
384 court records. The pause was to avoid possibly conflicting with or complicating this project’s
385 efforts. In early 2023, we were advised that this ongoing project should not cause us to stay our
386 hands. Though the precise contours of the project are not entirely clear, it seems now to be
387 addressing only the manner in which the clerk’s office manages materials filed under seal, not the
388 decision whether or not to authorize filing under seal. Whether the dividing line between the
389 decision to seal in the first place and later unsealing is crystal clear might be debated.

390 The Subcommittee is uncertain how far to venture into prescribing uniform procedures.
391 Although the various proposals received so far have urged the adoption of a new Rule 5.3 on filing
392 under seal, the Subcommittee’s inclination is instead to treat these procedural issues within the
393 framework of existing Rule 5(d). Though there are rules addressed to only one kind of motion
394 (e.g., Rule 37 on motions to compel; Rule 50 on motions for judgment as a matter of law; Rule 56
395 on motions for summary judgment; and Rule 59 on motions for a new trial), motions to seal do not
396 seem of similar moment, so that a whole rule devoted to them does not seem warranted.

397 At the same time, the Rule 5(d) approach sketched above could be adapted to include
398 various features suggested by submissions received by the Committee. The following offers a
399 variety of alternative provisions on which the Subcommittee hopes to receive reactions from the
400 full Committee, building on the sketch presented above.

401 **Rule 5. Serving and Filing Pleadings and Other Papers**

402 **(d) Filing.**

403 * * * * *

404 **(5)** *Filing Under Seal.* Unless filing under seal is directed by a federal statute or by
405 these rules, no paper [or other material] may be filed under seal unless [the court
406 determines that] filing under seal is justified and consistent with the common law
407 and First Amendment rights of public access to court filings. The following
408 procedures apply to a motion to seal:

409 (i) [Unless the court orders otherwise,] The motion must not be filed under seal;

410 Many urge that motions to seal themselves be included in the public docket and open to
411 public inspection. But there may be circumstances in which even that openness could produce
412 unfortunate results. The bracketed phrase would take account of those situations. The rule could
413 specify something more about what the motion should include, but that seems unnecessary given
414 the rule’s invocation of common law and First Amendment limitations in filing in court under seal.
415 A number of submissions provide that sealing orders be “narrowly tailored.” But that seems
416 implicit in the invocation of the existing limitations on filing under seal.

417 In the same vein, the proposal by some that there be “findings” to support an order to seal
418 seems an unnecessary addition. Except for court trials governed by Rule 52, there are few findings
419 requirements in the rules. (Rule 23(b)(3) does seem to have such a requirement because the court
420 may certify a class only if it finds that the predominance and superiority prongs of the rule are
421 satisfied.) Again, once the common law and First Amendment standards are specified as criteria
422 for deciding a motion to seal, adding a findings requirement seems unnecessary. Perhaps it would
423 be useful were frequent appellate review anticipated, but appellate review of discovery-related
424 rulings is rare, and there are no similar findings requirements for such rulings.

425 A potential problem here is that the party that wants to file the materials may not itself be
426 in a position to make the showing required to justify sealing. For example, if the party that wants
427 to file the materials obtained them through discovery from somebody else, the entity capable of
428 making the required showing is not the one that wants to file these items. (This may often be true.)

429 One possibility might be to direct that the parties confer about the motion to seal before
430 presenting it to the court, as is presently required for a motion to compel under Rule 37(a)(1). But
431 the motion to seal situation may be quite different from the motion to compel situation. Party
432 agreement is not sufficient to support sealing if the common law or First Amendment requirements
433 are not met, while party agreement is almost always sufficient to resolve discovery disputes.
434 Indeed, party agreement was a motivating factor behind the certification requirements of Rule
435 37(a)(1).

436 In a sense, there may often be two antagonistic parties wanting different things. Often the
437 party that wants to make the filing is indifferent to whether it is under seal, perhaps even favoring
438 public filing. It's another party (or perhaps a nonparty that responded to a subpoena) that wants
439 the court to seal the confidential materials. Conferring might simplify the court's task in such
440 circumstances, but it does not promise to relieve the court of the ultimate duty to make a decision
441 on the motion to seal.

442 (ii) Upon filing a motion to seal, the moving party may file the materials under
443 [temporary] {provisional} seal[, providing that it also files a redacted
444 version of the materials];

445 Some of the proposals forbid a court ruling on a motion to seal for a set period (say 7 days)
446 after the motion is filed and docketed. But it appears that the reality is that many such filings are
447 in relation to motions or other proceedings that make such a "waiting period" impractical. The
448 filing of a redacted version of the materials sought to be sealed seems to provide some measure of
449 public access.

450 (iii) The moving party must give notice to any person who may claim a
451 confidentiality interest in the materials to be filed;

452 This provision is designed to permit nonparties to be heard on whether the confidential
453 materials should be sealed. Perhaps it should be a requirement of (i) above, and it might also
454 include some sort of meet-and-confer requirement.

455 *Alternative 1*

456 (iv) If the motion to seal is not granted, the moving party may withdraw the
457 materials, but may rely on only the redacted version of the materials;

458 *Alternative 2*

459 (iv) If the motion to seal is not granted, the [temporarily] {provisionally} sealed
460 materials must be unsealed;

461 The question of what should be done if the motion to seal is denied is tricky. One answer
462 (Alternative 2) is that the temporary seal comes off and the materials are opened to the public.
463 Unless that happens, it would seem that the court could not rely on the sealed portions in deciding
464 the motion or other matter before the court. On the other hand, it seems implicit that if the motion
465 is granted the court can consider the sealed portions in making its rulings. Whether that might
466 somehow change the public access calculus might be debated.

467 Things get trickier if the motion is denied and the party claiming confidentiality is not the
468 one that wanted to file the materials. To permit that party (or nonparty) claiming confidentiality to
469 snatch back the materials would deprive the party that filed them of the opportunity to pursue the
470 result it sought in filing the materials in the first place.

471 (v) The motion to seal must indicate a date when the sealed material may be
472 unsealed. Unless the court orders otherwise, the materials must be unsealed
473 on that date.

474 This is a recurrent proposal. It cannot reasonably be adopted along with the alternative
475 (below) that the materials must be returned to party that filed them, or to the one claiming
476 confidentiality, at the termination of the litigation.

477 (vi) Any [party] {interested person} [member of the public] may move to unseal
478 materials filed under seal.

479 Various proposals have been submitted along these lines. One caution at the outset is that
480 such a provision seems to overlap with Rule 24’s intervention criteria. Rule 24 has been employed
481 to permit intervention by nonparties to seek to unseal sealed materials in the court’s files. See 8A
482 Fed. Prac. & Pro. § 2044.1.

483 Such intervention attempts may sometimes raise standing issues. A recent example is *U.S.*
484 *ex rel. Hernandez v. Team Finance, L.L.C.*, 80 F.4th 571 (5th Cir. 2023), a False Claims Act case
485 in which the district court denied a motion to intervene by a “health care economist.” The
486 intervenor sought to unseal information about health care pricing in an action alleging that
487 defendant routinely billed governments for doctor examinations and care services that did not
488 actually occur. The court of appeals concluded that “violations of the public right to access judicial
489 records and proceedings and to gather news are cognizable injuries-in-fact sufficient to establish
490 standing.” But the court also remanded for a determination whether the application to intervene
491 was untimely under Rule 24(b).

492 Because there is an existing body of precedent on intervention for these purposes,
493 providing some parallel right by rule looks dubious. On the one hand, the notion that every
494 “member of the public” can intervene may be too broad. Rule 24(b)(1), which is ordinarily relied

495 upon for such intervention to unseal, also has other requirements that might not be included in a
496 new rule.

497 The role of nonparty confidentiality claimants (mentioned above) seems distinguishable.
498 Particularly if their confidential information was obtained under the auspices of the court (e.g., by
499 subpoena), it would seem to follow that they should have some avenue to protect those interests
500 when a party sought to file those materials in court. (It might be mentioned that most of the
501 submissions seem to take no notice of the possibility that nonparties might favor filing under seal.)

502 (vii) Upon final termination of the action, any party that filed sealed materials
503 may retrieve them from the clerk.

504 This provision would not seem to fit with a requirement (mentioned above) that there be a
505 prescribed date for unsealing the material. Indeed, unless there is some sort of timeliness
506 requirement for requests by nonparties to unseal these materials (see Rule 24), permitting them to
507 be withdrawn would complicate matters. Must an application to unseal be made during the
508 pendency of the action? Must clerk's offices retain sealed materials forever?

509 An alternative proposal made in at least one submission is that all sealed materials be
510 unsealed within 60 days after "final termination" of the action. If that "final termination" is on
511 appeal, it may be difficult for the district court clerk's office to know when to unseal. Imposing
512 such a duty on the clerk's office, rather than empowering the party that filed the material to request
513 its return based on a showing that final termination of the action has occurred seems more
514 reasonable.

515 Alternatively, as reflected in at least one local rule, the clerk could be directed to destroy
516 the sealed materials after final termination of the action. That would also present the monitoring
517 problem mentioned just above.

518 It is worth noting that these proposals have also prompted at least one submission opposing
519 adoption of any such provisions. See 21-CV-G from the Lawyers for Civil Justice, arguing that
520 such amendments would unduly limit judges' discretion regarding confidential information,
521 conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

522 Discussions during the Advisory Committee's October 2023 meeting stressed the reality
523 that many litigations involve highly confidential technical and competitive information; making
524 filing under seal more difficult could prove very troublesome.

525 But attorney members of the committee stressed the extreme variety of practices in
526 different districts, sometimes making the lawyers' work much more difficult. Some districts have
527 very elaborate local provisions on filing under seal, and others have few or almost no provisions
528 dealing with the topic. But it was also noted that this divergence might in some instances reflect
529 the sorts of cases that are customary in different districts. There was discussion of the tension

530 between recognizing the need for local latitude in dealing with handling these problems and also
531 recognizing that concerns about perceptions of excessive sealing of court records have continued.

532 Suggestions during the Advisory Committee meeting included trying to consult with
533 districts that have particular views on these subjects and ensuring that clerk’s offices are involved
534 because they are “essential players” in the day-to-day handling of such problems. The Advisory
535 Committee welcomes reactions from the Standing Committee on this project.

536 Links to some of the submissions received on this topic (often lengthy) are below:

537 Suggestion 22-CV-A (Sedona Conference): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/sedona-conference-22-cv)
538 [policies/archives/suggestions/sedona-conference-22-cv](https://www.uscourts.gov/rules-policies/archives/suggestions/sedona-conference-22-cv)

539 Suggestion 21-CV-T (Knight First Amendment Institute at Columbia University):
540 <https://www.uscourts.gov/rules-policies/archives/suggestions/sedona-conference-22-cv>

541 Suggestion 21-CV-G (Lawyers for Civil Justice): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/lawyers-civil-justice-21-cv-g)
542 [policies/archives/suggestions/lawyers-civil-justice-21-cv-g](https://www.uscourts.gov/rules-policies/archives/suggestions/lawyers-civil-justice-21-cv-g)

543 Suggestion 20-CV-T (Prof. Volokh and Reporters Committee for Freedom of the Press):
544 [https://www.uscourts.gov/rules-policies/archives/suggestions/eugene-volokh-reporters-](https://www.uscourts.gov/rules-policies/archives/suggestions/eugene-volokh-reporters-committee-freedom-press-and-electronic)
545 [committee-freedom-press-and-electronic](https://www.uscourts.gov/rules-policies/archives/suggestions/eugene-volokh-reporters-committee-freedom-press-and-electronic)

546 (3) Cross-border discovery: Judge Michael Baylson (E.D. Pa.), a former member of the
547 Advisory Committee, submitted 23-CV-G. Since submitting that proposal, he and Professor
548 Gensler (another former member of this Committee) have prepared an article published in
549 *Judicature* entitled “Should the Federal Rules Be Amended to Address Cross-Border Discovery?”
550 A link to the *Judicature* article is provided below. It proposes that the Committee “initiate a project
551 to examine how the Civil Rules might be amended to better guide judges and attorneys through
552 the cross-border discovery maze.”

553 The Sedona Conference has submitted a letter in support of this project (23-CV-H), citing
554 three of its publications: The Sedona Conference International Principles of Discovery, Disclosure
555 & Data Protection (December 2011); The Sedona Conference International Litigation Principles
556 on Discovery, Disclosure & Data Protecting in Civil Litigation (Transitional Edition) (January
557 2017); and The Sedona Conference Commentary and Principles on Jurisdictional Conflicts Over
558 Transfers of Personal Data Across Borders (April 2020).

559 During the Advisory Committee’s October 2023 meeting, Judge Baylson made a
560 presentation about the growing importance of these issues. U.S.-style discovery is unknown in the
561 rest of the world, and attitudes about privacy and confidentiality also differ in other countries. The
562 Hague Convention offers methods that for obtaining evidence outside the U.S. that many American
563 lawyers consider unduly difficult. But sometimes it may be considerably more efficient to take a
564 collaborative approach to obtain evidence from abroad.

565 At the same time, it was clear that this would be a major undertaking. Indeed, it was
566 suggested that it might not be limited to discovery and evidence-gathering; attention might also
567 focus on Rule 44.1, dealing with proof of foreign law, and perhaps also service of process.

568 During the Advisory Committee meeting, a new subcommittee was appointed to undertake
569 this project. The Chair will be Judge Manish Shah (N.D. Ill.), and includes Magistrate Judge
570 Jennifer Boal (D. Mass.), Professor Zachary Clopton, Joshua Gardner (DOJ), and Bankruptcy
571 Judge Catherine McEwen (liaison to the Bankruptcy Rules Committee). Reactions from the
572 Standing Committee would be welcome.

573 Some background may be helpful for Committee members:

574 The Hague Convention, 28 U.S.C. § 1781: One starting point is the Hague Convention on
575 Taking Evidence Abroad. It was drafted in the 1960s, and the U.S. became a party in 1972. The
576 goal was to facilitate and regularize the taking of evidence in one country for use before the courts
577 of another country. But it also had built-in constraints. Of particular importance, it authorized
578 countries that joined the Convention also to adopt “blocking statutes” to prevent certain types of
579 discovery on their soil, in part because U.S. discovery is so much broader than parallel evidence-
580 gathering in the rest of the world. The basic point is that U.S. discovery is unique in the world.
581 Some might view U.S. discovery as an “imperialistic” endeavor.

582 For some time after 1972, many American federal courts were presented with arguments
583 that they would have to use the Convention discovery methods rather than those provided by the
584 Federal Rules to obtain cross-border discovery. There were counter-arguments that the
585 Convention’s procedures were cumbersome and slow, so that ordinary American discovery was
586 preferable. In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522
587 (1987), the Supreme Court essentially rejected the requirement of first resort to the Convention
588 procedures and directed that federal courts evaluate a number of factors in deciding whether to use
589 the Convention or ordinary American discovery. Justice Blackmun partially dissented, arguing
590 that comity principles should counsel greater deference to the Convention practices. But over the
591 years many American lawyers have argued that the Convention is costly and slow.

592 Insisting on discovery American style could present serious problems. On that, consider a
593 pre-Convention case, *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), in which a Swiss
594 company suing in the U.S. faced dismissal as a sanction for failure to produce documents it said
595 Swiss law forbade it to produce. The Supreme Court regarded this outcome as raising Due Process
596 issues, because it seemed that the company could not comply with the American production order
597 without violating Swiss criminal law.

598 Blocking statutes could produce the same sort of problem if they blocked evidence
599 collection needed for American litigation. Some experience suggests that a collaborative approach
600 could be more efficient and effective. An example is *Salt River Project Agricultural Improve. &*
601 *Power Dist. v. Trench France SAS*, 303 F.Supp.3d 1004 (D. Ariz. 2018), a decision by Judge David

602 Campbell, a former Discovery Subcommittee Chair, Advisory Committee Chair, and Standing
603 Committee Chair.

604 In that case, there were two defendants, one from France, which has adopted a blocking
605 statute, and a related corporate entity from Canada. Plaintiff sought production of a variety of
606 materials from both defendants. The French defendant took the initiative to have its production
607 handled under the Convention, urging the appointment of a private attorney in France as
608 “commissioner” to oversee the production in France. It pointed out “it would violate the French
609 Blocking Statute if it produced these documents and ESI outside of Hague Convention
610 procedures.” That could subject the company to up to six months imprisonment and a fine of up
611 to 90,000 Euros. The French company also made a showing that the actual commissioner process
612 could move efficiently and quickly, and that the Canadian company would produce most (but not
613 all) of the documents it would produce without the need to use Convention procedures, making
614 production by the French defendant less important.

615 Plaintiff opposed the motion, but Judge Campbell granted it, invoking the *Aerospatiale*
616 factors. This seems an eminently sensible result, and much to be preferred to some sort of face-off
617 between the American courts and the French sovereignty concerns. Judge Baylson had a similar
618 experience in a litigation over which he presided.

619 So it may be that some provision in the Civil Rules stimulating such a balanced approach
620 would pay dividends. On the other hand, some might say that such a provision would not be a real
621 “rule.” For a rule to say a court must always make first use of the Convention seems to run against
622 the main holding of *Aerospatiale*, and (as with Judge Campbell’s decision) the choice whether to
623 turn first to the Convention would seem to depend on the factors outlined by the Supreme Court
624 in that case.

625 In 1988, an amendment proposal to provide direction for the federal courts’ handling of
626 discovery for use in American cases was published for public comment. After the public comment
627 period was completed, the proposal was revised, approved by the Standing Committee and the
628 Judicial Conference and sent to the Supreme Court for its review. While the proposal was before
629 the Court, the Department of State transmitted a set of objections from the United Kingdom to the
630 Court. The Court then returned the proposed amendments to the rulemakers for further review,
631 and no further action occurred at that time.

632 This is relatively ancient history. Since 1990, very great changes have occurred in cross-
633 border litigation, and the advent of the Digital Age and E-Discovery mean that the importance and
634 implications of Hague Convention procedures may be viewed differently.

635 28 U.S.C. § 1782: U.S. discovery for use in proceedings abroad: A companion statute, 28
636 U.S.C. § 1782, authorizes U.S. discovery to provide evidence for use in “a proceeding in a foreign
637 or international tribunal” if the person from whom discovery is sought “resides or is found” in the
638 district in which discovery is sought. According to Yanbai Andrea Wang, Exporting American

639 Discovery, 87 U. Chi. L. Rev. 2089 (2020), there has been a very considerable uptick in the use of
640 this statute during the 21st century.

641 It seems that this statute was intended to some extent to prompt other countries to relax
642 their limitations on obtaining evidence. Some developments suggest that other countries are
643 relaxing their previous antagonism toward discovery. An example might be found in the
644 ELI/UNIDROIT Model European Rules of Civil Procedure (2020), which recognize a right for
645 parties to obtain evidence.

646 As with § 1781, the lower courts entertained a variety of limiting interpretations of this
647 statute. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court
648 gave a relatively broad reading to the statute and, as with § 1781, emphasized that district courts
649 have to use sound discretion in deciding whether to grant applications for discovery under this
650 statute. It held that the petitioner in the case was an “interested person” able to utilize the discovery
651 provisions even though it was not a formal party to the foreign proceeding. It took a broad view of
652 what is a foreign “tribunal” to include the European Commission (though a private arbitration did
653 not qualify as a “proceeding in a foreign or international tribunal”).

654 One significant limitation under § 1782 is that the party subject to American discovery
655 must be “found” in the district in which the discovery order is sought. Since 2011, the Supreme
656 Court has taken a cautious attitude toward “general jurisdiction” with regard to corporate parties.
657 But the Second Circuit has held that being “found” in the district under § 1782 is broader than the
658 “general jurisdiction” concept applied for purposes of due process limits on personal jurisdiction.
659 *See In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019); *see also In re Eli Lilly & Co.*, 37 F.4th 160
660 (4th Cir. 2022).

661 Link to *Judicature* article: [https://judicature.duke.edu/articles/should-the-federal-rules-of-](https://judicature.duke.edu/articles/should-the-federal-rules-of-civil-procedure-be-amended-to-address-cross-border-discovery/)
662 [civil-procedure-be-amended-to-address-cross-border-discovery/](https://judicature.duke.edu/articles/should-the-federal-rules-of-civil-procedure-be-amended-to-address-cross-border-discovery/)

663 C. Rule 7.1 Subcommittee

664 The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, was appointed at the
665 March 2023 Advisory Committee meeting to consider a rule amendment that would better
666 inform judges of circumstances that might trigger the statutory duty to recuse. The issue came to
667 the Committee in the form of two suggestions, one from Judge Erickson (8th Cir.) (22-CV-H)
668 and another from Magistrate Judge Barksdale (M.D. Fla.) (22-CV-F). Broadly, both proposals
669 seek to address concerns that current Rule 7.1 inadequately appraises district judges of a potential
670 financial interest in a case that would require recusal. Although a workable revision of the rule
671 will be a challenging task, the Committee has concluded that the “real-world” nature of this
672 problem is cause for the Subcommittee to investigate possible amendments.

673 Current Rule 7.1(a) reads:

674 Rule 7.1 Disclosure Statement

675 **(a) Who Must File; Contents.**

676 **(1) Nongovernmental Corporations.** A nongovernmental corporate party or a
677 nongovernmental corporation that seeks to intervene must file a statement that:

678 **(A)** identifies any parent corporation and any publicly held corporation owning
679 10% or more of its stock; or

680 **(B)** states that there is no such corporation.

681 The purpose of Rule 7.1(a), drawn from Rule 26.1 of the Federal Rules of Appellate
682 Procedure, is to provide district judges with the information necessary to comply with the recusal
683 statute, 28 U.S.C. § 455(b)(4). The statute provides that a judge “shall” recuse when:

684 He knows that he, individually or as a fiduciary, or his spouse or minor child
685 residing in his household, has a financial interest in the subject matter in
686 controversy or in a party to the proceeding, or any other interest that could be
687 substantially affected by the outcome of the proceeding[.]

688 The statute defines “financial interest” as “ownership of a legal or equitable interest, however
689 small, or a relationship as director, adviser, or other active participant in the affairs of a party,”
690 with exceptions for mutual funds and other investment vehicles not central to our efforts. *Id.* §
691 455(d)(4). The language of § 455(b)(4) is echoed in the Code of Conduct for United States
692 Judges, Canon 3C(1)(c).

693 Generally speaking, the concern is that the required Rule 7.1(a) disclosure is insufficient
694 to make judges aware that they may need to recuse, since the rule requires disclosure of only a
695 parent or publicly held corporation that holds 10% or more of stock. As the Committee Note to
696 Rule 7.1 explains, “the information required by Rule 7.1(a) reflects the ‘financial interest’
697 standard of Canon 3C(1)(c) [and] will support properly informed disqualification decisions.” But
698 the recusal statute and canon provide a different governing standard than the Rule, requiring
699 recusal if the judge has a financial interest “however small” in the “subject matter in controversy
700 or in a party to the proceeding, or any other interest that could be substantially affected by the
701 outcome of the proceeding.” 28 U.S.C. § 455(b)(4). The recusal statute therefore potentially
702 covers significantly more than a financial interest in a parent of a party, or in a 10%+ owner of
703 shares in a party.

704 The two proposals the Committee received seek to address this gap between what must
705 be disclosed and what would require disclosure in different ways. Judge Erickson’s proposal
706 suggests requiring disclosure of “grandparent” corporations in which judges may hold interests.
707 For instance, Berkshire Hathaway owns several companies that may control other corporate
708 parties, but because Berkshire is not the “parent” that relationship is not required to be disclosed,
709 meaning that judges who own shares of Berkshire may find themselves in the dark about whether
710 they must recuse. We have been informally referring to relative opacity of a judge’s ownership

711 interest in a corporation that in turn owns an interest in a subsidiary that, in further turn, owns an
712 interest in a party to a case as the “grandparent problem,” though it may also apply to great-
713 grandparents, and so on.

714 Magistrate Judge Barksdale’s proposal takes a different tack by suggesting amendment of
715 Rule 7.1(a) to require parties to check judges’ “publicly available financial disclosures and, if a
716 conflict or possible conflict exists, [] file a motion to recuse or a notice of a possible conflict
717 within 14 days of filing the disclosure.” At both the March 2023 Committee meeting, the
718 Subcommittee’s first meeting, and the October 2023 Committee meeting, there was a general
719 consensus that this proposal may eventually hold promise but that currently the relevant database
720 represents only a snapshot of a judge’s holdings at one moment in time, in the prior year, and it
721 may thus be out of date by the time of any particular litigation. Moreover, conflicts-check
722 systems currently in use in the district courts are thought to be reasonably effective at checking
723 Rule 7.1 disclosures against judicial financial disclosures. Ultimately, the Committee concluded
724 that a rule amendment that would broaden the disclosure obligation has more promise at the
725 present time.

726 Notably, Rule 7.1(a) has never been intended to comprehensively inform judges of *all*
727 instances where recusal is required; the Committee Note explains that the Rule is instead
728 “calculated to reach a majority of the circumstances that are likely to call for disqualification on
729 the basis of financial information that a judge may not know or recollect.” Moreover, the Judicial
730 Conference Committee on Codes of Conduct acknowledges as much in its formal advisory
731 opinion (no. 57) interpreting Canon 3C(1)(c), which explains that “when a judge knows that a
732 party is controlled by a corporation in which the judge owns stock, the judge should recuse,” and
733 that “the 10% disclosure requirement . . . is a benchmark measure of parental control for recusal
734 purposes.” But financial interest in a parent that “controls” a party is a much narrower category
735 than the “any financial interest” standard embodied in the recusal statute.

736 Although it seems clear that Rule 7.1 could go further, the challenge comes in defining
737 what disclosures may reasonably be required. This is not a new problem. As the current
738 Committee Note explains:

739 Although the disclosures required by Rule 7.1(a) may seem limited, they are
740 calculated to reach a majority of the circumstances that are likely to call for
741 disqualification on the basis of financial information that a judge may not know or
742 recollect. Framing a rule that calls for more detailed disclosure will be difficult.
743 Unnecessary disclosure requirements place a burden on the parties and on courts.
744 Unnecessary disclosure of volumes of information may create a risk that a judge
745 will overlook the one bit of information that might require disqualification, and also
746 may create a risk that unnecessary disqualifications will be made rather than
747 attempt to unravel a potentially difficult question. It has not been feasible to dictate
748 more detailed disclosure requirements in Rule 7.1(a).

749 Arguably, this challenge has only gotten more difficult in a commercial landscape that includes
750 many large actors that do not fall into the category of “nongovernmental corporations,” such as
751 LLCs, limited partnerships, and other business associations. Moreover, the current disclosure
752 requirement is limited to parent corporations and publicly traded corporations owning 10% or
753 more of a party. Of course, there may be entities that hold a substantial interest in a party that are
754 neither. And, as was raised at the last Committee meeting, the increasing prevalence of third-
755 party litigation funding (especially by entities that also engage in other business) may also serve
756 to create interests in the litigation of which a judge is not aware.

757 Despite the challenges, the Subcommittee has some leads on going forward, including
758 many local-rule variations. Under Rule 83, districts may craft their own local rules on disclosure,
759 so long as they are not inconsistent with Federal Rules. Former Rules Law Clerk Christopher
760 Pryby prepared an excellent and comprehensive memo cataloging all of the local rules (a link to
761 which follows) detailing the local rules in this area. 50 of 94 districts have local rules on this
762 subject, and they take, roughly, three approaches to augmenting the required disclosures: (1)
763 expanding the categories of entities to be disclosed to other possibilities, such as “persons,
764 associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent
765 or subsidiary corporations, or other legal entities that are financially interested in the outcome of
766 the case,” as in the Northern District of Texas; (2) requiring disclosure of entities owning a
767 smaller percentage of a party’s stock, such as 5%, which is the figure used in the Northern
768 District of Illinois; and (3) requiring disclosure of particular defined financial relationships, such
769 as an insurer, as in the Central District of California, or third-party litigation funder, as in the
770 District of New Jersey.

771 This is, of course, a non-exclusive list. Both the efficacy of these various local rules, and
772 courts’ and parties’ experience under them, may be subjects for further investigation. States also
773 have their own creative approaches to this problem, and further research into those may be
774 warranted. Whether these approaches lead to better information and more accurate application of
775 the recusal statute than current Rule 7.1 is an open question, as is whether the gains in
776 information further disclosure requirements would provide justifies the additional burdens placed
777 on parties to comply with them. The Subcommittee intends to engage in further study and
778 outreach in the coming months.

779 Finally, it is important to note that the Advisory Committee is not acting in a vacuum.
780 The Judicial Conference Codes of Conduct Committee is considering revisions to its guidance.
781 The Advisory Committee has connected with the Codes of Conduct Committee, which has
782 indicated that we should not delay our investigation of potential amendments. There is also
783 Congressional activity in the form of a bill sponsored by Sen. Warren (which in part echoes a bill
784 that failed to gain traction in the prior Congress). The Judicial Ethics and Anti-Corruption Act of
785 2023 (S. 1908) would bar a justice or judge from owning any interest in any security, trust,
786 commercial real estate, or privately held company, with exceptions for mutual funds and
787 government (or government-managed) securities. The legislation would also require justices and
788 judges to “maintain and submit to the Judicial Conference a list of each association or interest

789 that would require the justice, judge, or magistrate to be recused” and “any financial interests of
790 the judge, the spouse of the judge, or any minor child of the judge residing in the household of
791 the judge.” The bill has been referred to the Judiciary Committee and future action is uncertain,
792 but continued legislative attention is likely.

793 In the meantime, the Subcommittee intends to proceed forward in its research and
794 develop possible amendment language, and it would be eager to hear any feedback from the
795 Standing Committee.

796 Link to Rules Law Clerk August 27, 2023 memo:
797 [https://www.uscourts.gov/sites/default/files/2023-](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=220)
798 [10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=220](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=220)

799 **II. Other topics under consideration**

800 **A. Random assignment of cases**

801 The Advisory Committee has received several suggestions to consider rulemaking
802 regarding civil case assignment in the district courts. Attention to this issue has increased in
803 recent years due to concerns that in high-profile cases, especially cases seeking nationwide
804 injunctions against executive action, plaintiffs are engaged in a more precise form of forum
805 shopping that facilitates selecting a potentially favorable individual judge.

806 Forum shopping is, of course, a perennial concern and, to some degree, an inevitability.
807 But in most cases choosing a favorable forum does not guarantee a particular judge. Some case-
808 assignment methods, however, facilitate more precise “judge-shopping,” particularly in “single-
809 judge divisions” of a district court. In some districts, if a case is properly filed in a division of a
810 district court with a single sitting judge, then a plaintiff may be virtually guaranteed that her case
811 will be assigned to that judge, at least in the first instance. Professor Amanda Shanor, of the
812 Wharton School at the University of Pennsylvania, and the Brennan Center For Justice at NYU
813 School of Law, have suggested a new rule such that “[i]n cases where a plaintiff seeks injunctive
814 or declaratory relief that may extend beyond the district in which the case is filed, districts shall
815 use a random or blind assignment procedure to assign the cases among the judges in that
816 district.” (23-CV-U, linked below)

817 Beyond this suggestion, there is significant interest in this issue from multiple quarters.
818 On July 10, 2023, nineteen U.S. Senators wrote Judge Rosenberg a letter, linked below,
819 expressing concerns that in some districts “plaintiffs can effectively choose the judge who will
820 hear their cases due to local court rules governing how matters are assigned.” Moreover, in
821 August 2023, the American Bar Association adopted its Resolution 521, linked below, which
822 “urges federal courts to eliminate mechanisms that predictably assign cases to a single United
823 States District Judge . . . when such cases seek to enjoin or mandate the enforcement of a state or
824 federal law or regulation.” In such instances, the ABA proposes that these cases be “made
825 randomly and on a district-wide rather than a division-wide basis.” And both the House and

826 Senate Judiciary Committees have held hearings on the issues related to nationwide injunctions
827 and forum shopping. In sum, these matters are of significant current public concern.

828 At its October meeting, the Advisory Committee preliminarily considered these questions
829 and defined some areas for additional study.

830 An initial question is whether the Rules Enabling Act provides authority to address
831 assignment of judicial business. Currently, case assignment is a matter delegated by statute to
832 the districts. 28 U.S.C. § 137 states that “[t]he business of a court having more than one judge
833 shall be divided among the judges as provided by the rules and orders of the court.” Other
834 statutory provisions contain considerable detail about the divisions of district court, which may
835 sometimes be a reason why a plaintiff can be confident in a given division that the case will be
836 assigned to a particular judge. See 28 U.S.C. §§ 81-131. Since the focus of recent concerns
837 seems to be on divisions rather than entire districts, the detail of these statutory provisions raises
838 issues about whether a national rule can require a reallocation of business among divisions of a
839 district court, and whether Congress has demonstrated that it considers such questions beyond
840 scope of rulemaking.

841 This is not to say that the rules process is clearly unable to address these concerns.
842 Although § 137 has long provided that the districts divide their business among judges
843 themselves, a rule might properly supersede the statute by virtue of the Enabling Act’s
844 supersession clause, so long as it is a “general rule[] of practice and procedure” and does not
845 “abridge, enlarge, or modify any substantive right.” 28 U.S.C. § 2072. There is likely a good
846 argument that a rule about allocation of judicial business is a matter of procedure amenable to
847 rulemaking, and, if so, a rule would supersede § 137. That said, that authority was largely
848 intended to counter arguments in the 1930s and 1940s that the multitude of then-existing
849 statutory provisions dealing with topics addressed in the new rules could hamstring the new rules
850 in their infancy. At the October meeting, the Committee assigned the reporters to research the
851 history and past precedent involving case assignment and the supersession clause. This research
852 is ongoing.

853 Assuming authority to engage in rulemaking, the subsequent question would be whether
854 case assignments are best handled by Civil Rule. Both the agenda book and discussion at the
855 October meeting suggested some reasons for caution.

856 For instance, the flexibility that § 137 provides enables districts to tailor their assignment
857 policies to their particular needs, and intrusion in this area might be problematic. Preliminary
858 research reveals that districts have adopted a wide variety of methods for assigning cases
859 according to their needs. Several committee members expressed concerns about imposing a
860 uniform rule on districts that vary significantly in size and culture. While in some districts,
861 particularly those that are geographically smaller, local rules embrace random assignment to
862 judges across several divisions, in other districts, particularly geographically larger ones with
863 many divisions, cases are assigned to the judge or judges sitting in the divisions where cases are

864 filed. One advantage of this approach that is especially salient in expansive districts (such as
865 large states with a single district court) is that it increases both the likelihood that the forum is
866 convenient, ensuring access to justice in rural areas, and that the judge and jury pool are
867 connected to the community from which the controversy arose.

868 A different example is the Northern District of California, which uses district-wide
869 random assignment for patent, trademark, and copyright cases, and securities class actions. One
870 reason for this arrangement might be that judges in the San Jose Division (next to Silicon Valley)
871 might bear a very disproportionate portion of the district's workload were all cases brought by or
872 against Silicon Valley companies assigned to that division. Beyond these examples, the districts
873 have myriad approaches to related-case assignments, magistrate-judge assignments, and
874 assignments of specific types of cases.

875 Should work progress toward drafting rule language, the Committee will have to pay
876 significant attention to the scope of the rule and potential downstream effects. The
877 Shanor/Brennan Center proposal suggests application of a rule to cases seeking “injunctive or
878 declaratory relief that may extend beyond the district where the case is filed,” while the ABA
879 Resolution proposes random assignment when “cases seek to enjoin or mandate the enforcement
880 of a state or federal law or regulation.” These proposals illustrate only two of the directions a rule
881 could take and the challenge of designing a rule that defines exactly what kind of forum
882 shopping should be prohibited, and on what grounds. Both proposals are animated by the
883 problem of nationwide injunctions, but the first may be much broader (in that it captures cases
884 that fall outside of that category) while the second may be narrower (in that it may not capture
885 other kinds of cases that implicate the same problem beyond those challenging federal or state
886 law, such as judge-shopping in patent cases). Ultimately, in crafting a rule, the task will be to
887 match up the rule’s application to the problem it seeks to solve, and then to examine whether the
888 predicted effects will be positive. As a matter of order of operations, this inquiry would follow a
889 determination that there is a solid case for rulemaking authority.

890 Aside from the impact of reducing the current flexibility afforded the district courts, the
891 committee noted other areas for further investigation, such as appropriately defining the cases
892 affected by a rule, whether the rule would unduly interfere with statutes governing venue, and
893 whether such a rule ought to apply to magistrate judges. Further study of the many approaches in
894 the districts, including the degree to which some districts are addressing the question of divisions
895 with only one or a few judges, will inform additional investigation of these matters.

896 Given the importance of this issue, the Committee concluded that it should remain high
897 on its agenda, with initial focus on the question of rulemaking authority. Input from the Standing
898 Committee would be especially welcome on this question, or any other aspects of this issue.

899 Suggestion 23-CV-U (Prof. Shanor and Brennan Center for Justice):
900 [https://www.uscourts.gov/rules-policies/archives/suggestions/prof-amanda-shanor-and-](https://www.uscourts.gov/rules-policies/archives/suggestions/prof-amanda-shanor-and-brennan-center-justice-23-cv-u)
901 [brennan-center-justice-23-cv-u](https://www.uscourts.gov/rules-policies/archives/suggestions/prof-amanda-shanor-and-brennan-center-justice-23-cv-u)

902 Link to July 10, 2023 letter to Judge Rosenberg:
903 [https://www.uscourts.gov/sites/default/files/2023-](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=313)
904 [10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=313](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=313)

905 Link to ABA Resolution 521: [https://www.uscourts.gov/sites/default/files/2023-](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=318)
906 [10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=318](https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=318)

907 **B. Rule 81(c) – Demands for jury trial in removed cases**

908 Submission 15-CV-A from Nevada attorney Mike Wray, received in 2015, focused on a
909 change of verb tense made by the 2007 Style Project. When this submission was initially presented
910 to the Standing Committee at its June 2016 meeting, two members of that Committee (then-Judge
911 Gorsuch and Judge Graber) proposed that problems of loss of the right to jury trial due to failure
912 to make a timely demand for jury trial might be solved by amending Rule 38 to provide that there
913 is always a right to jury trial unless all parties and the judge agree to a court trial. Considerable
914 FJC research indicated that the requirements of Rule 38 did not often impede access to jury trial.
915 And the Rule 38 suggestion was removed from the Advisory Committee’s agenda.

916 That left the question of whether the original submission provided a basis for amending
917 Rule 81(c). The Style Project change that prompted the Rule 81(c) submission is presented below:

918 RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

919 **(c) Removed Actions.**

920 **(1) *Applicability.*** These rules apply to a civil action after it is removed from a state
921 court.

922 * * *

923 **(3) *Demand for a Jury Trial.***

924 **(A) *As Affected by State Law.*** A party who, before removal, expressly
925 demanded a jury trial in accordance with state law need not renew the
926 demand after removal. If the state law ~~does~~ did not require an express
927 demand for a jury trial, a party need not make one after removal unless the
928 court orders the parties to do so within a specified time. The court must so
929 order at a party’s request and may so order on its own. A party who fails to
930 make a demand when so ordered waives a jury trial.

931 **(B) *Under Rule 38.*** If all necessary pleadings have been served at the time of
932 removal, a party entitled to a jury trial under Rule 38 must be given one if
933 the party serves a demand within 14 days after:

- 934 (i) it files a notice of removal; or
- 935 (ii) it is served with a notice of removal filed by another party.

936 Neither the records of the Style Project nor the recollections of the Reporters suggest that
937 this change in verb tense was meant to affect the application of the rule; the Committee Note to
938 the style changes makes no mention of the change in verb tense.

939 But one might nevertheless regard the rule change as altering the meaning of the rule.
940 Before the change (using “does”) the rule seemed pretty clearly to say that the jury demand must
941 be made within 14 days unless the state court system from which the case was removed *never*
942 required a jury demand, perhaps the case if the state court had a jury demand setup like the
943 Gorsuch/Graber amendment proposal.

944 That was how the Ninth Circuit viewed the rule in 1983. In *Lewis v. Time, Inc.*, 710 F.2d
945 549 (9th Cir. 1983), the court applied Rule 81(c) as then written to require a demand for jury trial
946 within the time specified in Rule 38(b)(1) (*id.* at 556):

947 Lewis did not request a jury trial before his case was removed from California state court.
948 Under California law, a litigant waives trial by jury by, *inter alia*, failing to “announce that
949 one is required” when the trial is set. Cal. Civ. Proc. Code §§ 631, 631.01. (West 1982
950 Supp.). We understand that to mean that an “express demand” is required. Therefore, F.R.
951 Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand “not later
952 than 10 days after the service of the last pleading directed to such issue [to be tried].”
953 Failure to file within the time provided constituted a waiver of the right to trial by jury.
954 Rule 38(d).

955 If the change to “did” means that a demand within 14 days of removal is required only
956 when the time to demand a jury trial has already arrived in the state court proceeding, that could
957 mean that Rule 81(c) would not require a jury demand very often. Usually removal must occur
958 very early in the case, so the jury trial demand would not have been triggered in a system like the
959 one in California. According to Mr. Wray, the district courts in California nevertheless continued
960 to apply the rule as interpreted in the 1983 case. A number of Advisory Committee members
961 thought this change could prompt failure to make a timely jury demand.

962 Accordingly, one solution would be to amend the rule so that it again reads as it did before
963 2007. Alternatively, it might be clarified along the following lines:

964 **RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS**

965 **(c) Removed Actions.**

966 **(1) *Applicability.*** These rules apply to a civil action after it is removed from a state
967 court.

968

* * *

969 **(3) *Demand for a Jury Trial.***

970 **(A) *As Affected by State Law.*** A party who, before removal, expressly
971 demanded a jury trial in accordance with state law need not renew the
972 demand after removal. If the state law ~~does~~ did not require an express
973 demand for a jury trial, a party need not make one after removal unless the
974 court orders the parties to do so within a specified time. The court must so
975 order at a party’s request and may so order on its own. A party who fails to
976 make a demand when so ordered waives a jury trial.

977 **(B) *Under Rule 38.*** If all necessary pleadings have been served at the time of
978 removal, a party entitled to a jury trial under Rule 38 must be given one if
979 the party serves a demand within 14 days after:

- 980 (i) it files a notice of removal; or
981 (ii) it is served with a notice of removal filed by another party.

982 The Advisory Committee expects to return to this issue at its April 2024 meeting. Reactions
983 or guidance from the Standing Committee would be welcome.

984 Suggestion 15-CV-A (Mark Wray): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/mark-wray-15-cv)
985 [policies/archives/suggestions/mark-wray-15-cv](https://www.uscourts.gov/rules-policies/archives/suggestions/mark-wray-15-cv)

986 **III. Other topics that remain on agenda but are not focus of current work**

987 **A. Rule 62(b) – notice of premium for security bond**

988 This matter came to the Civil Rules Committee on referral from the Appellate Rules
989 Committee, which has prepared a set of proposed amendments to Appellate Rule 39 that are now
990 out for public comment through February 2024.

991 These proposed amendments to the Appellate Rules clarify Rule 39 and some of its
992 terminology, such as replacing the word “taxed” with the word “allocated.” As amended, Rule
993 39(a) contains the same basic provisions as current Rule 39(a).

994 But the amendments introduce in a new Appellate Rule 39(b) motion for reconsideration
995 of costs:

996 **(b) Reconsideration.** Once the allocation of costs is established by the entry of
997 judgment, a party may seek reconsideration of that allocation by filing a motion in
998 the court of appeals within 14 days after the entry of judgment. But issuance of the
999 mandate under Rule 41 must not be delayed awaiting a determination of the motion.

1000 The court of appeals retains jurisdiction to decide the motion after the mandate
1001 issues.

1002 As under current Appellate Rule 39(e)(3), costs taxable in the district court include
1003 “premiums paid for a bond or other security to preserve rights pending appeal.”

1004 The Rule 62 issue was explained in the Appellate Rules Committee’s report to the Standing
1005 Committee for the June 2023 Standing Committee meeting (agenda book at 76):

1006 The Advisory Committee was unable to come up with a good way to make sure
1007 that the judgment winner in the district court is aware of the cost of the supersedeas
1008 bond early enough to ask the court of appeals to reallocate the costs. Allowing a
1009 party to move for reallocation in the court of appeals after the bill of costs is filed
1010 in the district court would mean that both courts are dealing with the same costs
1011 issue at the same time. Creating a long period to seek reallocation in the court of
1012 appeals would mean that the case would be less fresh in the judges’ minds and begin
1013 to look like a wholly separate appeal. Requiring disclosure in the bill of costs filed
1014 in the court of appeals would be odd because those costs are not sought in the court
1015 of appeals. Plus, a party might forego the relatively minor costs taxable in the court
1016 of appeals and care only about costs taxable in the district court. It would be
1017 possible to have the court of appeals tax the costs itself, but that would be a major
1018 departure from the principle, endorsed by the Supreme Court in [*City of San*
1019 *Antonio v. Hotels.com*], that the court closest to the cost should tax it.

1020 For this reason, the Appellate Rules Committee believes that the easiest and most
1021 obvious time for disclosure is when the bond is before the district court for
1022 approval. It has requested the Civil Rules Committee to consider amending Civil
1023 Rule 62 to require that disclosure.

1024 In *City of San Antonio v. Hotels.com, L.P.*, 141 S.Ct. 1628 (2021), the Court unanimously
1025 held that under Appellate Rule 39 the district court has no authority to decline to tax the entire cost
1026 of a bond on the party that won in the district court but lost in the court of appeals.

1027 Ordinarily this is probably not a major concern, but in the *Hotels.com* case it was a major
1028 concern because the costs taxed in the district court totalled more than \$2.3 million. The underlying
1029 lawsuit was a class action brought by San Antonio on behalf of a class of 173 Texas municipalities
1030 against a number of online travel companies (OTCs) that plaintiffs alleged had been systematically
1031 underpaying hotel occupancy taxes by using wholesale rather than retail rates for hotel rooms.
1032 After a jury trial, the district court entered judgment for \$55 million in favor of plaintiffs. That led
1033 to a negotiation about supersedeas bonds (*id.* at 1632):

1034 The OTCs quickly sought to secure supersedeas bonds to stay the judgment. They
1035 negotiated with San Antonio over the terms of the bonds, and the city ultimately
1036 supported the OTCs’ efforts to stay the judgment with supersedeas bonds totaling

1037 almost \$69 million, an amount that was calculated to cover the judgment plus 18
1038 months of interest and further taxes. The District Court approved the bonds, which
1039 were subsequently increased at San Antonio’s urging to cover what grew to be an
1040 \$84 million judgment after years of post-trial motions.

1041 The court of appeals reversed, and defendants then filed a bill of costs in the court of
1042 appeals totaling \$905.60 to cover the appellate docket fee and the cost of printing filings in the
1043 court of appeals. There was no objection to these costs.

1044 In the district court, however, the OTCs filed a bill of costs for more than \$2.3 million,
1045 mainly to cover the premium on the supersedeas bond. San Antonio urged the district court to
1046 decline to award these costs on the ground that “the OTCs should have pursued alternatives to a
1047 supersedeas bond and that it was unfair for San Antonio to bear the costs for the entire class rather
1048 than just its proportional share of the judgment.” *Id.* at 1633. The district court declined San
1049 Antonio’s invitation on the ground it had no discretion to reallocate costs, and the court of appeals
1050 affirmed.

1051 The Supreme Court affirmed, reading Appellate Rule 39(a)(3) to refer to the court of
1052 appeals in directing that “if a judgment is reversed, costs are taxed against the appellee” unless
1053 “the court orders otherwise.” [Under the pending amendment proposal, new Rule 39(b) would
1054 presumably expressly provide a vehicle for such a request to the court of appeals.] San Antonio
1055 argued that the district court should have discretion to determine an equitable allocation of the
1056 costs, but the Supreme Court held that “Rule 39 gives discretion over the allocation of appellate
1057 costs to the courts of appeals.” *Id.* at 1634. As a consequence, “district courts cannot alter that
1058 allocation.” *Id.* at 1636.

1059 The published preliminary draft of proposed amendments to Appellate Rule 39 responds
1060 to this Supreme Court decision. The Committee Note begins: “The [*Hotels.com*] Court also
1061 observed that ‘the current Rules and the relevant statutes could specify more clearly the procedure
1062 that such a party [as San Antonio] should follow to bring their arguments to the court of appeals.’
1063 . . . The amendment does so.”

1064 But as noted above, the proposed Appellate Rule does not ensure that the party that lost on
1065 appeal after winning below is aware of the premium for the supersedeas bond at the time it must
1066 file its motion for reconsideration under new Appellate Rule 39(b). Under Rule 62(a), there is an
1067 automatic 30-day stay of execution, but unless a further stay is obtained under Rule 62(b) the
1068 judgment may be enforced thereafter.

1069 As suggested by the Appellate Rules Committee, a small change to Rule 62(b) could plug
1070 that gap:

1071 **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party
1072 may obtain a stay by providing a bond or other security. The party seeking the stay
1073 must disclose the premium [to be] paid for the bond or other security. The stay takes

1074 effect when the court approves the bond or other security and remain in effect for
1075 the time specified in the bond or other security.

1076 This amendment does not specify who is to receive this disclosure, but suggests that the
1077 court might consider the prospective premium in deciding whether to approve the security. As a
1078 general matter, assuming “gold plated” providers of security tend to charge higher premiums than
1079 “fly by night” providers of security, it might be odd for the judgment winner to try to persuade the
1080 district court to reject the high-priced security. But introducing the amount of the premium might
1081 occasionally produce tricky issues for district courts making Rule 62(b) decisions in some cases.

1082 One question is whether such an amendment is really needed. As the Supreme Court noted
1083 in *Hotels.com* (*id.* at 1636-37):

1084 Most appellate costs are readily estimable, rarely disputed, and frankly not large enough to
1085 engender contentious litigation in the great majority of cases. We recognize that
1086 supersedeas bond premiums are a bit of an outlier in that they can grow quite large. . . . But
1087 the underlying supersedeas bonds will often have been negotiated by the parties, as
1088 happened here. They will in any event have been approved by the district court, see Fed.
1089 Rule Civ. Proc. 62(b), and their premiums will have been paid by one of the parties to the
1090 appeal. There is no reason to think that litigants and courts will be forced to operate without
1091 any sense of the magnitude of the costs at issue. Indeed, San Antonio admits that it was
1092 largely aware of the costs of the bonds in this case when they were approved.

1093 So it may be that the predicament in which San Antonio found itself was a result of its
1094 expectation that it could pitch its arguments to the district court after the appellate reversal. Given
1095 the Supreme Court’s ruling that the district court has no such discretion in the face of Appellate
1096 Rule 39, that problem should not recur. The fact this was a class action, and it seems that San
1097 Antonio alone faced taxation for the premium presumably keyed to hotel taxes not paid to many
1098 other class members is another complicating factor in that case.

1099 But the Supreme Court recognized a solution: the losing party can ask the court of appeals
1100 to delegate the authority to allocate costs to the district court (*id.* at 1637):

1101 In all events, if a court of appeals thinks that a district court is better suited to
1102 allocate the appellate costs listed in Rule 39(e), the court of appeals may delegate
1103 that responsibility to the district court, as several Courts of Appeals have done in
1104 the pat. And nothing we say here should be read to cast doubt on that.

1105 It would seem that a motion under proposed Appellate Rule 39(b) could invite the court of appeals
1106 to do this rather than make its own allocation decision.

1107 Going forward, then, there may be no need for an amendment to Rule 62(b) because this
1108 is not likely to be a real problem, though amending the rule seems unlikely to produce a real
1109 problem, and it would respond to the suggestion of the Appellate Rules Committee.

1110 At its October 2023 meeting, the Advisory Committee discussed this possible amendment,
1111 and decided that it should remain on the Committee’s agenda but not the subject of immediate
1112 action. One significant matter is whether the amendment adding new Appellate Rule 39(b) goes
1113 into effect. If it does not, there may be no need for amending Rule 62(b). And in addition, it remains
1114 unclear how often appellees are unaware of the amount of the bond premium.

1115 Link to *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021):
1116 https://www.supremecourt.gov/opinions/20pdf/20-334_5h26.pdf

1117 **B. Rule 54(d)(2)(B) – Attorney fee awards for Social Security Appeals**

1118 Magistrate Judge Patricia Barksdale (M.D. Fla.) submitted 23-CV-L, which proposes that
1119 the Advisory Committee consider a rule amendment to deal with a timing problem in handling fee
1120 awards under 42 U.S.C. § 406(b). She calls attention to local rule changes being considered in the
1121 M.D. Fla. that might be a model for an amendment to Rule 54(d)(2)(B)(i), which requires generally
1122 that a motion for attorney’s fees must be made “no later than 14 days after the entry of judgment.”
1123 A link to the submission is provided below.

1124 Here is the local rule proposal:

1125 (e) ATTORNEY’S FEE IN A SOCIAL SECURITY CASE AFTER REMAND. No later than
1126 fourteen days after receipt of a “close out” letter, a lawyer requesting an attorney’s fee,
1127 payable from withheld benefits, must move for the fee and include in the motion:

- 1128 (1) the agency letter specifying the withheld benefits;
- 1129 (2) any contingency fee agreement; and
- 1130 (3) proof that the proposed fee is reasonable.

1131 The basic problem arises in connection with judicial review of decisions by the Social
1132 Security Administration (SSA) denying benefits. The fee award for in-court work by the attorney
1133 ordinarily depends on the outcome of further proceedings before the SSA because the normal relief
1134 in court for a successful plaintiff under 42 U.S. § 405(g) is remand to the SSA for further
1135 proceedings, and the attorney fee award under § 406(b) must be “reasonable” but is limited to “25
1136 percent of the total of the past-due benefits to which the claimant is entitled by reason of such
1137 judgment.” When the court orders a remand, that depends on the eventual outcome of those
1138 proceedings after remand.

1139 As spelled out in the Committee Note to Rule 54(b)(2), the 14-day deadline assures that
1140 the opposing party knows of the attorney fee claim before the time to appeal expires, but that does
1141 not seem to be important frequently in court remands of SSA denials of benefits. Another goal was
1142 to provide “an opportunity for the court to resolve fee disputes shortly after trial, while the services
1143 performed are freshly in mind.” That objective might be served by the deadline, but since the

1144 statutory limit on the fee award can't be known until further proceedings before the SSA it hardly
1145 seems dispositive.

1146 Review of SSA benefits decisions occupied much Advisory Committee time and energy
1147 recently, so some background on that effort seems in order. In 2017, the Administrative
1148 Conference of the U.S. made a proposal that explicit rules be developed for civil actions under 42
1149 U.S.C. § 405(g) to review denial of individual disability claims under the Social Security Act.

1150 The ACUS recommendation was based in large part on a 180-page study by Professors
1151 Jonah Gelbach and David Marcus entitled A Study of Social Security Disability Litigation in the
1152 Federal Courts. That study was very thorough and raised questions about many aspects of the
1153 SSA's internal processes in reviewing such claims. But it also suggested that the ordinary Civil
1154 Rules did not work well for what were essentially appellate proceedings, though conducted in the
1155 district court.

1156 The Standing Committee decided that the Civil Rules Committee should address the ACUS
1157 proposal. On the day before the Advisory Committee's November 2017 meeting, an informal
1158 subcommittee met with representatives of SSA and of claimant organizations. At that meeting,
1159 SSA representatives strongly urged the adoption of uniform national rules, in part because SSA
1160 attorneys have to handle cases in a number of courts or regions and the procedures may differ
1161 significantly from one court to the next. For details, see Minutes of the Nov. 7, 2017, Advisory
1162 Committee meeting at 7-12.

1163 A major difficulty in SSA benefits decisions was the amount of time the SSA takes to
1164 resolve claims. It was recognized during the informal meeting a national rule for in-court handling
1165 of appeals would not address those problems, which had been detailed in the Gelbach/Marcus
1166 report. So in-court procedural difficulties did not seem to be a big part of the overall SSA claims-
1167 processing activity.

1168 But it was also clear that because there are so many such proceedings – about 18,000 per
1169 year – and that SSA review usually differs in kind from other administrative review matters before
1170 the district courts, which are also much less numerous. Furthermore, these in-court proceedings
1171 very frequently end with a remand to the SSA for further proceedings, presenting the timing
1172 difficulty raised by this submission. Considerable grounds for specialized treatment appeared to
1173 exist.

1174 Moreover, one potential up side of a national rule for SSA appeals was that it could simplify
1175 service of the complaint on the SSA. Some districts were experimenting with that. But it was also
1176 noted that designing rules for only one type of case runs against the grain of the transsubstantive
1177 federal rules. There are exceptions, however, including the rules for § 2255 proceedings and the
1178 provisions of Supplemental Rule G for forfeiture proceedings.

1179 A formal Subcommittee was formed, with Judge Sara Lioi as Chair. The SSA continued to
1180 press for broad and detailed national rules. In particular, it urged the following as a model for a
1181 rule on attorney fee awards:

1182 (c) PETITIONS FOR ATTORNEY’S FEES UNDER 42 U.S.C. § 406(b).

1183 (1) Timing of petition. Plaintiff’s counsel may file a petition for attorney’s fees under
1184 42 U.S.C. § 406(b) no later than 60 days after the date of the final notice of award
1185 sent to Plaintiff’s counsel of record at the conclusion of Defendant’s past due
1186 benefit calculation stating the amount withheld for attorney’s fees. The court will
1187 assume counsel representing Plaintiff in federal court received any notice of award
1188 as of the same date that Plaintiff received the notice, unless counsel establishes
1189 otherwise.

1190 (2) Service of Petition. Plaintiff’s counsel must serve a petition for fees on Defendant
1191 and must attest that counsel has informed Plaintiff of the request.

1192 (3) Contents of petition. The petition for fees must include:

1193 (A) a copy of the final notice of award showing the amount of retroactive
1194 benefits payable to Plaintiff (and to any auxiliaries, if applicable), including
1195 the amount withheld for attorney’s fees, and, if the date that counsel
1196 received the notice is different from the date provided on the notice,
1197 evidence of the date counsel received the notice;

1198 (B) an itemization of the time expended by counsel representing Plaintiff in
1199 federal court, including a statement as to the effective hourly rate (as
1200 calculated by dividing the total amount requested by number of hours
1201 expended);

1202 (C) a copy of any fee agreement between Plaintiff and counsel;

1203 (D) statements as to whether counsel:

1204 (i) has sought, or intends to seek, fees under 42 U.S.C. § 406(a) for
1205 work performed on behalf of Plaintiff at the administrative level;

1206 (ii) the award to any other representative who has sought, or who may
1207 intend to seek, fees under 42 U.S.C. § 406(a);

1208 (iii) was awarded attorney’s fees under 42 U.S.C. § 2412, the Equal
1209 Access to Justice Act, in connection with the case and, if so, the
1210 amount of such fees; and

1211 (iv) will return the lesser of the § 2412 and § 406(b) awards to Plaintiff
1212 upon receipt of the § 406(b) award.

1213 (E) any other information the court would reasonably need to assess the
1214 petition.

1215 (4) Response. Defendant may file a response within 30 days of service of the petition,
1216 but such response is not required.

1217 In the agenda book for the November 2018 Advisory Committee meeting, the following
1218 report appears on p. 223:

1219 SSA reports that the general Civil Rules provisions work well for awarding fees
1220 under the Equal Access to Justice Act. But there are serious difficulties with the
1221 procedure for awarding fees under § 406(b). These fees, which come out of the
1222 award of benefits, are for attorney services in the court. The award is made by the
1223 court, not SSA. The substantive calculation can be difficult, including integration
1224 with fees awarded by the Commissioner for work in the administrative proceedings
1225 under §406(a) and fees awarded by the court under the Equal Access to Justice Act.
1226 Rule text addressing those substantive issues does not seem appropriate, even if the
1227 substantive rules are clearly established.

1228 It may be possible, however, to address the problem of timing a motion for an award
1229 by the court under § 406(b). In a great many cases the result of the court's judgment
1230 is a remand to SSA for further proceedings. The Civil Rule 54(d)(2) timing
1231 requirements geared to judgment do not fit well with a motion that cannot become
1232 ripe until conclusion of the administrative proceedings. There are serious problems.

1233 To recognize that there are serious problems, however, is not to agree that they can
1234 be resolved by a new court rule. There is a mess, but it originates primarily outside
1235 the Civil Rules. Attempts to clean it up would be difficult and might make matters
1236 worse.

1237 Despite the sentiment that these problems may be too varied and too complicated
1238 to address by rule, the Subcommittee concluded that the topic should be carried
1239 forward for further consideration.

1240 The SSA Subcommittee spent two years developing its proposal for Supplemental Rules.
1241 Those eight Supplemental Rules in relatively brief compass set out a specialized sequence of
1242 actions for "an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the
1243 Commissioner of Social Security that presents only an individual claim." Supp. Rule 1(a).
1244 Supplemental Rule 1(b) then provides that the Civil Rules apply to proceedings under § 405(g)
1245 "except to the extent that they are inconsistent with these rules."

1246 Subsequent rules prescribe the contents of the complaint (Rule 2), service in a simplified
1247 manner (Rule 3), the answer and any motions (Rule 4), the method of presenting the action for
1248 decision (Rule 5), the plaintiff's brief (Rule 6), the Commissioner's Brief (Rule 7) and a reply brief
1249 by the plaintiff (Rule 8). There is no mention of attorney fee awards.

1250 The Supplemental Rules went into effect on Dec. 1, 2022.

1251 One contrast between Judge Barksdale's submission and the SSA submission is that the
1252 SSA focused only on § 406(b), while the judge's proposal applies to any application for an award
1253 of attorney fees in § 504(g) proceedings. Either way, it might be odd to add a provision to Rule
1254 54(d)(2) if it is only about § 405(g) proceedings, or perhaps only some of them. There may well
1255 be other situations in which the same sort of timing disjunctions could be urged as a basis for an
1256 exception to the timing requirements of Rule 54(d)(2)(B). If we are to proceed down this line, it
1257 might be better to consider an amendment to the Supplemental Rules, perhaps a new rule solely
1258 about attorney fee awards under section 406(b). But given that the new Supplemental Rules went
1259 into effect less than a year ago, it might seem premature to change them now.

1260 It also seems worth noting that there are somewhat complex statutory provisions about
1261 attorney fees in § 405(g) proceedings. This seems to be a specialized practice with a specialized
1262 bar, and less familiar to others. And as one might imagine, the stakes can be considerable for the
1263 cognoscenti. But some introductory points can be made.

1264 Representation before SSA: 42 U.S.C. § 406(a) contains extensive provisions about fees
1265 for representation before the SSA. It permits non-attorneys to provide such representation, but the
1266 Commissioner may refuse to recognize a proposed representative or disqualify the representative.
1267 § 406(a)(1). In general, the Commissioner can by rule or regulation prescribe the maximum fees
1268 for such services.

1269 § 406(a)(2) further limits such fees to 25% of the total payment of past-due benefits, and
1270 limits that to \$4,000 total, though the Commissioner may increase that dollar amount if that
1271 increase is keyed to "the rate of increase in primary insurance amounts under section 415(i) of this
1272 title." "[T]he term 'past-due benefits' excludes any benefits with respect to which payment has
1273 been continued pursuant to [provisions of another section] of the title." See § 406(a)(2)(B).

1274 There are also fairly elaborate provisions in § 406(a)(3) - (5) regarding the SSA
1275 determination whether a fee claimed under this provision exceeds the maximum amount allowed
1276 under the statute.

1277 But it appears that § 406(a) is entirely or mainly about fees claimed without regard to an
1278 action in court governed by the new Supplemental Rules. If that is correct, there seems no need to
1279 address such determinations in the Civil Rules.

1280 § 406(b) addresses attorney fee awards for proceedings in court. But it is not the only statute
1281 that addresses that. The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, also can apply to

1282 a proceeding in court. Indeed, a 1985 amendment to the EAJA provided that “where the claimant’s
1283 attorney receives fees for the same work under both [§ 406(b) and the EAJA] the attorney [must]
1284 refun[d] to the claimant the amount of the smaller fee.” *See Astrue v. Ratliff*, 130 S.Ct. 2521 (2010)
1285 (holding that the EAJA award belongs to the client, not the lawyer). In that case, the Court pointed
1286 out that the award to the attorney under § 406(b) went directly to the attorney, but the EAJA award
1287 went to the claimant, so the Government could offset the Claimant’s other obligations to the
1288 Government against the amount of the fee award.

1289 Though SSA reported that the Civil Rules work well for EAJA applications in § 405(g)
1290 actions, EAJA decisions in such cases provide reasons for caution. This topic almost certainly is
1291 of great importance to both sides, and questions of timing (central to the current submission) have
1292 proved very challenging under the EAJA. It is likely that substantial education will be needed to
1293 gain a full grasp of these issues.

1294 Perhaps a good illustration is provided by *Shalala v. Schaefer*, 113 S.Ct. 2625 (1993),
1295 which Justice Scalia, speaking for the Court, introduced as presenting the question of “the proper
1296 timing of an application for attorney’s fees under the [EAJA] in a Social Security case.”

1297 Plaintiff Schaefer was denied disability benefits and sought judicial review under § 405(g).
1298 The district court found that SSA had committed three errors and remanded to SSA. As we shall
1299 see, the Court regarded it as important that the original court decision was under sentence four of
1300 § 405(g): “The court shall have the power to enter, upon the pleadings and transcript of the record,
1301 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social
1302 Security, with or without remanding the case for a rehearing.”

1303 After remand, Schaefer’s application was granted. He then applied for an attorneys fee
1304 award under EAJA. Under the EAJA, such an application must be made “within thirty days of
1305 final judgment in the action.” 28 U.S.C. § 2412(d)(1)(B). SSA argued that the trigger for applying
1306 the 30-day requirement would be the end of the 60-day period from the entry of the court’s remand
1307 order. The district court, however, found that the remand order was not a final judgment if “the
1308 district court retain[s] jurisdiction . . . and plan[s] to enter dispositive sentence four judgmen[t]”
1309 after the administrative proceedings were complete, and made a fee award. The court of appeals
1310 affirmed.

1311 The Supreme Court emphasized that the EAJA requires the application for attorneys fees
1312 to be made within 30 days of “final judgment.” Schaefer argued, however, that in a sentence four
1313 ruling the court need not enter judgment at the time of remand, but could postpone entry and
1314 judgment and retain jurisdiction pending completion of the administrative proceedings on remand.
1315 Justice Scalia rejected this argument as “inconsistent with the plain language of sentence four,
1316 which authorizes a district court to enter a judgment ‘with or without’ a remand order, not a remand
1317 order ‘with or without’ a judgment.” *Id.* at 297.

1318 Indeed: “Immediate entry of judgment (as opposed to entry of judgment after post-remand
1319 agency proceedings have been completed and their results filed with the court) is in fact the

1320 principal feature that distinguishes a sentence-four remand from a sentence-six remand.” *Id.*
1321 Sentence six provided as follows:

1322 The court may, on motion of the Secretary made for good cause shown before he
1323 files his answer, remand the case to the Secretary for further action by the Secretary,
1324 and it may at any time order additional evidence to be taken before the Secretary,
1325 but only upon a showing that there is new evidence which is material and that there
1326 is good cause for the failure to incorporate such evidence into the record in a prior
1327 proceeding; and the Secretary shall, after the case is remanded, and after hearing
1328 such additional evidence if so ordered, modify or affirm his findings of fact or his
1329 decision, or both, and shall file with the court any such additional and modified
1330 findings of fact and decision, and a transcript of the additional record and testimony
1331 upon which his action in modifying or affirming was based.

1332 Schaefer relied on *Sullivan v. Hudson*, 490 U.S. 877 (1989), holding that under the EAJA
1333 the fee award may include fees in connection with further proceedings before SSA. In that case,
1334 the district court said it was retaining jurisdiction for such a potential award. But in *Sullivan v.*
1335 *Finkelstein*, 496 U.S.617 (1990), the Court “made clear . . . that the retention of jurisdiction . . .
1336 was error . . . and a sentence-four remand order ‘*terminate[s]* the civil action’ seeking judicial
1337 review of the Secretary’s final decision.” 509 U.S. at 299. “We therefore do not consider the
1338 holding of *Hudson* binding as to sentence-four remands that are ordered (as they should be) without
1339 retention of jurisdiction.” *Id.* It added in a footnote that “*Hudson* remains good law as applied to
1340 remands ordered pursuant to sentence six.” *Id.* n.4.

1341 Nonetheless, the Court also held that the appeal in Schaeffer’s case was timely because the
1342 district court had not entered a judgment as a separate document as required by Rule 58, meaning
1343 that the remand judgment remained appealable at the time Schaefer applied for an EAJA fee award,
1344 making the application timely under the EAJA. So the award of fees was upheld.

1345 Justice Stevens (joined by Justice Blackmun) concurred in the judgment upholding the
1346 award of fees, but rejected the majority’s reasoning because the EAJA permits an award only to a
1347 “prevailing party,” so “it makes little sense to start the 30-day EAJA clock running before a
1348 claimant even knows whether he or she will be a ‘prevailing party’ under EAJA by securing
1349 benefits on remand.” *Id.* at 304. He also rejected the “major premise” underlying the Court’s
1350 decision “that there is a sharp distinction, for purposes of the EAJA, between remands ordered
1351 pursuant to sentence four and sentence six of 42 U.S.C. § 405(g).” *Id.* at 305.

1352 Though *Schaefer* has been cited in more than 7,000 decisions since it was decided, it does
1353 not appear that the Supreme Court has addressed these issues again. Under the circumstances,
1354 caution is indicated before adopting a timing rule applicable to fee awards under § 406(b)(1)(A),
1355 which provides:

1356 Whenever a court renders a judgment favorable to a claimant under this subchapter
1357 who was represented before the court by an attorney, the court may determine and

1358 allow as part of its judgment a reasonable fee for such representation a reasonable
1359 fee for such representation, not in excess of 25 percent of the total past due benefits
1360 to which the claimant is entitled by reason of such judgment

1361 As with the EAJA, it would seem difficult for the court to determine the “past due benefits
1362 to which the claimant is entitled by reason of such judgment” until the further proceedings before
1363 the SSA are completed. But under *Schaeffer*, it appears that (at least for EAJA purposes) a
1364 sentence-four remand order is a judgment. And *Finkelstein* seemingly means that the court cannot
1365 retain jurisdiction to address fees after remanding under sentence four.

1366 Nevertheless, if it seems worthwhile, it may be possible to obviate the timing impact of
1367 Rule 54(d)(2)(B) as an additional Supplemental Rule 9:

1368 **Rule 9. Attorney fee award under § 406(b)**

1369 In its judgment remanding to the Commissioner, the court may[, without regard to Rule
1370 62(d)(2)(B),] {notwithstanding Rule 62(d)(2)(B),} retain jurisdiction to permit plaintiff to
1371 [move] {apply} for an attorney fee award under 42 U.S.C. § 406(b) within __ days of the
1372 [final decision of the Commissioner] {final notice of the award sent to plaintiffs’ counsel}
1373 after the remand.

1374 The foregoing is a very tentative draft. Whether retention of jurisdiction is really valid with
1375 regard to a sentence-four remand remains uncertain. Recommending that district courts disregard
1376 Rule 58 when they want to do so seems to invite a violation of the Civil Rules. The draft is focused
1377 only on changing the time limits for a motion for an attorney fee award. Rule 54(d)(2)(B) refers to
1378 a motion, not an application. Rule 7(b)(1) says requests to the court for an order must be made by
1379 motion.

1380 The draft speaks of the “final decision” of the Commissioner because that is the term used
1381 in the Supplemental Rules. See Supplemental Rule 2(b)(1)(B), requiring that the complaint
1382 “identify the final decision to be reviewed, including any identifying designation provided by the
1383 Commissioner with the final decision.” As noted in braces, the original proposal by SSA used
1384 “final notice of the award sent to plaintiff’s counsel.”

1385 The SSA proposal and the draft local rule cited in Judge Barksdale’s submission both
1386 contain specifics about what the moving party ought to provide in support of the motion. It is not
1387 clear why the procedures of Rule 54(d)(2) need elaboration, and Rule 54(d)(2)(D) authorizes local
1388 rules for resolving fee-related issues. It is not clear why more is needed in a national rule, and
1389 could be that some parties might regard some features to afford them an advantage. The problem
1390 to be solved is a timing problem, not a content problem.

1391 At the Advisory Committee’s October 2023 meeting, it was noted that the question of
1392 handling of attorney fee awards was consciously not included in the Supplemental Rule package
1393 despite SSA urging that it be included. A concern raised was that proceeding down this line would

1394 raise issues of unintentional shifting of advantage between the SSA and claimants. But because
1395 this very large category of actions (around 18,000 per year) involves a specialized practice, it
1396 would likely be true that addressing it would require a relatively intense education process similar
1397 to the one that led to the adoption of the Supplemental Rules.

1398 At the same time, it was also noted that revising Rule 54(b)(2)(B), which deals with all
1399 kinds of actions, seems a dubious idea given that this concern appears limited to the matters
1400 covered by the Supplemental Rules, and that carving out one kind of action within Rule
1401 54(d)(2)(D) seems unwarranted.

1402 The Advisory Committee’s conclusion was to await developments before dealing further
1403 with this issue. For one thing, if the proposed local rule reported by Magistrate Judge Barksdale
1404 goes into effect experience under that rule could inform a national rule-amendment effort. For
1405 another, it seems worthwhile to let the new Supplemental Rules have some time to operate to see
1406 if other issues emerge. If this task is undertaken, it will probably be important for the Advisory
1407 Committee to become better educated about the details § 405(g) actions and in particular of §
1408 406(b) fee awards.

1409 Suggestion 23-CV-L (Hon. Patricia Barksdale): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/hon-patricia-barksdale-23-cv-l)
1410 [policies/archives/suggestions/hon-patricia-barksdale-23-cv-l](https://www.uscourts.gov/rules-policies/archives/suggestions/hon-patricia-barksdale-23-cv-l)

1411 **IV. Items to be removed from the Advisory Committee’s agenda**

1412 **A. Revision of Rule 26(a)(1) based on Mandatory Initial Discovery Pilot**

1413 With the approval of the Standing Committee, a multi-year Mandatory Initial Discovery
1414 Pilot (MIDP) was undertaken in the District of Arizona and the Northern District of Illinois. The
1415 FJC did a thorough analysis of data from this project, producing a report available via a link below.
1416 The Discovery Subcommittee undertook to review the report to determine whether it identified
1417 specific possible amendments to the initial disclosure regime of Rule 26(a)(1)(A) that warranted
1418 further study.

1419 A bit of background on initial disclosure issues seems helpful. In 1991, this Committee
1420 proposed adoption of a new Rule 26(a)(1) initial disclosure requirement. That proposal prompted
1421 considerable resistance. Ultimately Rule 26(a)(1)(A) was adopted, but with an opt-out feature
1422 permitting districts to elect whether to follow the “national” rule. The rule was not limited to
1423 disclosure of favorable information, but instead required disclosure of information relevant to
1424 matters alleged with particularity, even if unfavorable to the disclosing party. Three Supreme Court
1425 Justices dissented from adoption of the disclosure rule, largely on the ground that it was out of step
1426 with the American adversarial litigation system. See Amendments to the Federal Rules of Civil
1427 Procedure, 146 F.R.D. 402, 507-09 (1993) (dissenting opinion of Justice Scalia, joined by Justices
1428 Thomas and Souter). The disclosure rule went into effect in 1993.

1429 Considerable diversity among districts emerged, prompting preparation of a thorough
1430 study of divergent practices in various districts. See D. Stienstra, Implementation of Disclosure in
1431 United States District Courts, With Specific Attention to Courts’ Responses to Selected
1432 Amendments to Federal Rule of Civil Procedure 26 (FJC 1998). During the same general period
1433 of time, districts were obliged to develop cost and delay plans pursuant to the Civil Justice Reform
1434 Act, and the RAND Corporation intensely studied the results of those projects. Finally, in 1997, at
1435 the request of the Advisory Committee, the FJC did a very thorough study of a variety of discovery
1436 issues, including several affected by rule amendments that went into effect in 1993. See T.
1437 Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems,
1438 and Proposals for Change (FJC 1997).

1439 In 1998, the Advisory Committee proposed amendments to Rule 26(a)(1) that would
1440 remove the opt-out provision for district courts and restore national uniformity, but also limit initial
1441 disclosure to information the disclosing party “may use to support” its claims or defenses. There
1442 was considerable resistance to the national uniformity features of this amendment proposal,
1443 including some from district court judges, but it was adopted and went into effect in 2000. The
1444 rule has remained essentially unchanged since then. From time to time, there have been
1445 expressions of satisfaction and dissatisfaction with the present rule.

1446 The MIDP was a careful effort to investigate the potential effect of more demanding initial
1447 requirements. It was implemented on a voluntary basis by judges in the District of Arizona and the
1448 Northern District of Illinois. Some judges of these courts elected not to participate. Among other
1449 things, the pilot did not limit required initial discovery to information on which the party providing
1450 discovery would rely, and it also required the filing of responsive pleadings even from parties
1451 intending to file Rule 12(b) motions (something not explicitly required in the 1991 proposed rule
1452 or the 1993 rule as adopted).

1453 The FJC study focused on cases filed between Jan. 1, 2014, and March 12, 2020 (the day
1454 before the pandemic emergency declaration). “Comparison” districts were selected for purposes
1455 of comparison – the S.D.N.Y. for the N.D. Ill. and the E.D. Cal. for the D. Ariz. The FJC report
1456 has very detailed information about the study, and deserves close study. This agenda book includes
1457 a link to the full FJC report. But some overall reactions may provide a useful introduction.

1458 One important take away is that the project had a statistically significant effect on case
1459 duration – “the pilot shortened disposition times for cases subject to the MIDP.” But it is not
1460 possible to say that the study of these two volunteer districts provides a firm foundation to support
1461 national rulemaking at this time.

1462 The members of the Subcommittee carefully reviewed the report. Ultimately, the
1463 conclusion was that though the pilot projects were admirable undertakings and the FJC analysis
1464 was excellent, there is not a solid foundation for further initial disclosure provisions. It remains
1465 true that there is considerable resistance in the bar, and perhaps to some extent within courts. So
1466 though it was important to do this experiment it does not seem to justify any rules effort now.

1467 At its October 2023 meeting the Advisory Committee accepted the Discovery
1468 Subcommittee recommendation that the topic be removed from the Committee’s agenda.

1469 Link to Mandatory Initial Discovery Pilot (MIDP) Final Report:
1470 <https://www.fjc.gov/sites/default/files/materials/23/MIDP%20Final%20Report%20advisory%20committee.pdf>
1471

1472 **B. Revision of Rule 60(b)(1) in response to *Kemp v. U.S.*, 142 S.Ct. 1856 (2022).**

1473 At the Standing Committee’s January 2023 meeting of the Standing Committee, Judge
1474 Pratter made the following suggestion:

1475 At the January 2023 Standing Committee meeting, Judge Pratter suggested that the
1476 Civil Rules Committee consider whether there is a need to address the recent
1477 Supreme Court decision *Kemp v. United States* (2022). In that opinion, the Court
1478 held that a “mistake” under Civil Rules 60(b)(1) includes a judge’s error of law.

1479 *Kemp v. United States*, 142 S.Ct. 1856 (2022), involved a Rule 60(b) motion to reopen
1480 Kemp’s motion under § 2255 to vacate his 2011 sentence of 420 months after conviction for a
1481 variety of crimes. Kemp appealed his conviction, as did his co-defendants, and the Eleventh Circuit
1482 consolidated the appeals and affirmed the convictions in November 2013. Ordinarily such a
1483 judgment would become final when the 90 days to seek certiorari or rehearing expired, in February
1484 2014. Though Kemp did not seek rehearing of this affirmance or certiorari, two of his co-
1485 defendants did seek rehearing, which the Eleventh Circuit denied in May 2014.

1486 In April 2015, Kemp filed the § 2255 motion. The Government moved to dismiss on the
1487 ground that the motion was too late because the statute requires that the motion must be filed within
1488 one year from “the date on which the judgment of conviction becomes final.” The district court
1489 granted the Government’s motion, concluding that the judgment on Kemp’s appeal became final
1490 in February 2014, 90 days after the panel ruling. Though his § 2255 motion was filed within one
1491 year of the Eleventh Circuit denial of his co-defendants’ motion for a rehearing, Kemp did not
1492 appeal the dismissal.

1493 Two years after the dismissal of the § 2255 motion, Kemp sought to reopen that action,
1494 relying on Rule 60(b)(6). He argued that even though he did not move for rehearing from the
1495 original affirmance of his conviction some of his co-defendants did, meaning that the final
1496 judgment was entered only when the rehearing petitions of those co-defendants were denied in
1497 May 2014, so that his April 2015 motion actually was timely. Kemp relied on the Supreme Court’s
1498 Rule 13.3, which prescribes that the 90-day clock to seek certiorari does not begin to run until *all*
1499 parties’ petitions for rehearing are denied.

1500 The district court rejected Kemp’s argument on the timeliness of his original § 2255
1501 motion, but also held that in any event his Rule 60(b) motion was untimely under the one-year

1502 limit in Rule 60(c)(1): “A motion under Rule 60(b) must be made within a reasonable time – and
1503 for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order.”

1504 Kemp argued before the Eleventh Circuit that his motion was actually under Rule 60(b)(6)
1505 – “any other reason that justifies relief” – because it was premised about the district court’s legal
1506 error in determining whether his original § 2255 motion was timely. The Eleventh Circuit agreed
1507 that Kemp’s original § 2255 motion appeared to have been timely due to the petitions for rehearing
1508 filed by his co-defendants, but held that he was nevertheless barred by the one-year limit in Rule
1509 60(c)(1) since his motion was based on a “mistake.”

1510 Noting that there was a division among the circuits about whether Rule 60(b)(1) was
1511 available for relief due to an argument that the court erred as a matter of law, the Supreme Court
1512 granted cert. See 142 S.Ct. at 1861 n.1, saying that the Eighth and First Circuits had ruled that
1513 Rule 60(b)(1) does not apply in such circumstances, while the Seventh, Second, Sixth and Eleventh
1514 had ruled that it includes the court’s errors of law.

1515 By an 8-1 vote, the Court held that, in light of the “text, structure, and history of Rule
1516 60(b),” a judge’s errors of law are “mistakes” within the rule. It rejected Kemp’s reliance on Rule
1517 60(b)(6) because that is available only when Rules 60(b)(1) through 60(b)(5) are inapplicable, and
1518 60(b)(1) was applicable.

1519 Justice Sotomayor concurred in the Court’s opinion, but stressed her understanding that
1520 Rule 60(b)(6) might be available in “extraordinary circumstances, including a change in
1521 controlling law.” The Court recognized that “we do not decide whether a judicial decision rendered
1522 erroneous by subsequent legal or factual changes also qualifies as a ‘mistake’ under Rule
1523 60(b)(1).” See *id.* at 1862 n.2.

1524 Justice Gorsuch dissented on the ground that the Court should not have taken the case, and
1525 that the issue should instead have been addressed through the rules process because it “presents a
1526 policy question about the proper balance between finality and error correction.” He also stressed
1527 that the rule interpretation “matters only under rare circumstances”: “By petitioner’s own
1528 (uncontested) count, his is the first petition *ever* to present today’s question for this Court’s
1529 review.” *Id.* at 1865.

1530 The majority did not accept Justice Gorsuch’s urging that the matter be addressed by
1531 rulemaking, so the question going forward is whether this decision provides a ground for
1532 considering a change to Rule 60(b). As matters now stand, it seems that the Court has held that the
1533 interpretation of Rule 60(b)(1) previously employed by the Eighth and First Circuits was wrong,
1534 and that the interpretation of four other circuits was right.

1535 The main impact of the Court’s interpretation of Rule 60(b)(1) is to subject motions seeking
1536 relief from an order or judgment to the one-year time limitation in Rule 60(c)(1), which would not
1537 apply to a motion under Rule 60(b)(6). One concern might be that including legal errors among
1538 those within “mistake” under Rule 60(b)(1) would permit losing parties to sidestep the time limits

1539 on appealing by filing 60(b)(1) motions within a year. The Court addressed this issue in *Kemp*
1540 (142 S.Ct. at 1864):

1541 In any event, the alleged specter of litigation gamesmanship and strategic delay is
1542 overstated. Rule 60(b)(1) motions, like all Rule 60(b) motions, must be made
1543 “within a reasonable time.” Fed. Rule Civ. Proc. 60(c)(1). And while we have no
1544 cause to define the “reasonable time” standard here, we note that Courts of Appeals
1545 have used it to forestall abusive litigation by denying Rule 60(b)(1) motions
1546 alleging errors that should have been raised sooner (*e.g.*, in a timely appeal). See,
1547 *e.g.*, *Mendez v. Republic Bank*, 725 F.3d 651, 660 (CA 7 2013).

1548 The Seventh Circuit’s *Mendez* decision (cited by the Court) held that, after a timely notice
1549 of appeal was filed in that case, the district court could entertain a Rule 60(b)(1) motion premised
1550 on an error that would lead to reversal unless corrected by the district court. It quoted Judge Henry
1551 Friendly: “no good purpose is served by requiring the parties to appeal to a higher court, often
1552 requiring remand for further trial proceedings, when the trial court is equally able to correct its
1553 decision in the light of new authority on application made within the time permitted for appeal.”
1554 *Id.* at 660, quoting *Schildhaus v. Moe*, 335 F.2d 529, 531 (2d Cir. 1964). It added (*id.*):

1555 To be clear, this conclusion does not undermine our effort to prevent Rule 60(b)
1556 from being used to evade the deadline to file a timely appeal. This concern may be
1557 adequately addressed through careful enforcement of the requirement that Rule
1558 60(b) relief be sought within a “reasonable time.” * * * [A] Rule 60(b) motion filed
1559 after the time to appeal has run that seeks to remedy errors that are correctable on
1560 appeal will typically not be filed within a reasonable time.

1561 The Seventh Circuit’s *Mendez* decision also stressed that “district courts are given broad
1562 discretion to deny motions for relief from judgment. Accordingly, we review the grant or denial
1563 of relief from judgment only for abuse of discretion.” *Id.* at 657-58.

1564 During the Advisory Committee’s October 2023 meeting, the view expressed was that it
1565 does not appear likely that the Supreme Court’s *Kemp* decision (adopting what seems to have been
1566 the majority view of the courts of appeals) will cause significant problems. If later developments
1567 show that the decision has caused problems, attention could return to the rule. But for the present,
1568 the Advisory Committee’s consensus was to drop the matter from its agenda.

1569 Suggestion 23-CV-D (Hon. Gene E.K. Pratter): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/hon-gene-ek-pratter-23-cv-d)
1570 [policies/archives/suggestions/hon-gene-ek-pratter-23-cv-d](https://www.uscourts.gov/rules-policies/archives/suggestions/hon-gene-ek-pratter-23-cv-d)

1571 Link to *Kemp v. United States*, 142 S.Ct. 1856 (2022):
1572 https://www.supremecourt.gov/opinions/21pdf/21-5726_5iel.pdf

1573 **C. Rule 30(b)(6) – Requiring disclosure of entity representative prior to**
1574 **deposition**

1575 Submission 23-CV-I, from William D. Sanders, proposes amending Rule 30(b)(6) to
1576 require that an entity subject to a deposition identify the representative it will offer for deposition
1577 in advance of the deposition. Such a requirement might be useful in some cases. But after very
1578 extensive study and a public comment period with many witnesses testifying and more than 1700
1579 written comments submitted, the Advisory Committee decided not to include such a requirement
1580 in the amendments to Rule 30(b)(6) that went into effect in 2020.

1581 The 2020 amendment to Rule 30(b)(6) was developed by a Rule 30(b)(6) Subcommittee
1582 chaired by Judge Joan Ericksen (D. Minn.) that engaged in an extended effort to gather reactions
1583 to a variety of possible revisions to the rule and ultimately recommended publishing for public
1584 comment an amendment that would require the parties to discuss the list of matters for examination
1585 and the identity of the representative to be designated to provide answers during the deposition.
1586 The proposed requirement to discuss the identity of the representative produced very vigorous
1587 opposition on a variety of grounds, including that the organization has unfettered discretion to
1588 choose its representative and that it can happen that last-minute developments require the entity to
1589 present a different representative.

1590 Given the vigorous resistance to the requirement that the organization discuss with the
1591 noticing party the identity of the representative, the Advisory Committee had a very thorough
1592 discussion of the issues raised during its Spring 2019 meeting. Several current members of the
1593 Advisory Committee were involved in that discussion. The eventual conclusion was to remove the
1594 requirement to discuss the identity of the witness from the amendment, and the amended rule that
1595 went into effect in 2020 did not include that requirement.

1596 At the Advisory Committee’s October 2023 meeting, it was recognized that the current
1597 proposal in essence replicates the feature removed from the 2020 amendment to the rule. The
1598 consensus was that taking up the same proposal so soon after it was withdrawn is unwarranted, so
1599 that this proposal should be withdrawn from the agenda.

1600 Suggestion 23-CV-I (William Sanders): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/william-sanders-23-cv-i)
1601 [policies/archives/suggestions/william-sanders-23-cv-i](https://www.uscourts.gov/rules-policies/archives/suggestions/william-sanders-23-cv-i)

1602 **D. Rule 11 – requiring imposition of sanctions in actions brought under federal**
1603 **statutes commanding imposition of sanctions**

1604 23-CV-N proposes that Rule 11 be amended to require district courts to impose sanctions
1605 on finding a violation of Rule 11(b) if Congress has “mandated” that sanctions be imposed for
1606 such violations when claims are made under certain federal statutes.

1607 The question whether Rule 11 should require district courts to impose sanctions whenever
1608 there is a violation of the certification requirements of Rule 11(b) was a contentious issue after the
1609 rule was extensively amended in 1983. In 1991, due to concerns about the amended rule, the
1610 Advisory Committee issued an unprecedented “call” for comments on whether the rule should be

1611 amended. After much discussion, the rule was amended to say that the court “may” impose
1612 sanctions, not that it “must” do so in 1993.

1613 The use of “may” produced some controversy. There was a Supreme Court dissent from
1614 the Court’s adoption of the 1993 amendment to Rule 11. In 1995, Congress passed the Private
1615 Securities Litigation Reform Act (PSLRA), which contains certain requirements about judicial
1616 enforcement of the Rule 11(b) certification requirement. From time to time since then, bills have
1617 been introduced in Congress to mandate sanctions whenever the rule is violated. See, e.g., Lawsuit
1618 Abuse Reduction Act of 2017 (passed by the House in March 2017 but not acted upon by the
1619 Senate).

1620 As discussed during the Advisory Committee’s October 2023 meeting, this proposed
1621 amendment would not be needed for actions under the PSLRA, since its provisions apply in such
1622 actions. And even if it were adopted, the question of what sanctions should be employed would
1623 remain open. Rule 11(c) does not compel courts that apply sanctions to impose specific sanctions.
1624 Under the circumstances, the Advisory Committee consensus was to drop this proposal from the
1625 agenda.

1626 Suggestion 23-CV-N (Joseph Leckenby): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/joseph-leckenby-23-cv-n)
1627 [policies/archives/suggestions/joseph-leckenby-23-cv-n](https://www.uscourts.gov/rules-policies/archives/suggestions/joseph-leckenby-23-cv-n)

1628 **E. Rule 53 – direct that masters are held to “fiduciary duty” standards**

1629 Submission 23-CV-O proposes that Rule 53 be amended to “reign in” masters by providing
1630 that “masters are held to a fiduciary standard type of relationship.” This rule was very extensively
1631 amended by a Rule 53 Subcommittee chaired by Judge Shira Sheindlin (S.D.N.Y.) in 2003 to adapt
1632 it to contemporary use of masters. The amended rule therefore requires that an order appointing a
1633 master specify the master’s duties, the circumstances (if any) in which the master may engage in
1634 ex parte communications, and the records the master must retain and file as a record of the activities
1635 undertaken pursuant to the order.

1636 In other settings, such as with regard to investment advisors, the introduction of a
1637 “fiduciary duty” standard has produced concerns. Whether such a standard would be governed by
1638 state law or created afresh by a Civil Rule could be litigated. The Advisory Committee decided
1639 during its October 2023 meeting that this proposal should be dropped from the agenda.

1640 Suggestion 23-CV-O (Anthony Buonopane): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/anthony-buonopane-23-cv-o)
1641 [policies/archives/suggestions/anthony-buonopane-23-cv-o](https://www.uscourts.gov/rules-policies/archives/suggestions/anthony-buonopane-23-cv-o)

1642 **F. Rule 10 – Requiring that each pleading include a Document of Direction of**
1643 **Claims (DoDoC)**

1644 Submission 23-CV-Q urges that Rule 10 be amended to require that all pleadings include
1645 a “Document of Direction of Claims” (DoDoC). Examples are attached to the submission, The

1646 evident goal is to assist the court and the parties in visualizing the claims asserted in multiparty
1647 actions.

1648 Though such a diagram might often be useful to the court or to parties in some cases, the
1649 Advisory Committee decided during its October 2023 meeting that this matter should be dropped
1650 from the agenda. Policing this requirement as a feature of pleading practice could invite cost and
1651 delay without providing significant benefit. The ideal of motion practice to determine the
1652 sufficiency of a party’s DoDoC, and requiring a new one each time a pleading is amended, are not
1653 inviting.

1654 Suggestion 23-CV-Q (Richie Muniak): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/richie-muniak-23-cv-q)
1655 [policies/archives/suggestions/richie-muniak-23-cv-q](https://www.uscourts.gov/rules-policies/archives/suggestions/richie-muniak-23-cv-q)

1656 **G. Rule and Statutory Amendments Concerning Contempt**

1657 Submission 23-CV-K proposes adoption of a new Rule 42 and also new Appellate,
1658 Bankruptcy, Criminal and Evidence rules (as well as some statutory changes). It is supported by
1659 the submitter’s recent law review article on problems with use of contempt in some circumstances.

1660 There certainly can be problems with use of contempt. For example, in his dissent in *U.S.*
1661 *v. United Mine Workers*, 330 U.S. 258, 364 (1947), Justice Rutledge described contempt as a
1662 “criminal-civil hodgepodge.” For a review from a half century ago, see Dan Dobbs, *Contempt of*
1663 *Court: A Survey*, 56 Cornell L.Q. 183 (1971).

1664 This article reflects an incredible amount of research on both the history of contempt and
1665 the history of rulemaking. But except for the provision in Rule 37(b)(2)(A)(vii) permitting the
1666 court to use contempt to deal with certain failures to comply with discovery orders, there is no
1667 comprehensive treatment of contempt (often regarded as an element of the court’s inherent
1668 authority) in the Civil Rules.

1669 At the October 2023 meeting, the Advisory Committee concluded this matter should be
1670 dropped from the agenda unless some other advisory committee (the proposal is directed to all
1671 five) decides to proceed with consideration of a rule amendment. If that does occur, there may be
1672 reason to consider amending the Civil Rules as well.

1673 Suggestion 23-CV-K (Joshua Carback): [https://www.uscourts.gov/rules-](https://www.uscourts.gov/rules-policies/archives/suggestions/joshua-carback-23-cv-k)
1674 [policies/archives/suggestions/joshua-carback-23-cv-k](https://www.uscourts.gov/rules-policies/archives/suggestions/joshua-carback-23-cv-k)

TAB 5B

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
October 17, 2023

1 The Civil Rules Advisory Committee met on October 17, 2023, in Washington, D.C.
2 Participants included Judge Robin Rosenberg (Advisory Committee Chair) and Judge John Bates
3 (Standing Committee Chair), Advisory Committee members Justice Jane Bland; Judge Cathy
4 Bissoon; Judge Jennifer Boal; Bryan Boynton; David Burman; Professor Zachary Clopton; Chief
5 Judge David Godbey; Judge Kent Jordan; Judge M. Hannah Lauck; Judge R. David Proctor;
6 Joseph Sellers; Judge Manish Shah; Ariana Tadler; and Helen Witt. Professor Richard Marcus
7 participated as Reporter, Professor Andrew Bradt as Associate Reporter, and Professor Edward
8 Cooper as Consultant. Also representing the Standing Committee were Judge D. Brooks Smith,
9 Liaison to the Advisory Committee, Professor Catherine Struve, Reporter to the Standing
10 Committee and Professor Daniel Coquillette, Consultant to the Standing Committee (remotely).
11 Representing the Bankruptcy Rules Committee was Judge Catherine McEwen, liaison to the
12 Advisory Committee. Carmelita Shinn, clerk liaison, also participated. The Department of Justice
13 was also represented by Joshua Gardner. The Administrative Office was represented by H. Thomas
14 Byron III; Allison Bruff; and Zachary Hawari. The Federal Judicial Center was represented by Dr.
15 Emery Lee.

16 Approximately a dozen observers, including Susan Steinman of the American Association
17 for Justice, Alex Dahl of the Lawyers for Civil Justice, and John Rabiej of the Rabiej Litigation
18 Center, attended the meeting in person. Additional observers attended by Teams. Those observers
19 are identified in the attached list.

20 Judge Rosenberg began the meeting by noting that the Committee will meet again on April
21 9, 2024, though the location of this meeting is not presently set. On Oct. 16, the day before this
22 meeting, the first of three public hearings on the two sets of amendment proposals that the
23 Committee has published for public comment was held in Washington, D.C. The other hearings
24 will be on Jan. 16, 2024, and Feb. 6, 2024, and are presently expected to be virtual hearings.

25 Judge Rosenberg introduced Professor Zachary Clopton of Northwestern Pritzker School
26 of Law, the new academic member of the Committee. He brings an impressive background to this
27 post. He joined the Northwestern faculty as Professor of Law in 2019. Before becoming a law
28 professor, he clerked for the Honorable Diane Wood of the Seventh Circuit, served as an Assistant
29 United States Attorney in Chicago, and worked in the national security group at Wilmer Hale in
30 Washington, D.C. Before joining the Northwestern faculty, he was an Associate Professor at
31 Cornell Law School, and he has also served as a Public Law Fellow at the University of Chicago
32 Law School. His scholarship has appeared or is forthcoming in the Yale Law Journal, Stanford
33 Law Review, NYU Law Review, University of Chicago Law Review, Michigan Law Review,
34 California Law Review, and Cornell Law Review, among others.

35 Judge Rosenberg also reported that the Oct. 16 hearing was a full-day affair that produced
36 much valuable information for members, whether participating in person or virtually. Summaries
37 of the testimony and the written comments that have been submitted will be forthcoming on a
38 rolling basis, particularly as the later hearings approach. Once the full public comment process is
39 completed, a final summary will be prepared and included in the agenda book for the Committee's

40 April meeting, when it may be appropriate to decide whether to recommend final adoption of these
41 rule changes.

42 There was a brief report on the June meeting of the Standing Committee, at which
43 publication of the privilege log and Rule 16.1 proposals was approved. Allison Bruff reported on
44 the pending effective date of amendments the Committee has proposed – to Rules 6, 15, and 72,
45 and a new Rule 87 on emergency measures – all of which are to go into effect on Dec. 1, 2023.
46 Zachary Hawari reported on pending legislative proposals that might affect the rules or rules
47 process. Of particular note is the Protecting Our Courts From Foreign Manipulation Act, which
48 includes provisions dealing with disclosure of third party litigation funding, a topic that has been
49 on the Committee’s agenda for some time and which is being currently monitored.

50 *Review of Minutes*

51 The draft minutes included in the agenda book were unanimously approved, subject to
52 corrections by the Reporter as needed.

53 *Report of Discovery Subcommittee*

54 Chief Judge Godbey offered a “30,000 foot view” of the four items the Subcommittee is
55 bringing before the Committee for discussion. None of these is presented for final approval, but
56 on three of them the Subcommittee hopes for feedback from Committee members. These items
57 are:

58 (1) Manner of serving a subpoena. Rule 45(b)(1) says that serving a subpoena requires
59 “delivering a copy of the subpoena to the named party.” There are different interpretations of the
60 rule, particularly about whether this means in-hand service is required. This uncertainty has
61 imposed costs on lawyers and bred conflict in some cases. The report offers a possible approach
62 to amending the rule.

63 (2) Rule provisions on filing under seal. In 2020-21, the Subcommittee addressed proposals
64 to include in the rules some recognition of limitations on filing under seal. It developed amendment
65 ideas for Rules 26(c) and 5(d) to clarify that protective orders providing for confidential treatment
66 of materials exchanged through discovery are judged by a different standard from requests to file
67 under seal in court, due to the First Amendment and common law rights of access to court files.
68 But as this work was ongoing the Committee was advised that the A.O. had undertaken a project
69 dealing more generally with handing of filing under seal, so the Subcommittee suspended its work
70 on this project pending completion of the A.O. project. Earlier this year, however, the
71 Subcommittee was advised that the A.O. project should not be an impediment to work on possible
72 rule amendments. It appears that the A.O. project will focus principally on handing of sealed
73 materials once they are filed, rather than on the decision whether to permit filing under seal, which
74 has been the primary focus of the Subcommittee’s work.

75 (3) Examining the fruits of the FJC work on the MIDP in the District of Arizona and the
76 Northern District of Illinois. The Subcommittee has carefully examined the very thorough and

77 impressive research completed by the FJC regarding the pilot project using expanded early
78 disclosure or discovery provisions, and the comparison districts (E.D. Cal. and S.D.N.Y.). Though
79 this excellent project produced much data, no clear basis for proposing further rule amendments
80 at this time has emerged. The Subcommittee does not recommend further work on this project.

81 (4) Cross-border discovery. Judge Michael Baylson (E.D. Pa.) has submitted a proposal
82 that the Committee initiate a project exploring and developing rules for cross-border discovery.
83 This is the first time this topic has been presented to the full Committee. It seems a challenging
84 undertaking.

85 Professor Marcus provided some additional introductory remarks on the three topics on
86 which the Subcommittee recommends proceeding.

87 *(1) Service of Subpoena*

88 There are notable differences among the courts in what method is required to serve a
89 subpoena under Rule 45(b)(1). One referent on methods of service might be state court practice,
90 and Rules Law Clerk Chris Pryby did an extremely thorough memo on varying state practices what
91 was included in the agenda book. Unfortunately, that report shows that methods of service are “all
92 over the map.” In some states, methods include a phone call from the sheriff, or even the coroner.
93 So there is no extant and consistent model for the Federal Rules to follow.

94 On the other hand, it seems that service of subpoenas has not presented great difficulties
95 with frequency; usually the parties do not want to require that in-hand service, perhaps in part
96 because personal service may actually be unnerving to witnesses, with the result that counsel
97 would often want to avoid it.

98 The Subcommittee discussion, however, emphasized that uncertainty about methods of
99 service caused notable difficulty and imposed significant costs in some cases. It could enable
100 witnesses, particularly nonparty witnesses, to cause difficulties. Clarification would be desirable.

101 One possible clarification has been rejected by the Subcommittee – requiring in-hand
102 service in all instances.

103 Instead (as presented on p. 128 of the agenda book), the Subcommittee has focused on
104 borrowing the Rule 4 provisions for service of original process. Service of original process is not
105 the same as service of a subpoena. On the one hand, it may seem more important to ensure actual
106 notice, given the possibility of default. On the other hand, there is a built-in lag time before an
107 answer is due, and courts are usually lenient even if a deadline is missed.

108 Subpoenas may on occasion call for much faster action, such as testimony in court in a few
109 days, perhaps in a court far away. And subpoenas can be served on nonparties, who have no prior
110 familiarity with the action. So the formality of in-hand or some substitute method may be important
111 for them. And one could argue that there are significant differences between subpoenas to testify
112 in court and deposition or document subpoenas as part of discovery; the urgency of the former is
113 much more notable.

114 Because consideration of the subpoena service project is ongoing, the Subcommittee was
115 seeking reactions from the members of the Committee on its proposed approach. As presented on
116 p. 128, it involved authorizing any method permitted under Rules 4(d), 4(e), 4(f), 4(h), or 4(i),
117 which could invoke pertinent state service standards. In addition, it proposed granting the court
118 authority to approve further means of service by an order in the case or perhaps a local rule. The
119 question whether the rule should direct that these alternative methods be “reasonably calculated to
120 give notice” (adopting the standard from the old *Mullane* case) is included in brackets.

121 A first reaction from a Committee member was that this “sounds like a good idea” – pull
122 in all the methods currently recognized for service of other process. A liaison member agreed,
123 particularly with adopting state practices. This member also favored including the “reasonably
124 calculated” language.

125 A question was raised – why not include the whole of Rule 4, not just the listed
126 subdivisions? One response was that some provisions of the rule seem duplicative of what is
127 already in Rule 45. Rule 45(b)(1) directs that service be done by a nonparty of age 18 or older.
128 Rule 4(c)(2) says pretty much the same thing. And Rule 4(b) says that the plaintiff can present a
129 summons to the clerk, and that the clerk must issue the summons if properly filled out. The
130 provisions of Rule 45(a)(3) seem somewhat different. Rule 4(a) on the required contents of a
131 summons does not seem useful in the subpoena context.

132 A different question was raised – the invocation of Rule 4(i) raises possible difficulties.
133 There are significant differences between service on the United States itself and service on a U.S.
134 employee as a party in an official capacity. Moreover, if the federal employee is served as an
135 individual sued individually under Rule 4(i)(3), further complications can arise. Though the
136 Department of Justice seeks to be efficient in the handling of process, it can happen that process
137 is not acted upon immediately upon service. The Department was invited to submit specific
138 comments about these problems.

139 Another member urged that the *Mullane* “reasonably calculated” language be retained,
140 either in the rule or in the Note. Disputes about whether a subpoena was actually served can be
141 important, and that is the goal to be pursued.

142 (2) *Filing under seal*

143 In 2021, the Subcommittee presented its initial thoughts explicit provisions about filing
144 under seal in the rules with changes to Rule 26(c) and the addition of a new Rule 5(d)(5) with
145 regard to the showing required for filing under seal, presented on p. 130 of the agenda book.

146 One choice made by the Subcommittee is not to try to adopt a rule-based locution of the
147 pertinent standard under the First Amendment or the common law right of access to court filed.
148 For example, there may be some divergence among the circuits about whether some filings (e.g.,
149 discovery filings) are not related to the merits of the case and therefore not subject to the ordinary
150 right of access. Whether this is universally recognized is uncertain and not something that need be
151 addressed or resolved by a rule.

152 Another issue is whether “sealing” always means the same thing. There is at least some
153 indication that some sealed documents are regarded as especially sensitive – “highly confidential”
154 – and that national security concerns may introduce even more concerns about confidentiality.

155 Moving beyond standards for sealing, there are many potential issues about the procedures
156 to be used in making sealing decisions. To illustrate, the Sedona Conference submitted a model
157 rule that was about seven pages long. A submission from the Knight First Amendment Institute at
158 Columbia University attached a 100-page compilation of local rules that varied a great deal. Some
159 proposed rules were very detailed (though not as long as the Sedona model rule) and others were
160 quite brief.

161 The agenda materials identify many issues that might be addressed if the decision is made
162 to prescribe nationwide standards. Doing so would almost inevitably override at least some local
163 practices and rules. The agenda book included some examples:

164 Permitting the motion to seal to be filed under seal. Several of the submissions to the
165 Committee urge that motions to seal should be open to public inspection.

166 Treatment of the confidential material while the motion to seal is pending. One possibility
167 is to provide that nothing can be filed under seal until a court has so ordered, and some urge that
168 there be a minimum of seven days after filing of the motion publicly because the court may rule
169 on it. But some local rules permit “temporary” or “provisional” filing under seal pending the
170 court’s ruling on the motion to seal. For litigators acting under filing deadlines, building in either
171 a requirement that the court grant an order for filing under seal or (beyond that) that the court may
172 not act on the motion to seal for some time, perhaps seven days, may make life very difficult as
173 filing deadlines approach.

174 Requiring that the filing party also submit a redacted document that is in the open files.
175 This measure could ensure some public access, but could also be a further burden on litigators
176 meeting filing deadlines.

177 Notice to parties and nonparties with confidentiality interests. It may be that the party
178 wanting to file the confidential materials is not the one contending that the materials are
179 confidential, as with materials obtained under a protective order through discovery. So the showing
180 needed to justify filing under seal may depend on a showing by another party, or even a nonparty.
181 And providing these other persons notice of the proposed filing of the confidential materials may
182 be important to protecting their confidentiality interests.

183 Consequences of denial of the motion to seal. Providing that filing under seal may occur
184 only if the court so orders would avoid a problem that can arise if filing “provisionally” under seal
185 is permitted before the ruling on the motion to seal. But if filing can occur before the court rules
186 on the motion to seal, the question what happens if the motion to seal is denied arises. One
187 possibility is that the filed document is automatically completely unsealed. Another might be that
188 the party that sought to file under seal could retract the document and rely only on the redacted
189 version (assuming filing a redacted version is required). But if retraction of the documents is a

190 remedy, another issue is that the party wanting to rely on the document may not be the one who
191 claims confidentiality interests in the document. It would be odd to deny the moving party the
192 chance to rely on the document after the court has ruled that the grounds for filing under seal have
193 not been established.

194 Stating the date the seal ends. Another proposed requirement is that the motion to seal state
195 when the document can (perhaps automatically) be unsealed. It may be that the clerk's office is to
196 make a record of such unsealing dates and act upon them without further action by the parties.
197 That could be a burden for the clerk. Relatedly, one proposal is that a rule direct that the document
198 be unsealed 60 days after the "final resolution" of the action. But if there is an appeal, it may be
199 uncertain (particularly for the court clerk) when "final resolution" has occurred.

200 Specialized intervention rules. There a body of caselaw recognizing that there is a right to
201 intervene in some circumstances to seek to have materials unsealed even though they were filed
202 under seal. One focus of that body of intervention law is the sort of interest a nonparty must
203 demonstrate to support such focused intervention. Some submissions urge, however, that any
204 "member of public" should have what seems to be a presumptive right in effect to intervene,
205 whether or not that would otherwise be authorized under Rule 24.

206 Returning sealed documents to the filing party. Another possibility is to return the sealed
207 documents to the filing party. That would not fit with a requirement that the documents be unsealed
208 by a date certain or upon "final termination" of the action.

209 The Subcommittee invited reactions to these issues.

210 An initial reaction from a judge was "Why do practitioners want such a rule?" This judge
211 is familiar with many cases involving highly confidential technical and competitive information.
212 Impeding filing under seal would be very troublesome in such litigation.

213 An attorney emphasized that the extreme variety of local practices is a serious problem for
214 the bar. Indeed, it would excellent if this Committee could regularize the practices of state courts
215 as well, but that is beyond its remit. This member favors permitting filing of the sealed document
216 before the court rules on the motion to seal, but also requiring simultaneous filing of a redacted
217 document. Including time frames could be helpful. As things stand, without a uniform nationwide
218 procedure things can get bogged down. It would be very desirable to determine what is really
219 needed.

220 Another attorney member agreed. "There is a lot of uncertainty." One can have material
221 from another party that it claims is confidential. "We should avoid micromanaging, but adopting
222 a uniform set of procedures would be very helpful." The question what to do when the motion is
223 denied is challenging.

224 Another attorney member agreed. Not only are districts presently inconsistent, but some of
225 them have very onerous requirements. The real life difficulties for lawyers are substantial. Building

226 in required meet-and-confer sessions, etc., really imposes on a lawyer up against a filing deadline.
227 But it is likely at least some courts may push back against some particulars.

228 Another attorney member recognized that the nature of practice in different districts could
229 be quite significant on these topics. Some districts may have a high proportion of technology cases
230 with great sensitivity about relevant data. Other districts may have caseloads that involve very
231 different sorts of cases that do not present such problems.

232 A judge liaison brought up the issues of bankruptcy courts. At least some filings there must
233 be kept under seal, including motions. For example, consider a motion to garnish. In addition, there
234 may be confidentiality in a sense “inherited” from another court action. In addition, this member
235 suggested that the draft Rule 5(d)(5) should be modified to say “Unless filing under seal is directed
236 or permitted by a federal statute or by these rules”

237 A judge noted that “This is a big job.” It’s important to recognize that there are courts that
238 think they know what they are doing. “Less is more with this kind of thing.” And remember to
239 focus on step 3 in Judge Dow’s series of questions – will we create problems by making a change
240 to respond to the problem called to our attention?

241 It was asked why the Appellate Rules are not a focus of this effort. One response is that the
242 courts of appeals “inherit” sealing decisions made by district courts in the record on appeal. But it
243 can happen that further matters are filed in the appellate court for which confidentiality is claimed.

244 An attorney member noted that “The Seventh Circuit does not credit district court seals.”

245 Another suggestion was that Subcommittee members should consult with districts that
246 have views on these subjects to learn more about their concerns.

247 A judge warned that it would be a mistake to assume that all CM/ECF systems are the
248 same. Moreover, it is not necessarily true that anyone can really retract something filed in this
249 manner – “Once on the server, it’s hard to impossible to remove.” It may be that something would
250 be adopted at a high level of generality, but caution is needed.

251 Another judge noted, however, that concerns about excessive use of sealing have been
252 floating around for years. So this is important. But it is also critical to assure that clerk’s offices
253 are involved because they are “essential players.”

254 (3) *MIDP*

255 There was brief discussion of the learning of the very thorough MIDP study. No members
256 urged that work continue on this topic, and it will be dropped from the agenda.

257 (4) *Cross-border Discovery*

258 Judge Michael Baylson (E.D. Pa.) attended the meeting during the discussion of this topic,
259 and introduced the issues raised by his submission urging that the rules address the growing
260 phenomenon of cross-border discovery. He noted that he dealt with these issues as a lawyer in
261 private practice and also as U.S. Attorney before he took the bench. More recently, he has played
262 a prominent role in a number of meetings and conferences about these issues, including a number
263 involving the Sedona Conference, which has written to the Committee supporting Judge Baylson's
264 proposals.

265 As a judge, he has found it workable to take a collaborative approach to discovery in France
266 in a major litigation before him that involved discovery in France.

267 Altogether, these issues have persuaded him that we need to have rules addressing these
268 challenges. The frequency of this activity has increased a great deal in this century, and the trend
269 lines are pointed up in his forthcoming *Judicature* article, as indicated on p. 194 in the agenda
270 book. But presently there is essentially no guidance in the rules for these problems even as they
271 proliferate. "We are in a global universe." His suggestion is that the rules consider (1) that the
272 judge ought to pay attention to foreign law; (2) that the judge should take account of comity; (3)
273 that a rule should emphasize proportionality; and (4) that the challenges of ESI must be recognized
274 in the rules. He is confident that interested lawyers can be approached for insights.

275 A reaction was that too often American litigators (and perhaps some judges) seem to insist
276 on doing things their own way even though taking a cooperative approach might achieve valuable
277 and rapid results while taking a confrontational approach can prove ineffective. In addition, it was
278 noted that different approaches may be needed for discovery abroad for use in U.S. litigation under
279 section 1781 and discovery in the U.S. for use in foreign courts (under section 1782).

280 Judge Baylson agreed that the Hague Convention is very important, but also noted that it
281 is very unpopular with many American lawyers. It will be a challenge to explain why we need a
282 rule, but it is worthwhile challenge.

283 It was noted that this is the first time this topic has been on the Committee's agenda, and
284 the Subcommittee is presently at an early stage and seeking reactions.

285 A member reacted that these are important concerns, but not limited to discovery. There
286 are closely related issues regarding service of process, the use of Rule 44.1 on proof of foreign
287 law. In the 1950s, Congress created a process for cross-border issues.

288 A reaction was to that comment was that it may be better to adhere to a "pure procedural"
289 framework. Another was that when this set of discovery issues came up more than 30 years ago
290 and resulted in a rule change approved by the Judicial Conference and forwarded to the Supreme
291 Court, the government of the United Kingdom submitted objections and the Court returned the
292 proposed amendments to the rulemakers, leading to eventual abandonment of the proposals.
293 Perhaps taking a low profile approach would be prudent.

294 At the end of the Advisory Committee meeting, it was announced that a new subcommittee
295 had been established to address cross-border issues. It will be chaired by Judge Manish Shah
296 (N.D.Ill), and include Magistrate Judge Jennifer Boal (D. Mass.), Professor Clopton, Josh Gardner
297 (DOJ), and Judge Catherine McEwen (liaison to the Bankruptcy Rules Committee).

298 Rule 41

299 Judge Bissoon introduced the report of the Rule 41 Subcommittee. A key problem is the
300 interpretation of the word “action” in the rule. At least one court of appeals has taken a very literal
301 approach to that word in this rule, holding that even a stipulated dismissal of parts but not all of an
302 action is not covered by the rule. Other courts have taken a more pragmatic approach to the rule,
303 particularly when dismissal is done pursuant to a stipulation and by court order. There has been
304 some outreach to the bar and bench about the issues raised by Rule 41(a), and that outreach is
305 ongoing. Meanwhile, the thought is that the rule might benefit from a shift from “action” to
306 “claims.” That could mean complete dismissal of all claims against any party or dismissal of some
307 but not all claims against a given party could be covered by the rule.

308 Professor Bradt added that there is a great variety of potential interpretations. At one end
309 is the Eleventh Circuit interpretation that “action” means only that – the whole case. Another
310 approach is that the rule should permit unilateral dismissal by plaintiff as to any defendant or any
311 claim. In between, there are many possible positions.

312 A related problem is whether the current deadlines – filing of an answer or motion for
313 summary judgment – should be moved up. Other rules cut off other things at an earlier point, so
314 perhaps the filing of a Rule 12 motion should cut off the right to dismiss without prejudice.

315 Historical research does not provide much light on the current problem. It is clear that the
316 goal in the 1930s was to put an end to the widespread problem of dismissals without prejudice at
317 very late stages in the litigation (even after trial had begun). But that does not much inform the
318 issues encountered nowadays, when multiparty cases abound.

319 Further discussion pointed up the variety of ways in which the rules might produce results
320 like the ones Rule 41(a) authorizes. Rule 16 authorizes the judge to “narrow” the issues and claims
321 as part of the pretrial process. Parties can in essence drop claims by forgoing a request under Rule
322 51 for instructions on some claims. Even the Eleventh Circuit has said that parties may “abandon”
323 claims. And Rule 11(b) says that even as to claims properly asserted in the first place, if it becomes
324 clear that they are unwarranted the attorney violates the rule by “later advocating” the claims.

325 The discussion so far was summed up as reflecting the reality that has emerged that the
326 rule is “clunky” and that a literal interpretation resembles trying to fit “a square peg into a round
327 hole.” It is not clear how much additional outreach to the bench and bar will facilitate this work,
328 though help is always welcome. The current thinking is that the rule should focus on “claims”
329 rather than “actions.” There seems to be less interest in revising the provisions about time frames
330 – e.g., before an answer or Rule 56 motion is filed.

331 Another set of questions was raised: (1) How would the “without prejudice” feature of Rule
332 41(a) play out? Does that mean the claim dropped at one point in the case can be re-introduced
333 later in the case? (2) How does that affect the consequences of eventual judgment in the case
334 (assuming the withdrawn claim does not return) in a separate action asserting the withdrawn claim?

335 A first reaction to these questions was that the existing rules hardly work efficiently to deal
336 with such situations. “Amending the complaint in the middle of a trial would be a problem.”
337 Another member agreed, and added that problems can arise if there is a settlement with some but
338 not all defendants in a multi-defendant case. One does not want to invite a “whole satellite
339 litigation” about how to proceed in such circumstances. And nonsettling defendants can cause
340 mischief.

341 Regarding the second question, a further point was that “without prejudice” under Rule
342 41(a) (as under Rule 41(b)) only means that the dismissal itself is not *res judicata*. Assuming there
343 is a final judgment on the remaining claims in the case, the claim preclusive effect of the judgment
344 in a separate litigation would depend on the rules of claim preclusion. So that means the various
345 claims initially combined in the action may have little to do with one another. If so, the rule should
346 not provide that the withdrawn claims would have to be regarded as barred by the judgment on the
347 remaining ones. It would depend on the specifics of the given case.

348 A further note was that the Supreme Court’s *Semtek* case points out that the rules ought not
349 try to control claim preclusion. That decision was about Rule 41(b), but instructive for Rule 41(a).

350 Yet another note was that Rule 41(b) speaks of “any claim,” not the entire “action.” So
351 even within Rule 41 we have divergent attitudes toward dismissals. This set of questions is ripe
352 for careful examination.

353 And the Rule 41(a) question is not limited to unilateral actions by a party; the “action”
354 limitation (if it is one) also applies to stipulations and court orders under Rule 41(a).

355 The Subcommittee will continue examining these issues.

356 Rule 7.1

357 Justice Bland is Chair of the Rule 7.1 Subcommittee, which was appointed after the last
358 meeting of the Committee and has begun work. Though the work to date is preliminary, progress
359 has been made. One starting point is that Rule 7.1 does not map perfectly onto the main recusal
360 statute, 28 U.S.C. § 455. But that is not necessarily a flaw in the rule. The rule does not tell judges
361 when they must recuse. Instead, it serves to alert judges to the possible existence of statutory
362 grounds for recusal. “Rule 7.1 does not put a thumb on the scale on whether to recuse, but only
363 provides information for the judge.”

364 The current rule may, however, not do that job as well as could be hoped. One submission
365 to the Committee emphasized what has been called the “corporate grandparent” problem. The
366 illustrative instance (but not only illustration) is Berkshire Hathaway. It may own 100% of the
367 stock of a subsidiary that in turn owns 100% of the stock of the party before the court. The current

368 rule does not clearly call for disclosure of Berkshire Hathaway in such a situation, and the judge
369 who owns Berkshire Hathaway stock (perhaps acquired before appointment to the bench) may be
370 unaware of the possible connection.

371 At this point, one question is whether it makes sense to try to revise the rule. If so, there
372 are other questions, such as:

373 (1) whether Rule 7.1 should be conformed to the recusal statute in some manner. For
374 example, one district has a rule that focuses on whether the judge's interests might be
375 "substantially affected" by the outcome of the pending case.

376 (2) Whether the disclosure net should be widened beyond interests in corporate parties.
377 Today's commercial world includes many large actors who are not "nongovernmental
378 corporations," which are the focus of the rule. Examples that come to mind include LLCs,
379 limited partnerships, etc. Perhaps something like "entity" should be used, though that
380 probably would introduce very uncertain boundaries. Beyond that, one might also focus on
381 "profit-sharing agreements" or perhaps "insurance agreements."

382 (3) Whether the 10% figure in present Rule 7.1(a)(1)(A) should be changed. That is derived
383 from outside the rules.

384 (4) The rule is limited to publicly-traded entities. But in today's world many large
385 commercial players do not fit that description. Should it be assumed that the judge would
386 not need notice of such interests (as compared to holding stock in publicly-traded entities)
387 because the judge would recognize the connection without the need for a formal disclosure
388 requirement.

389 Another proposal was to require the parties to examine the judge's holdings (as now
390 required to be disclosed) and notify the judge of any possible ground for recusal within a short
391 period.

392 A judge noted that one district is also looking at disclosure of third party litigation funding
393 as a related sort of method of identifying possible grounds for recusal. A response was that TPLF
394 remains on the Committee's agenda and is being actively monitored. Another response followed
395 up with an observation by a judicial member of the Committee on this topic several years ago: "I
396 don't think very many judges hold substantial interests in hedge funds." It has been asserted that
397 hedge funds are major players in the TPLF world. The TPLF set of issues is probably separate,

398 Another reaction was that the rule could be expanded to call for disclosure of "any financial
399 interest," but this would be quite broad.

400 A judge noted that if the goal is to assist the judge it is worth noting the Codes of Conduct
401 Committee of the Judicial Conference is reportedly at work on revising the ethics guidance for
402 judges to take account of the current landscape in terms of judicial ethics. One possible focus is on
403 control (as opposed to a financial stake). Another is the "appearance issue" -- what would create
404 an appearance of bias?

405 Another member agreed, but added that this could become a “huge quagmire.” Using terms
406 like “entity” or “affiliates” would be very broad.

407 It was stressed that the statute commands judges to recuse in situations the statute describes.
408 The rule does not purport to replace the statute in that regard, but only to give the judge information
409 helpful in making the decisions the statute commands the judge make.

410 On the 10% provision in the current rule, it was noted that it serves as a proxy for focusing
411 on “control.” Presumably there may be other connections that could contribute to “control,” but
412 defining them and excluding semantically similar arrangements that do not constitute “control”
413 would be quite difficult. Our rule currently avoids other proxies. And it might be that statutory
414 changes could bear on such topics. For example, Senator Warren has introduced a bill that would
415 restrict judicial ownership of securities. No action has been taken on that bill, but if something like
416 that were adopted it might inform what should be in Rule 7.1.

417 A judge suggested it would be a good idea to reach out to the Judicial Conference
418 Committee on Codes of Conduct. The response was that the Subcommittee had already made
419 contact with that group, and the Chair of that committee favored moving forward on the rules front
420 as well. Another point made was that, to some extent, it seems that the Civil Rules Committee is
421 serving as a lead on these topics, which also bear on the Bankruptcy, Criminal, and Appellate rules.

422 A judge noted that it appears that about half the districts do not have a local rule
423 implementing the national rule. Maybe this is something on which districts vary a great deal in
424 important ways. For example, a district in a financial center might have very different needs than
425 a rural district.

426 Another reaction was that this is really more of a court conduct issue than a procedural
427 rules concern. Having a disclosure rule is helpful to judges who must decide whether they should
428 recuse under the statute. Our goal is to help judges avoid problems, not to tell them what to do.

429 The Subcommittee will continue with its work.

430 *Inter-Committee Matters*

431 Prof. Struve, Reporter of the Standing Committee, made oral reports about two sets of
432 issues being addressed by inter-committee committees.

433 E-Filing by Self-Represented Litigants

434 Professor Struve reported on the progress of the working group that has been studying two
435 broad topics relating to self-represented litigants – first, increasing their electronic access to court
436 (whether by access to CM/ECF or by other means), and second, removing the current rules’
437 requirement that paper filers effect paper service (of papers submitted subsequent to the complaint)
438 on CM/ECF participants. One new development is that there now is a report (included in the
439 agenda book) that deals with findings from a round of interviews that Dr. Tim Reagan and Prof.
440 Struve conducted in Spring with employees of nine district courts.

441 The other new development concerns tentative decisions taken at the working group’s most
442 recent meeting. At that meeting, working group participants noted the substantial support that had
443 emerged from the advisory committee discussion concerning a change to the rules governing
444 service of papers subsequent to the complaint. The consensus supports repealing the current rules’
445 apparent requirement that non-CM/ECF users serve CM/ECF users separately from the NEF
446 generated after a filing is scanned and uploaded into CM/ECF. But a sketch of a proposed
447 amendment is not before the advisory committees this fall because the working group concluded
448 that it may be worthwhile to consider a broader overhaul of the service rules, to take greater
449 account of the overall shift from paper to electronic service. Given that service by means of the
450 NEF is the primary means of service nowadays, the idea is that the service provisions in Civil
451 Rules 5 and the other national rules should be revised to foreground that as the primary means.

452 As to the question of CM/ECF access for self-represented litigants, working group
453 participants recognized that in the advisory committee discussions there were expressions of
454 support for expanding that access, but also expressions of skepticism and concern about expanding
455 that access. Accordingly, the working group was now considering the possibility of proposing a
456 rule that would merely disallow districts from adopting blanket bans entirely denying all CM/ECF
457 access to all self-represented litigants. Such a rule could say that even if a district generally
458 disallows CM/ECF access for all self-represented litigants, it should make reasonable exceptions
459 to that policy. Professor Struve invited participants to share any ideas about how such a rule could
460 be drafted so as to address any concerns held by skeptics in the room.

461 Midnight deadline for E-filing

462 Professor Struve also reported on the work of the E-Filing Joint Subcommittee. The
463 subcommittee had been formed in response to a 2019 suggestion by then-Judge Michael Chagares
464 that the national time-counting rules be amended to set a presumptive deadline (for electronic
465 filing) earlier than midnight. The subcommittee asked the FJC for research on relevant issues, and
466 the FJC produced two excellent reports – one on electronic filing in federal courts, and one on
467 electronic filing in state courts.

468 The other notable development was the adoption by the Third Circuit of a local rule that
469 moved the presumptive deadline for most electronic filings in that court of appeals to 5:00 p.m.
470 That local rule took effect in July 2023.

471 The Standing Committee had asked the subcommittee to consider these developments. The
472 subcommittee met virtually in summer 2023. They carefully considered both the Third Circuit's
473 reasons for its new local rule and also concerns that a number of private attorneys and the DOJ
474 had expressed about the proposed local rule. The subcommittee voted not to propose any national
475 rule changes and also voted that it should be disbanded.

476 One Advisory Committee member suggested that things were working out fine in the Third
477 Circuit. Another participant suggested that it would make sense for the rules committees to allow
478 things to work themselves out in that circuit.

479 Redaction of last four digits
480 of Social Security number

481 Rules Committee Chief Counsel Thomas Byron reported on recent developments
482 concerning the redaction of social-security numbers. Senator Wyden has asked for a re-
483 examination of the current provisions in the privacy rules (including Civil Rule 5.2) that allow
484 filings to include only the last four digits of the social-security number in court. An alternative
485 would instead require redaction of the entire social-security number. The current rules allowing
486 partial redaction reflect the judgment of the Advisory Committees that uniformity considerations
487 warranted consistent redaction requirements across the Appellate, Bankruptcy, Civil, and Criminal
488 Rules. Because the Bankruptcy Rules Committee previously determined that the last four digits of
489 a social-security number could be important in some bankruptcy filings, this committee and others
490 decided to follow the lead of the Bankruptcy Rules because practitioners would benefit from
491 consistent requirements across the rules.

492 The Bankruptcy Rules Committee has discussed this issue during its last two meetings;
493 those discussions suggest that there remains a need in bankruptcy proceedings to allow at least
494 some filings that include a partial social-security number. Although that committee will continue
495 to consider whether some changes to the Bankruptcy Rules might be warranted, it seems unlikely
496 to recommend a requirement of complete redaction. That tees up the question for this committee,
497 as well as the Appellate and Criminal Rules Committee, whether to depart from a uniform
498 approach and adopt a rule requiring the complete redaction of social-security numbers. The
499 reporters for the Advisory Committees and the Standing Committee met to discuss this question,
500 and hope to have more to report to this Committee at the spring 2024 meeting.

501 Professor Marcus observed that the Civil Rules do not appear to require that any part of a
502 social-security numbers be included in a filing. He also noted that Senator Wyden's suggestion did
503 not identify any specific problem attributable to the inclusion of a partial number in a court filing.
504 Mr. Byron responded that it might not be possible to trace an instance of identity theft to a court
505 filing with a partial social-security number but there might nevertheless be good precautionary
506 reasons for considering a complete redaction requirement. A practitioner member noted concerns
507 about data breaches and the and the possibility of serious harm from identity theft using a partial
508 social-security number and other information.

509 A judge member explained the benefits to both debtors and creditors of allowing partial
510 social-security numbers in bankruptcy proceedings. For example, the discharge in bankruptcy has
511 value to the debtor only if the debtor can show that this discharge applies to that person. The last
512 four digits are one way to do that. Another example is to give immediate effect to the automatic
513 stay upon filing of the petition in bankruptcy court. It can be crucial to show that this “John Doe”
514 is the one being sued in a given case.

515 Professor Marcus and a judge member discussed the practice of the Social Security
516 Administration that historically included complete social-security numbers in administrative
517 proceedings. Professor Struve pointed out that the current privacy rules exempt filings in social
518 security review cases.

519 An academic member suggested that there might be technological tools available to
520 identify partial or complete social-security numbers in court filings. Mr. Byron agreed that those
521 kinds of tools could be useful, even if not matters for rulemaking. He also reminded the committee
522 that the Federal Judicial Center is conducting research into the scope of any noncompliance with
523 the redaction requirements of the privacy rules.

524 This issue will be carried forward.

525 Remote testimony in Bankruptcy Court

526 As an information matter, it was reported that the Bankruptcy Rules Committee has begun
527 discussion of relaxing limits on remote testimony in some court proceedings. A focus group study
528 is ongoing.

529 Civil Rule 43(a) says that remote testimony is permitted only in “compelling
530 circumstances” and only with “appropriate safeguards.” It appears that the Bankruptcy Rules
531 committee is focused on relaxing the “compelling circumstances” requirement.

532 It was noted that the CARES Act Subcommittee formed at the beginning of the pandemic
533 examined all the Civil Rules to determine whether the pandemic experience should a need for
534 special treatment of the requirements of Rule 43(a), but found that the current rule gave courts
535 sufficient flexibility in dealing with the problems via remote proceedings.

536 A judge raised a caution about too much relaxation. One illustration was noted by another
537 participant – *Nuvasive, Inc. v. Absolute Medical, LLC*, 642 F.Supp.3d 1320 (M.D. Fla. 2022), in
538 which a witness testifying remotely in an arbitration proceeding was receiving text messages from
539 another party seemingly telling the witness what to say. *See id.* at 1331-32. This is a real concern,
540 but the judge was clear that this was the only such instance he had seen in his long career.
541 Contemporary methods of communication may make this sort of thing easier than it was in the
542 past, however. At the same time, safeguards only work if they are honored, and liars may cheat on
543 that score as well. In this cited case, there were some safeguards in place, but they did not entirely
544 protect against misbehavior.

545 Pushing in the direction of flexibility, however, is the likelihood that remote participation
546 may enhance access to court. For example, it was reported that in the state courts in Texas
547 (particularly family law matters) remote hearings had been used some two million times. This
548 permitted better participation than in conventional in-person proceedings. It offered “road testing
549 in real time” and shows great promise.

550 *Random case assignment*

551 The issue of “judge-shopping” has been very prominent recently with regard to a number
552 of high-profile suits, often seeking “nationwide” injunctive relief. The Brennan Center for Justice
553 at NYU Law School submitted 23-CV-U, urging the adoption of a rule that “would establish a
554 minimum floor for the randomization of judicial assignment within districts in certain civil cases.”

555 That is not the only such initiative. The American Bar Association in its Resolution 521
556 (adopted in August 2023) urged the federal courts to “eliminate case assignment mechanisms that
557 predictably assign cases to a single United States District Judge without random assignment when
558 such cases seek to enjoin or mandate the enforcement of a state or federal law or regulation and
559 where any party, including intervenor(s), in such a case objects to the initial, non-random
560 assignment within a reasonable time.”

561 In July 2023, 19 U.S. senators wrote to Judge Rosenberg raising similar concerns.

562 This is clearly a matter of great importance. But the introduction of this matter during the
563 Committee’s meeting also noted that it is not clear that this is best addressed in a Civil Rule.
564 Somewhat supportive of that concern is 28 U.S.C. § 137(a), which appears to grant the district
565 court authority to adopt a method of allocating cases. Statutory provisions also contain
566 considerable detail about the divisions of district court, which may sometimes be a reason why a
567 plaintiff can be confident in a given division that the case will be assigned to a particular judge.
568 See 28 U.S.C. §§ 81-131. Since the main focus of recent concerns seems to be on divisions rather
569 than entire districts, the detail of these statutory provisions raise issues about whether a national
570 rule can require a reallocation of business among divisions of a district court.

571 This is not to say that the rules process is clearly unable to address these concerns via rule.
572 For one thing, there is likely a good argument that a rule about allocation of judicial business is a
573 matter of practice or procedure within the Rules Enabling Act. And the supersession clause of that
574 Act says that rules supersede even statutes. But that authority was largely intended to counter
575 arguments in the 1930s and 1940s that the multitude of then-existing statutory provisions dealing
576 with topics addressed in the new rules could hamstring the new rules in their infancy. On the other
577 hand, § 137 was adopted more than 20 years before the Enabling Act was adopted in 1934, so it
578 seems to be within the ambit of the supersession clause. (Contrast, for example, the procedural
579 provisions of the Private Securities Litigation Reform Act, adopted in 1995.)

580 Background information on this topic appears beginning on page 301 of the agenda book.

581 Discussion of the issues involved several Committee members.

582 A judge noted that judge shopping of this sort is not a new phenomenon. Indeed, because
583 single-judge districts were probably more common in the past than in the present, it may have been
584 more common in the past. This judge is Chief Judge of a district that is very large, roughly 500
585 miles by 500 miles. Insisting that all cases be assigned randomly among all judges in the district
586 could impose very substantial burdens on many parties, who could be required to travel long
587 distances to attend proceedings in a distant court in the district. Whether there is a single judge or
588 many judges in a given division is largely controlled by Congress, and its allocation of divisions
589 is governed by statute. Given changes in political ideology, this sort of concern has heightened
590 importance today, but it is hardly something that only came into existence in the last few years.
591 We must keep in mind that Congress not only created the districts and the divisions (and the
592 number of judgeships in each of them), it also adopted venue statutes that determine where cases
593 may be filed. For the most part, these things are not controlled by the Civil Rules. Importantly,
594 “there is an interest in having local disputes decided locally.”

595 Another judge noted that this may not be among the responsibilities of this Committee.
596 Congress says how the districts are to be organized. Under guidance of Congress (and partly due
597 to the difference in size of states) there are districts of very different sizes. This judge has noted
598 bumper stickers in his state saying “I walked across the state.” That is in some ways impressive,
599 but pales in comparison to trying to walk across a state that is 1,000 miles wide. “We should be
600 very careful about whether to wade in here.” The statute leaves these matters to the Chief Judge,
601 possibly under direction by the Circuit Judicial Council. This Committee should be very cautious
602 in this area.

603 Another judge noted that this localism is not a modern phenomenon. This judge distinctly
604 recalls being asked decades ago by a senator during his confirmation hearing whether he realized
605 that the new seat for which he was appointed would mean he would need to reside in and become
606 a part of the community where the new seat was located. Indeed, as of that time, Congress had
607 created a one-judge division, and the senator wanted to be certain the candidate understood the
608 need to be connected to that locale.

609 On behalf of the Department of Justice, competing considerations were emphasized. “This
610 is a real issue.” The State of Texas, for example, has sued the United States 32 times, and its forum
611 selection has not been random. Not every case is a “local dispute.” To the contrary, the matters
612 that called forth this proposal are national in scope, but there is an appearance problem when a
613 litigant like a state can go into any particular division and essentially choose their judge. Section
614 137 does not so clearly preclude rulemaking to address these issues. The general topic falls within
615 the scope of the Enabling Act. And the statute recognizes “rules or orders” of the district. Yet local
616 rules themselves are adopted pursuant to Rule 83, suggesting a role for the rules in overseeing
617 these issues. It would not be so odd for a rule to superseded this century-old statute. This issue
618 deserves further study.

619 A reaction to these points was that the rules have generally stayed away from this sort of
620 issue. The operation of district courts and allocation of responsibilities among the judges in a
621 district have traditionally been subject to local regulation. Section 137 is one of “an array of
622 statutes regarding judicial organization.” Some of them may become controversial. Consider

623 related cases local rules, which have attracted attention on occasion. But the point is that they are
624 local rules. “There are dragons along this pathway.”

625 A judge suggested that – given the importance of these issues – the Standing Committee
626 should have a role in deciding how and whether to pursue a rules-based response. For the present,
627 what seems to be needed is further legal analysis of the potential role for the rules process. This is
628 not so much a task for a subcommittee as a legal research challenge.

629 Another judge agreed. We must satisfy ourselves on the question whether we can or cannot
630 solve this problem or at least change the facts on the ground by a national rule. We cannot be blind
631 to the perception that litigants -- from both ends of the political spectrum -- may attempt to exploit
632 judicial assignment arrangements to obtain favorable results on cases of high national importance.
633 This issue should remain on the Committee’s agenda for its next meeting.

634 Another judge noted that such concerns are not limited to nationwide injunction cases.
635 Patent cases, “mega bankruptcy” proceedings may fall into the same sort of category.

636 Another member noted that similar concerns could be voiced about Rule 4(k), regarding
637 the personal jurisdiction reach of district courts.

638 Another judge cautioned that this is statute-driven. With regard to bankruptcy venue issues,
639 there is a “perennial bill” in Congress on such concerns.

640 Work will continue on these issues, and in particular the scope of rulemaking authority to
641 address them.

642 *Rule 60(b) – Kemp v. U.S.*

643 The issue was introduced as involving *Kemp v. United States*, 142 S.Ct. 1856 (2022), in
644 which the Supreme Court decided that “mistake” under Rule 60(b)(1) includes a judicial mistake.
645 During the January 2023 meeting of the Standing Committee, Judge Pratter (E.D. Pa.), a former
646 member of this Committee, asked whether a rule change might be considered in light of this
647 decision.

648 Information concerning this issue is in the agenda book beginning at page 334, and include
649 the *Kemp* case, beginning at page 338 of the agenda book.

650 In the *Kemp* case, the issue arose from a motion under § 2255 to vacate a sentence. Kemp
651 was convicted in 2011 and sentenced to 420 months in prison. Along with several co-defendants,
652 he appealed his conviction. The court of appeals consolidated the appeals and affirmed in
653 November 2013. Several other defendants – but not Kemp – sought a rehearing, and the court of
654 appeals denied that application in May 2014.

655 In April 2015 – less than a year after denial of the application for rehearing by Kemp’s co-
656 defendants in the court of appeals – Kemp filed a § 2255 motion. The Government moved to
657 dismiss on the ground the motion was too late because the court of appeals affirmance of Kemp’s

658 conviction became final 90 days after the court of appeals' affirmance in November 2013. The
659 district court granted the Government's motion to dismiss, and Kemp did not appeal. But due to
660 the petition for a rehearing by Kemp's co-defendants the district judge's dismissal on timeliness
661 grounds may have been wrong.

662 Two years after dismissal of the § 2255 proceeding, Kemp sought to reopen the action,
663 arguing that the judge had been wrong to grant the Government's motion to dismiss because his
664 time to file was extended due to the application for rehearing by his co-defendant in consolidated
665 cases, making his filing timely.

666 This time the district court denied the motion on the ground it was filed too late because it
667 was beyond the one-year limit prescribed in Rule 60(b) for motions under Rules 60(b)(1), (2), or
668 (3). Kemp contended that he was not relying on 60(b)(1) because that provision did not include
669 legal errors, but only errors or omissions by parties. The district court dismissed, and the court of
670 appeals rejected this argument when Kemp appealed.

671 Because there was a circuit split, the Supreme Court granted certiorari, and it held by an 8-
672 1 vote that Rule 60(b)(1) includes legal mistakes by the judge. Justice Sotomayor concurred in the
673 opinion, but reserved the question whether that interpretation would apply if the legal error was a
674 result of a change in law after the court's original decision, a possibility the Court's opinion
675 recognized remained undecided. Only Justice Gorsuch dissented, and he argued that the issue
676 should be addressed through the rules process, not that the interpretation of the rule was wrong.

677 The Court's decision adopted the majority interpretation of the rule, holding that the one-
678 year limitation in Rule 60(b) applies to judicial errors of law. In addition, it also noted that, beyond
679 that one-year limitation, the rule also requires that the motion be brought "within a reasonable
680 time." That has been held (in at least one case cited by the Court) to mean that it is not reasonable
681 to permit the time to appeal to expire and then to challenge the ruling under Rule 60(b).

682 Because this decision adopts the majority rule and only applies that one-year limitation as
683 an outside limit on the bringing of a motion within a "reasonable time," it does not seem that the
684 Supreme Court's decision (by an 8-1 vote) calls for consideration of a rule change.

685 One member expressed agreement, and the consensus was to drop this matter from the
686 Committee's agenda.

687 *Rule 62(b)*

688 This issue was introduced as being raised by the Appellate Rules Advisory Committee. In
689 the wake of *City of San Antonio v. Hotels.com, L.P.*, 141 S.Ct. 1628 (2021), the Appellate Rules
690 Committee prepared a proposed amendment to Appellate Rule 39 authorizing a motion in the court
691 of appeals for reconsideration of the allocation of costs. This proposed amendment is out for public
692 comment presently.

693 The Supreme Court's decision was that, after remand from the court of appeals the district
694 court had no discretion about how to allocate costs. In that case, the major item on the cost bill

695 was the premium on a bond posted by the losing defendant to stay enforcement of the large
696 judgment in the city’s favor. The premium was more than \$2 million. After reversing the district
697 court judgment in favor of the city, as provided in the Appellate Rule the court of appeals directed
698 that the city bear the costs on appeal, remanding to the district court to determine the amount of
699 those costs. The proposed amendment to Appellate Rule 39 is designed to provide a vehicle for
700 the losing party to seek a revision from the court of appeals of the cost allocation while the overall
701 matter is still fresh in the mind of the court of appeals judges.

702 During the drafting of this amendment to Appellate Rule 39, one concern was whether the
703 judgment winner might not know the magnitude of the premium for the bond at the time it would
704 have to decide whether to seek a court of appeals ruling on the allocation of the costs on appeal if
705 that emerged only after remand to the district court. So a provision calling for disclosure of that
706 cost would be useful, but the Appellate Rules Committee could not devise a way to fit that into its
707 Rule 39. It has suggested, instead, that Civil Rule 62(b) be amended to call for such disclosure.

708 A possible amendment approach was included in the agenda book:

709 **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party
710 may obtain a stay by providing a bond or other security. The party seeking the stay
711 must disclose the premium [to be] paid for the bond or other security. The stay takes
712 effect when the court approves the bond or other security and remain in effect for
713 the time specified in the bond or other security.

714 It is not clear, however, whether such a change is needed. For one thing, it may be that,
715 even though there is no formal requirement for disclosure, in fact the judgment winner usually
716 knows the amount of the bond premium in connection with the district court’s approval of the
717 bond. In the *Hotels.com* case itself, the particulars off the bonding arrangement seemed to have
718 been discussed in some detail. It is not clear that lack of disclosure explains the city’s failure to
719 seek a reallocation of costs in the court of appeals, which may have resulted from its mistaken
720 belief that the district court would, on remand, have discretion to change the allocation ordered by
721 the court of appeals.

722 It might be, as well, that incorporating disclosure into the rule could be taken to mean the
723 district court could refuse to approve the bond on the ground that the premium was too high.
724 Perhaps, given the requirement that the district court approve or disapprove the bond arrangements
725 before granting a stay, this would be a good addition. But it seems that the winning party would
726 usually not want a bond issued by a “cut rate” bonding company, so it would be a curious ground
727 for declining to approve the bond.

728 The question at present is whether such a change would be a positive development,
729 assuming that it would not have negative consequences. In other words, is there really a need for
730 this rule change?

731 One reaction was that this does not seem to be a “real world problem.” Instead, it is a minor
732 problem, though a rule amendment might in some instances provide helpful notice to the judgment

733 winner of the need to seek re-allocation in the court of appeals under the new procedure if it is
734 added to Appellate Rule 39. On the other hand, it is not clear that there is any significant risk of
735 adverse consequences due to such a rule amendment.

736 The matter will remain on the Committee's agenda, but the need for action remains
737 uncertain. The question can be addressed again at a later Advisory Committee meeting.

738 *Rule 81(c)*

739 Submission 15-CV-A has remained on hold since 2016. It focuses on a small change of
740 verb tense made in the 2007 restyling:

741 (c) **Removed Actions.**

742 (1) **Applicability.** These rules apply to a civil action after it is removed from a
743 state court.

744 * * *

745 (3) **Demand for a Jury Trial.**

746 (A) **As Affected by State Law.** A party who, before removal, expressly
747 demanded a jury trial in accordance with state law need not renew
748 the demand after removal. If the state law ~~does~~ did not require an
749 express demand for a jury trial, a party need not make one after
750 removal unless the court orders the parties to do so within a specified
751 time. The court must so order at a party's request and may so order
752 on its own. A party who fails to make a demand when so ordered
753 waives a jury trial.

754 (B) **Under Rule 38.** If all necessary pleadings have been served at the
755 time of removal, a party entitled to a jury trial under Rule 38 must
756 be given one if the party serves a demand within 14 days after:

757 (i) it files a notice of removal; or

758 (ii) it is served with a notice of removal filed by another party.

759 When this submission was reported to the Standing Committee at its meeting in June 2016,
760 two members of that committee (then-Judge Gorsuch and Judge Graber) proposed that, instead of
761 this change focused on removed cases, Rule 38 itself be amended to dispense with the need for a
762 jury demand in any civil case, as is already the attitude of the Criminal Rules. Were this change
763 made, of course, there would be no need to revise Rule 81(c) since the jury demand requirements
764 of Rule 38 would be inapplicable. After extensive FJC research showing that failure to demand a
765 jury trial rarely led to loss of the right to a jury trial, however, the Committee had recently decided

766 to drop that Rule 38 suggestion from the agenda. For that reason, this submission has returned to
767 the agenda.

768 The submission is from a Nevada lawyer who found that his failure promptly to demand a
769 jury trial after removal in an action removed from a Nevada state court deprived his client of a jury
770 trial because he did not demand one after removal even though the time when state court rules
771 required a jury demand had not passed as of the time of removal. He contended that the change in
772 verb tense misled him.

773 The restyling change in verb tense does not appear to have been meant to affect the
774 application of the rule; as with other rules, the Committee Note to the restyling said that the change
775 was “intended to be stylistic only.” In 1983, the Ninth Circuit interpreted Rule 81(c) to require a
776 jury demand in removed actions whenever a jury demand is required by the rules of the state court
777 from which removal was effected. And the district courts in the Ninth Circuit have continued to
778 interpret the rule, in keeping with what the Committee Note said.

779 In the Nevada case that prompted this submission, the district court was unwilling to excuse
780 the failure to demand a jury trial promptly after removal. And the revised rule may have reassured
781 the attorney that no demand was needed. Using “does” (as the rule did until 2007) seems to focus
782 on whether the state law practice never requires a jury demand. Perhaps that would be true if a
783 state had a rule like the Gorsuch/Graber revision to Rule 38 proposed in 2016. It is not known
784 whether there are any states which such provisions.

785 With the change in tense to “did,” the reader might take Rule 81(c) to ask whether, at the
786 time of removal, state law required that a jury demand already have been made. So interpreted, the
787 change in verb tense could reassure a plaintiff whose case was removed that the federal timetable
788 for demanding a jury trial did not apply because the due date for a jury trial had the case remained
789 in state court had not yet arrived. For example, it appears that in California state courts the jury
790 trial demand need not be made until “the time the cause is first set for trial, if it is set upon notice
791 or stipulation, or within five days after notice of setting if it is set without notice or stipulation.”
792 Cal. Code Civ. Proc. § 631(f)(4). So under the prior version of Rule 81(c), California is a state that
793 “does” require an express jury demand, which was the basis for the Ninth Circuit’s 1983 decision
794 about the effect of the rule in a case removed from a California state court.

795 To take the change in verb tense to mean that Rule 38’s deadline does not apply unless
796 state law required that a jury trial demand be made as of the date of removal would mean, it seems,
797 that removal before the due date in state court would, in effect, mean that in removed cases the
798 demand requirement would resemble what the Gorsuch-Graber proposal would have produced in
799 federal court. That would seem an odd result of a provision that seems to have been designed only
800 to guard against loss of the right to a jury trial when practitioners accustomed getting a jury trial
801 without having to demand one find their cases removed to federal court.

802 It might be added that, because removal ordinarily must be sought very early in the case,
803 this reading of the rule would routinely exempt removed cases from the jury-demand requirement.

804 Since Rule 38 requires a jury demand only after the last pleading addressing an issue is served, it
805 would seem that usually the change in verb tense would nullify the Rule 38 demand requirement.

806 It does not seem that the 2007 style revision has caused courts to re-interpret Rule 81(c),
807 however. But as one Committee member noted, the matter is not clear from the restyled rule. The
808 lawyer who sent in this submission seemingly misread the restyled rule. And another member
809 asked how a self-represented litigant would likely read the rule.

810 Whether it is worthwhile to go back and undo every seeming “glitch” in the restyling
811 process raises questions about whether serious consideration of an amendment of Rule 81(c) is
812 wise. So an amendment that merely substituted “does” for “did” might not be worth it. But a
813 rewriting of the rule might clarify things significantly, as noted in 2016:

814 **(3) Demand for a Jury Trial.** Rule 38(b) governs a demand for jury trial unless, before
815 removal, a party expressly demanded a jury trial in accordance with state law. If all
816 necessary pleadings have been served at the time of removal, a party entitled to a
817 jury trial under Rule 38 must be given one if the party serves a demand within 14
818 days after:

819 (A) it files a notice of removal, or

820 (B) it is served with a notice of removal filed by another party.

821 It was noted that this rule change would remove the long-existing exemption from making
822 a jury demand upon removal from states (if there are any) that excuse parties from making a
823 demand at any time.

824 The resolution was that the matter should be returned to the Committee during its Spring
825 meeting. At least three options exist:

826 (1) Leave the restyled rule unchanged, as it does not seem to have caused much difficulty;

827 (2) Change “did” back to “does” in the rule, going back to the pre-2007 locution; or

828 (3) Revise the rule, perhaps along the lines above, to make it clearer.

829 *Rule 54(d)(2)(B)(i)*

830 Rule 54(d)(2)(B)(i) requires that a motion for an award of attorney’s fees be filed “no later
831 than 14 days after entry of judgment.” Submission 23-CV-L, from Magistrate Judge Barksdale
832 (M.D. Fla.), points out that this requirement does not work in relation to appeals to the court from
833 denials of Social Security benefits when the result of the court review is a remand to the
834 Commissioner to reconsider the initial Social Security decision. These remands are done pursuant
835 to “sentence four” of 42 U.S.C. § 405(g). Such remands to the SSA can result in enhancing benefits
836 for the claimant beyond what was originally awarded.

837 The Social Security legislation is extremely complicated and presents significant
838 challenges to those unfamiliar with the practice. There appears to be a specialized bar that focuses
839 on such cases. But the practice is surely important to the federal courts; some 18,000 actions are
840 filed each year challenging denials of benefits. And remands to the Social Security Administration
841 happen with considerable frequency.

842 The statute places clear limits on attorney's fees awards, capping them at 25% of the
843 amount garnered for the claimant as a result of the proceeding in court (separate from the
844 proceeding before the SSA). Further complicating the picture is the possibility of a fee award under
845 the Equal Access to Justice Act.

846 The time limit specified in Rule 54(d)(2)(B) is designed to enable the court to make a fee
847 determination while the underlying litigation is fresh in the court's mind. But with this particular
848 sort of proceeding, the limit to a fee award would ordinarily depend on events that cannot be known
849 when the court's remand occurs. And one could note as well that the judge might normally not be
850 called upon to invoke much of the work done in handling the appeal to court since the cap would
851 likely apply arithmetically, something not true of many other attorney fee awards subject to Rule
852 54(d)(2), whether handled under the "common fund" or "lodestar" method of determining a fee
853 award.

854 To try to deal with this problem, Judge Barksdale reports in her submission that the M.D.
855 Florida is considering a local rule with a 14-day time limit for fee applications keyed to the
856 claimant's receipt of a "close out" letter regarding the proceedings before SSA after remand from
857 the court.

858 By way of background, some description was offered regarding the development of
859 Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), which went into effect
860 on Dec. 1, 2022, less than a year ago. Those Supplemental Rules resulted from a major project
861 involving a subcommittee of the Advisory Committee headed by Judge Lioi (N.D. Ohio). That
862 project resulted from a recommendation by the Administrative Conference of the United States,
863 itself based on a 200-page study of the operation of the SSA review of claims. Though that study
864 found that the most significant problems with claim processing lay within the SSA, it also found
865 that the handling of review proceedings in court could be improved by recognizing that they are
866 essentially appellate and for that reason different from ordinary actions in federal court.

867 The relevance of this background is that Judge Lioi's subcommittee had to immerse itself
868 in the details of this specialized area of practice to come to grips with issues not familiar to the
869 members of the subcommittee. In large measure, that involved "education" sessions with SSA
870 representatives and also representatives of the main Social Security claimants' organization and
871 with the section of the American Association for Justice focused on these sorts of claims. Only
872 after considerable effort did the subcommittee feel comfortable devising a set of Supplemental
873 Rules that would be neutral and helpful to the courts and the litigants.

874 Among the issues not included in that set of Supplemental Rules was the handling of
875 attorney fee awards. Of note is the fact that SSA early proposed a fairly elaborate rule for fee

876 awards under one of the pertinent statutes – 42 U.S.C. § 406(b) – though not for EAJA fee awards.
877 That proposed rule appeared at pp. 416-17 of the agenda book for this meeting. This suggestion
878 was not pursued, in part because the subcommittee was worried about recommending rule
879 provisions that might unintentionally grant an advantage to one side or the other.

880 The present proposal may raise issues of unintentional shifting of advantage between the
881 SSA and claimants, and could require a similar process of education about an area of practice not
882 familiar to members of this Committee. That does not seem worthwhile for this single issue.

883 One reaction, however, can be offered: revising Rule 54(d)(2)(B) to alter the treatment of
884 one category of cases would raise risks to the central principle of transsubstantivity on which the
885 rules are based. That principle was a key consideration in deciding whether to go forward with
886 Supplemental Rules for Social Security appeals, but the poor fit offered by the Civil Rules for
887 those very numerous matters ultimately made the effort seem worthwhile. So if it seems worth
888 proceeding to respond to this timing concern, it probably would be better to do so with a
889 Supplemental Rule. The agenda book offered a sketch of what such a rule might look like:

890 **Rule 9. Attorney fee award under § 406(b).**

891 In its judgment remanding to the Commissioner, the court may[, without regard to Rule
892 62(d)(2)(B),] {notwithstanding Rule 62(d)(2)(B),} retain jurisdiction to permit plaintiff to
893 [move] {apply} for an attorney fee award under 42 U.S.C. § 406(b) within __ days of the
894 [final decision of the Commissioner] {final notice of the award sent to plaintiffs' counsel}
895 after the remand.

896 Particularly given the very large effort involved in becoming acquainted with the
897 particulars of this area of practice, it seems premature to consider this idea. The Supplemental
898 Rules have been in effect for less than a year, and it may be that more experience will show that
899 some revision of those rules would be desirable. That might be a good reason to embark on another
900 effort to educate Committee members about this area of practice.

901 The resolution was that no action be taken presently on this submission. It would be
902 desirable to notify Magistrate Judge Barksdale of this conclusion, and also invite information about
903 how the proposed local rule in the M.D. Fla. has worked if it is adopted.

904 *Proposals to Remove From Agenda*

905 The last items on the agenda were five submissions for which the recommendation was
906 that they be removed from the agenda. These five submissions were examined in the agenda book
907 and presented together orally to the Committee during the meeting. After that presentation, the
908 Committee unanimously voted to remove these items from the agenda. Below is a summary of the
909 presentation during the meeting regarding these proposals:

910 *Rule 30(b)(6) – 23-CV-I:* This proposal urges that the rule be amended to require
911 organizations that will designate a person to testify about the information they have on listed
912 matters to identify the individual who will testify some time before the deposition occurs. This

913 proposal largely tracks a proposed amendment to Rule 30(b)(6) that was put out for public
914 comment in 2018. There was intense controversy about proposed rule provisions regarding
915 conferring about the identity of the individual selected, and eventually it was decided not to include
916 rule provisions about that subject. This episode involved more than 1780 written comments and
917 dozens of witnesses at hearings. Without debating the merits of the current proposal, taking up
918 essentially the same thing again seems unwarranted.

919 *Rule 11 – 23-CV-N:* This proposal seeks addition of a statement in the rule that sanctions
920 are required and not discretionary “when Congress has mandated by statute that sanctions be
921 imposed.” The proposal seems unnecessary, and there is at least one example of such a statute
922 (PSLRA) in which the statute rather than the rule has governed the issue of sanctions. The change
923 would be unnecessary and could engender issues to be litigated.

924 *Rule 53 – 23-CV-O:* This proposal seeks to add a provision to Rule 53 saying that masters
925 “are held to a fiduciary duty type of relationship.” Rule 53 was extensively reorganized 15 years
926 ago to take account of how it is used in contemporary litigation. The proposal urges that “masters
927 need to be reigned [sic] in.” But the recent revisions to the rule do seek to channel that activity of
928 masters, and the “fiduciary duty” standard could introduce confusion.

929 *Rule 10 – 23-CV-Q:* This submission proposes that Rule 10 be amended to require (at least
930 in multiparty cases, and perhaps in multi-claim cases) that there be a “Document of Direction of
931 Claims” (DoDoC) appended to the pleadings. Examples are provided on pp. 478-81 of the agenda
932 book. Adding this requirement to the rules might in some instances assist parties in visualizing the
933 party relationships, but could become complicated (particularly if some claims or parties were
934 dropped, either under Rule 41 or otherwise, perhaps requiring submission of a revised DoDoC)
935 and might also invite delaying motions. Consider, for example, a motion to strike a DoDoC as
936 inadequate.

937 *Contempt – 23-CV-K:* The rules do not deal much with contempt. There is authority under
938 Rule 37(b)(2)(A)(vii) to treat a party’s failure to obey an order compelling discovery as contempt.
939 Often the contempt power is regarded as inherent in the judicial office. And the topic surely
940 presents challenges. In 1947, for example. Justice Rutledge in a dissent described contempt as “a
941 civil-criminal hodgepodge.” This submission is based on an article the submitter has recently
942 published that proposes adoption of a new Civil Rule 42 dealing with contempt (perhaps causing
943 all rules currently numbered above 41 to be renumbered), and also calling for statutory
944 amendments and amendments to the Appellate, Bankruptcy, Criminal, and Evidence Rules. It is
945 not clear whether any other advisory committee intends to pursue such amendments, but unless
946 that occurs there seems little reason to pursue an amendment to the Civil Rules.

947 At the conclusion of the meeting, Judge Rosenberg reminded Committee members that the
948 Spring meeting would occur on April 9, 2024, and that additional hearings on the proposed
949 amendments out for public comment would occur on Jan. 16, 2024, and Feb. 6, 2024.

950 Respectfully submitted

951 Richard Marcus
952 Reporter

Draft

Members of the Public Joining Via Teams:

Last Name	First Name	Affiliation/Company
Anderson	Jennie	Andrus Anderson
Barnett	Gary	International Legal Finance Association
Bays	Lea	Robins Geller Law
Cantone	Jason	Federal Judicial Center
Cutrona	Danielle	Burford Capital
Greene	Thomas	American College of Trial Lawyers
Hawkinson	John	Freelance Journalist
Juhring	Luke	
Kalil	Danielle	
Kalina	Jerome	Judicial Panel on Multidistrict Litigation
Kekis	Lidia	Paul Weiss Rifkind
Levy	Robert	Exxon Mobil
Lorber	Leah	GSK
Pennington	Michael	Bradley
Raymond	Nate	Reuters

TAB 6

TAB 6A

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

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. James C. Dever III, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 8, 2023

I. Introduction

The Advisory Committee on Criminal Rules met in Minneapolis, Minnesota, on October 26, 2023. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents the following information items.

- The Committee heard an interim report from the Rule 17 Subcommittee, which is studying the possibility of amending the rule to expand the availability of third-party subpoenas.

- The Committee removed from its agenda a proposal to allow bench trials under some circumstances without the government’s consent, but it identified an issue concerning the Sentencing Guidelines that the Standing Committee might consider appropriate to bring to the attention of the Sentencing Commission.
- The Committee discussed a proposal by 38 members of Congress to authorize broadcasting of proceedings in the cases of *United States v. Donald J. Trump*. Rule 53 prohibits the broadcasting of criminal proceedings, and the Committee concluded that it had no authority to take the requested action, nor would any potential amendment to Rule 53 take effect in time to affect those cases, given the statutory and Judicial Conference requirements for the promulgation of amendments.

The Chair informed the Committee that after the completion of the Agenda Book, a media coalition had submitted a related proposal requesting, *inter alia*, that the Committee amend Rule 53 to allow the broadcasting of some or all criminal proceedings, and he announced the appointment of a subcommittee to take up that proposal.

- The Committee discussed and provided input on several cross-committee projects, and it removed from its agenda the cross-committee proposal to amend the deadline for e-filing.

II. Rule 17 and pretrial subpoena authority (22-CR-A)

The Subcommittee has been moving in a careful and deliberate fashion to consider the many issues raised by the proposal to amend Rule 17, and it has tentatively concluded that amendments are warranted both to clarify the rule and to expand the scope of pretrial subpoena authority. As a policy matter, it would be beneficial to expand the parties’ authority to subpoena material from third parties before trial. The *Nixon* standard,¹ as applied in most districts, is too narrow to provide a basis for discovering and obtaining much of the material the defense needs from third parties.

The *Nixon* standard requires a party to show that the specific material being sought will be admissible at trial (or other upcoming proceeding). Rigorously applied, it prevents the defense from obtaining material that it has not yet been able to review and cannot access through Rule 16 because the government does not possess it. Without first reviewing such material, the defense cannot verify that it will be admissible. Indeed, in some districts the standard is so strict that it has discouraged counsel from even seeking subpoenas, despite their ethical obligation to investigate facts that would provide a basis for a defense. Information that could be essential to the defense, such as information that would be turned over under *Brady* or Rule 16 if possessed by the government, can remain off limits because there is no mechanism in the Rules for discovery from

¹ *United States v. Nixon*, 418 U.S. 683, 700 (1974), requires a party seeking documents through Rule 17(c) to “clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity.” The Court also stated that when a party seeks pre-hearing production of documents, it must establish: (4) “that [the documents] are not otherwise procurable reasonably in advance of [the proceeding] by exercise of due diligence”; and (5) “that the party cannot properly prepare for the proceeding without such production and inspection in advance of [the proceeding] and that the failure to obtain such inspection may tend unreasonably to delay the [proceedings].” *Id.* at 699-700.

third parties in criminal cases. In the Subcommittee’s view, some expansion of the authority to obtain access to such material in the hands of third parties is warranted to increase the accuracy and fairness of the process.

Before beginning the work of drafting a proposed standard other than *Nixon* for obtaining a third party subpoena, the Subcommittee focused on issues that may affect that central task, and it reached the following tentative conclusions.

- All third party subpoenas should be subject to judicial supervision. The subpoena authority is compulsory process, and judicial oversight is important to regulate its use in criminal cases. The party seeking a subpoena should do so by filing a motion.
- The rule should distinguish between—and set different standards for—subpoenas seeking materials that are private or protected and those seeking materials not subject to such protections. Third party subpoenas might seek documents or items that are private, confidential, privileged, or otherwise protected by law, such as victim information, school disciplinary records, health care and counseling records, correspondence, emails and texts, financial records, business or enforcement strategies, law enforcement personnel files, presentence reports, or adoption records. As a practical matter, assurance of adequate safeguards for protected information is a prerequisite for any proposal seeking a more relaxed standard for other non-confidential information, such as gas station surveillance video, store receipts, hotel registrations, jail records of cellmates, etc.
- The rule should use the phrase “personal or confidential information” to define which subpoenas would require the higher standard for issuance.
- The rule should provide for ex parte subpoenas upon a showing of “good cause.”

Discussion at the meeting clarified several points concerning the work of the Subcommittee. First, the Subcommittee’s decisions at this point are necessarily tentative, and will need to be revisited to create a coherent proposal. Second, Subcommittee chair Judge Nguyen and the reporters emphasized that nothing in the rule would override any statutory protections for privacy, such as those in the Stored Communications Act or statutes protecting medical and educational records. The Subcommittee has been consulting with experts on these statutory regimes and will continue to do so. It will also consider the possible constitutional implications of subpoenas under the Fourth Amendment. Finally, because this would be such a significant change, there was support for road testing any proposal with judges, prosecutors, and defense lawyers before publication.

III. Rule 23 and government consent to bench trials (23-CR-B)

The Committee decided to remove from its agenda a proposal by the Federal Criminal Procedure Committee of the American College of Trial Lawyers to change Rule 23, which now requires a written request from the defendant for a bench trial, the consent of the United States, and the approval of the court. The proposal was first discussed at the Committee’s April meeting,

and the Committee sought additional information to help it determine whether there is a problem with the current rule. Members were unable to reach consensus on identifying a problem with the existing rule. Article III treats jury trial as the gold standard of adjudication, and the Supreme Court's decision in *Singer v. United States*, 380 U.S. 24 (1965), held that a judge can override the government's refusal to consent in a compelling circumstance in which the defendant could not get a fair trial. Some members also noted that 11 percent of trials are now bench trials, and they saw no basis for concluding that this number was too low.

Members also expressed a variety of concerns about requiring a court to determine whether the reasons presented by a defendant were "sufficient to overcome" "the presumption in favor of jury trials," as the proposal recommended. This would take the courts into uncharted territory. Would it be improper, for example, for the government to withhold consent because the U.S. Attorney favored adjudication by juries? What if the parties were assessing the likelihood of success before a particular judge? Would that be improper in an adversarial system? If so, it seemed likely to generate an awkward procedure in which counsel would be pressed to identify why they did, or did not, wish to try their case before a particular judge.

In light of these issues, a majority of the Committee voted against appointing a subcommittee to pursue the proposal in greater depth.

During the discussion, however, concerns were raised about the defendant's ability to obtain credit for acceptance of responsibility under U.S.S.G. § 3E1.1(b) after a jury trial held solely to preserve an antecedent issue for appeal when the government had declined to either accept a conditional plea or consent to a bench trial. Members saw this as a Guidelines issue, not a rules issue. There was support for making the Sentencing Commission aware of those concerns, and several members voiced support for clarifying that judges may award acceptance of responsibility in those circumstances.

IV. Rule 53 and broadcasting court proceedings in the cases of United States of America v. Donald J. Trump (23-CR-E)

The Committee discussed a letter from 38 members of Congress requesting that the Judicial Conference explicitly authorize the broadcasting of the court proceedings in the cases of United States of America v. Donald J. Trump. Judge Mauskopf forwarded the letter to the Rules Office to be logged as a suggested amendment. The Committee concluded it lacked the authority to take the requested action, or to amend Rule 53 in time to affect those trials.

Federal Rule of Criminal Procedure 53 currently provides "[e]xcept as otherwise provided by a statute or these rules, the court must not permit ... the broadcasting of judicial proceedings from the courtroom." Because no current statute or rule permits the broadcasting of criminal proceedings, Rule 53 prohibits the broadcasting of the proceedings in all federal criminal proceedings, including the Trump prosecutions.

The Committee agreed that it had no authority to exempt or waive in a particular case the application of Federal Rule of Criminal Procedure 53. The Rules Enabling Act, which is the

exclusive source of authority for this Committee (and the Standing Committee), provides no mechanism for waiving or exempting individual cases from the general rules of practice and procedure for cases in district courts. The Committee has statutory authority to assist the Judicial Conference by recommending new or amended rules, but no authority to recommend exceptions to existing rules in individual cases.

The Committee also interpreted the Congressional letter as possibly seeking an amendment to Rule 53 that would allow exceptions for particular cases of public importance. After reviewing the amendment process, the Committee recognized that even if each step in the amendment process were taken as quickly as possible, an amendment could take effect no earlier than December 1, 2026, after the completion of the particular trials that were the focus of the Congressional letter.

However, after the Agenda Book was completed, the Committee had also received a proposal from a coalition of media organizations that requested Rule 53 be revised to permit broadcasting in criminal proceedings or to include an exception for extraordinary cases. A subcommittee has been appointed to study this proposal. As noted, the amendment process could not be completed until December 1, 2026 at the earliest, and is unlikely to proceed that quickly. Thus any amendment would not affect the cases that were the focus of the earlier Congressional letter.

V. Cross-committee projects

A. Self-represented litigant access to electronic filing

The Committee received a report from Professor Struve describing the activities of the working group. Although no draft language was available, she noted a developing consensus that the national rules should no longer require self-represented litigants who had access to e-filing to make redundant and burdensome service on persons already receiving notices from CM/ECF. As to self-represented litigants' access to e-filing, current practices vary greatly, and the working group is considering a minimalist approach.

B. The E-filing deadline

Following the lead of its sister rules committees, the Committee voted to remove from its agenda a proposal that the e-filing deadlines be changed from midnight to an earlier time in the day. The Third Circuit recently adopted a controversial rule changing the e-filing deadline, and this was not the time to move ahead with a national rule.

C. Social Security Numbers

The Committee received an oral report from Mr. Byron regarding the redaction requirements for Social Security numbers. The Criminal Rules (and the parallel provisions in the

Bankruptcy, Civil, and Appellate Rules) allow the inclusion of the last four digits of Social Security numbers in court filings. Previous suggestions to require the redaction of the full Social Security number had been rejected on the grounds that the last four digits were useful in bankruptcy cases, and the value of uniformity outweighed any concerns that might differ in other contexts.

Last year, the decision was made to allow the Bankruptcy Rules Committee to take the lead, and to determine whether they still considered the last four digits to serve a valuable purpose in some context in bankruptcy proceedings. That committee has now reached the tentative conclusion that there are at least some situations in which the last four digits do serve a useful purpose.

Accordingly, the Criminal, Civil, and Appellate Rules Committees will take up the question whether uniformity remains paramount. There will be continued communication among the reporters, under the direction of Professor Struve, and it may be possible to bring a proposal to the committees' spring meetings.

TAB 6B

**ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 26, 2023
Minneapolis, Minnesota**

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (“the Committee”) met on October 26, 2023, in Minneapolis, Minnesota. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Robert J. Conrad, Jr.
Dean Roger A. Fairfax, Jr. (via Microsoft Teams)
Judge Michael J. Garcia (via Microsoft Teams)
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Jacqueline H. Nguyen
Angela E. Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Catherine M. Recker, Esq. (via Microsoft Teams)
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.¹
Judge John D. Bates, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

H. Thomas Byron, Esq., Secretary to the Standing Committee
Allison Bruff, Esq., Counsel, Rules Committee Staff
Zachary Hawari, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center

¹ Mr. Wroblewski represented the Department of Justice.

Opening Business

Judge Dever began the meeting by introducing the University of St. Thomas School of Law Dean Joel Nichols, who welcomed the Committee, made some remarks about the School, and thanked the Committee for allowing students to observe its proceedings.

Judge Dever then introduced and welcomed the new Committee members, Marianne Mariano (who had already begun participating on the Rule 17 Subcommittee) and Magistrate Judge Michael Harvey. Judge Dever noted the members and other participants who were attending remotely and asked all of the participants to introduce themselves. Judge Dever noted that Mr. Wroblewski was representing the Justice Department at the meeting, because new ex officio member Nicole Argentieri, the Acting Assistant Attorney General, had been unable to attend. Nicole Teo, a former Rules Office intern and Elizabeth Shapiro, from the Department of Justice, were introduced as guests.

A motion to approve the minutes of the spring meeting passed unanimously.

Judge Dever asked the Rules staff to present updates on the pending rules and pending legislation. Ms. Bruff noted that the technical amendment to Rule 16, the amendments to Rules 45 and 56 adding Juneteenth National Independence Day to the list of legal holidays, and the new emergency Rule 62 will take effect December 1, absent congressional action (p. 105 of the Agenda Book). Mr. Hawari noted that pending legislation of interest was collected in the Agenda Book beginning on page 112. He mentioned that the Government Surveillance Transparency Act of 2023, introduced last month, would require the Judicial Conference to promulgate rules to put any criminal surveillance order, including search warrants, on a public docket and possibly create a case number and caption for it, with some exceptions.

Rule 17

Judge Dever asked Judge Nguyen to provide an update on the work of the Rule 17 Subcommittee. Noting the Reporters' more detailed memo on the Subcommittee's work beginning on page 127 of the Agenda Book, Judge Nguyen said the Subcommittee has had extensive discussions and input from the Department of Justice, the defense bar, law professors and other experts. The Subcommittee has been persuaded that a case has been made to move forward and engage in a more detailed study and consideration of a possible amendment, but it was still far from discussing specific language. As reported at the last full committee meeting, practices under Rule 17 vary widely from district to district and among judges within the same district, and some clarification of Rule 17 will be very useful. On the key substantive question of whether the *Nixon* standard is too restrictive, the Subcommittee has tentatively concluded that it is. Thus, it is considering possible amendments to expand subpoena authority under Rule 17.

Other key tentative conclusions are that any amendment should include judicial approval before a third party subpoena under Rule 17 is issued, and that subpoenas for personal and confidential information should be treated differently than those seeking nonprotected materials. After pretty extensive discussions, the Subcommittee's tentative conclusion is that the phrase "personal or confidential information" would be appropriate to define protected materials

without going too far in the weeds specifying exactly what they are. The Subcommittee also tentatively concluded that *ex parte* subpoenas should be allowed upon motion and a showing of good cause.

The Subcommittee met the previous day to discuss additional issues, such as whether information should be disclosed to opposing counsel and whether material should be turned over directly to the party or to the court. Next, it will be deciding what standards to apply to protected material and nonprotected material, and there are other issues to discuss as well before the actual drafting.

Professor Beale noted the Subcommittee had met five times since the spring meeting and although the tentative decision is to try to write a proposed amendment, it wouldn't necessarily be what the New York Bar Committee had recommended. The Subcommittee was moving systematically issue by issue, not presuming that the current rule is right, and not presuming that the Bar proposal is right. It was working to learn what's going on in practice because so much of this is not specified in the rule now, and practice is really working *around* the rule. She reminded the Committee of the earlier October 2022 meeting where practitioners described very different practices, experiences, and opinions, and she emphasized that the Subcommittee was continuing to try to understand the various issues. When the Subcommittee completes its consideration of the last of these issues, it will have to put the whole proposal together to see whether all of its tentative decisions fit together, and then come up with language to capture it all. She commented that the Subcommittee has been persuaded that the rule is very confusing and clarification is absolutely needed, but there are many questions about how to do that without micromanaging the process. She noted that the amendments might not stay in Rule 17 and might end up as two different rules. So there was a lot of work to do, both in finishing the initial review of the issues and reaching tentative conclusions on each, putting those issues together, and then drafting the language of a complete proposal. The Committee could anticipate further discussion at the spring meeting that will get more into substance, but the Subcommittee welcomed comments or questions about the tentative conclusions it has reached so far.

Judge Dever thanked Judge Nguyen for her leadership of the Subcommittee, and the members (Judge Boyle, Ms. Recker, Mr. Wroblewski, and Ms. Mariano) as well as the reporters for their work. He asked for comments.

Mr. Wroblewski described the proposal as “tricky” for a number of reasons. On the one hand there is near unanimity that the rule needs to be clarified. And in some districts, implementing the proposal would be a pretty simple and straightforward process because the use of subpoenas is widespread, there is no judicial oversight of them, and they are routinely *ex parte*. But in other districts, such as Philadelphia, where there is currently almost no subpoena practice, it would be a much bigger change. He characterized the proposal as a very big deal, and he commented that the Subcommittee's slow, steady, and measured approach was fantastic. He noted that the Subcommittee was considering a change that would overturn controlling Supreme Court precedent, rewrite the law of subpoenas in criminal cases, and likely change pretrial practice—though he noted the Subcommittee did not know yet exactly where it was going. He thought it was also an especially big deal because a few years earlier, in the *Carpenter* decision,

the Supreme Court said for the first time said that subpoena practice implicates the Fourth Amendment. Now, with cloud computing and third parties having control of every last little bit of our lives, he thought the Subcommittee's measured, careful approach was especially important. He hoped that after the Subcommittee came up with a rule, the Committee would road test it before publication with judges, prosecutors, and defense lawyers around the country. That would be a really important step. There is a lot of hard work to come, and he was grateful for the efforts of the reporters, Judge Nguyen, and the other Subcommittee members.

Another member of the Subcommittee thanked Judge Nguyen for keeping the work so organized. The member said the bottom line was we would be creating additional pretrial discovery for the government and the defense, though it was not yet clear whether this would be a little bit more discovery, or a lot more discovery.

Judge Dever commented that the process Mr. Wroblewski described—slow, steady, deliberative, and thoughtful—is a feature and not a bug of the process under the Rules Enabling Act.

Judge Bates asked if the hardest issue was the standard. He noted that the Subcommittee has dealt with a lot of the issues, procedural and otherwise, with respect to the rule. But the *Nixon* standard has created the problem in some districts and nationwide, so is coming up with the standard the ultimate hardest issue? The Subcommittee has identified that it should be a two-part standard, one for the personal and confidential information and one for other information. Had there been discussion yet on trying to come up with the standard and was that really going to be a difficult issue?

Judge Nguyen said the Subcommittee would meet at least twice before the Committee's April meeting and would be tackling that issue first. The answer to that question was going to cause a sea change in the use of Rule 17. So yes, in that sense it would be hard. But before tackling that standard, the Subcommittee thought it was important to first get out of the way some of these other issues about how the subpoena was going to work. Is it going to be by motion? Are *ex parte* applications allowed? When are *in camera* reviews appropriate, and how to guide district judges in that? How do you treat personal and confidential information? The Subcommittee wanted to have those questions answered preliminarily to create a framework around which it could come up with an appropriate standard.

Professor Beale said the Subcommittee could not answer the question about the standard without making some preliminary decisions. For example, it was important to decide whether the standard would be bifurcated and whether there was going to be more protection for protected information. There is an interaction between the issues. The category of protected information might need to be larger if the general standard for nonprotected information is very low. The Subcommittee had not yet had that discussion.

Professor King agreed that some of the issues that the Subcommittee had been talking about so far depend to some degree on the standards and vice versa. It is an iterative process, and the hardest part may be fitting them together, and deciding, for example, if what we say about *in camera* review makes sense, given the scope of "personal or confidential." They are somewhat

tradeoffs, and they balance and affect each other. So she thought coming back and creating a coherent package would probably be tough.

A member said that the issue that seems to be lurking in the background is the pretrial discovery that will be created with this kind of rule change. On the civil side, the member noted, excessive discovery, both in terms of cost and delay, has had a very negative effect on case resolution and jury trials. The criminal side by and large has not had that kind of issue. He thought it would be unfortunate if speedy trial and other considerations were impacted in a negative way by a change in Rule 17.

Noting she was familiar only with criminal practice, Professor Beale asked whether the member could confirm her impression that the problems with civil discovery arise principally from reciprocal demands by the parties for discovery from one another, and not from the parties' efforts to discover material in the hands of third parties. If so, she commented, the parallel in criminal proceedings would be discovery under Rule 16, not discovery from third parties, and the changes being considered here would be different from the most problematic aspects of the dynamic in civil proceedings.

The member agreed, but also noted that the current emphasis in Rule 17 focuses on trial subpoenas, not subpoenas for discovery. The member thought that would be a significant change, and Professor Beale agreed. Another member commented that on the civil side under Rule 45, which covers third party subpoenas, you can get just about anything.

A different member noted the intersection between the developing amendment and the Stored Communications Act (SCA). He said perhaps 70% of the warrants he reviews are under the Stored Communications Act—it's in the cloud, it's Apple, it's Google, it's emails, texts, cell site information. Some of the defense attorneys said they would be interested in some of that. But of course, for most of that information the Stored Communications Act requires a warrant. So how would this subpoena interface with that?

Judge Nguyen replied that nothing in any rule change would affect any statutory protection, and the Committee would have to be certain that the language that it drafts makes that point clearly. Professor Beale agreed and stressed that the rule change would not override any statutory protections for privacy, such as the Stored Communications Act. Judge Nguyen emphasized that any other laws that provide protections right now would not be affected in any way by any rule change.

The member said the SCA defines what you can get by subpoena and when you need a warrant. He didn't think Google would honor a subpoena. There are whole classes of information that the government has access to, and there was a reason that 70% of the warrants are in that area—that's where all the evidence is.

The member said his fundamental question was whether a subpoena under whatever standard the Subcommittee was considering—coming from a third party and not from the government—would satisfy the SCA? Professor Beale said no. The SCA gives different rights to

the government and this would not give third parties rights that they don't already have to override protections of the SCA.

On the question whether this rule would change criminal into civil discovery, another member said there was no chance of that because of all the protections in the rule. The rule could not permit serving the other side with interrogatories or request for production or depositions.

Professor King responded to the member asking about the SCA. One of the things that the Subcommittee talked about is how important it is to (as Mr. Wroblewski noted) road test these ideas on the constituencies that are going to be most concerned about them. So certainly the Subcommittee would solicit even more input from third parties who are likely to hold the kind of information that will be subpoenaed, and seek their reactions and concerns about any potential change. She noted that it had already started that process by talking to an expert on the SCA as well as practitioners from that industry. It would continue to do that. But, she said, the issue was not just the SCA. Similar issues arise under HIPAA and FERPA, as well as state protection privacy laws. All of these statutes have idiosyncratic controls on disclosure, and the rule has to accommodate them. The Subcommittee has no interest at all in changing the legislative policies that have been crafted in all of these jurisdictions in their laws that govern disclosure. The idea is to clarify what information the parties in criminal cases can get from third parties through subpoena before or for trial, and not to change how individual types of information have already been regulated.

A member added that it would not override statutes, but would provide more discovery.

Judge Nguyen agreed it would be an expansion, that is an important point to keep in mind, and it will be significant. She said the Subcommittee was very sensitive to how that intersects with statutes and current protections in place. Although it had researched that area, she thought the idea of road testing it would be really important because the Subcommittee does not necessarily have all the expertise. So input from members and from people who are on the ground would be important to make sure that what the Subcommittee was contemplating and trying to memorialize in draft language would actually work out in that fashion.

Mr. Wroblewski noted that there might be metadata or cell site information that is not governed by the SCA, and constitutional issues that are implicated. That makes drafting the standard really hard: the rule must set out something that will allow the user to recognize that the rule doesn't cover everything, and you must go to these other privacy protection laws, and perhaps consult Fourth Amendment jurisprudence. It was going to be difficult.

A liaison to the Committee said he understood the Rule would not override any federal law, but he emphasized the need to clarify the effect on state privacy protection laws. If the Rule would not allow a party to subpoena information that would otherwise be protected under a state privacy law, he thought that should be made explicit. Because it doesn't necessarily follow that that would be the case (as it would be with respect to the federal law), it should be set forth in the committee note or text to make that limitation clear.

Another member said this all came about because of this letter from the New York bar saying that in this day and age they need more discovery because of the internet, and the situation has changed over 60 years. They convinced us to look into the fact that they likely do need more pretrial information. The Subcommittee did not know how much, but it will be a significant change.

Judge Dever thanked the members for their comments and noted that the discussion illustrates why the Subcommittee is being deliberative and continuing to study these issues. It had received information from Professor Kerr, a former academic member of this Committee, who is an SCA scholar, as well as from attorneys that have represented and advised entities that hold electronic information. And those discussions will continue because the Subcommittee was trying to answer the initial question that the Committee always asks in connection with any proposal that we get: is there a problem? The Committee spends a lot of time exploring that. And then if we think there is a problem, can we address that without creating more problems? We do that by being cognizant of issues like the ones that have been raised in the discussion. That partly explains why the process, compared to some other subcommittees, is taking a little longer because it really is a big issue. Other than the victim amendments, Rule 17 essentially is as it was from the beginning, unlike Rule 45 in the Civil Procedure Rules, which has been changed a number of times since those rules were adopted. He again thanked Judge Nguyen and all the members of the Rule 17 Subcommittee for their continued hard work and invited Committee members to contact the reporters with any other thoughts. He noted that one of the benefits of the Committee's structure is that it has stakeholders with lots of experience and perspectives that all help collectively to get it right with any proposed rule change.

Rule 23

Judge Dever turned the Committee's attention to Rule 23, and the memo at page 134 of the Agenda Book. The Committee received a proposal from the Federal Criminal Procedure Committee of the American College of Trial Lawyers (ACTL) to change Rule 23, which now requires a written request from a defendant for a bench trial, the consent of the United States, and the approval of the court. At its last meeting the Committee decided it would be useful to gather more information on the question whether there is a problem, and both the Department of Justice (DOJ) and the defenders helped gather additional information. Judge Dever said that after introductory comments from the reporters, he would ask for discussion of whether to create a subcommittee to further study this issue, and if so, what the subcommittee would be studying, and how any proposal would interact with Supreme Court precedent.

Professor King noted that the Reporter's memo, at page 134 of the Agenda Book, is quite short and briefly reviews the discussion at the last meeting. That discussion, in the minutes at pages 24–34 of the Agenda Book, focused on whether there is a problem with the current rule and the differences in practices around the country regarding DOJ consent to requests for bench trials. At the end of that discussion, the Committee decided to seek more information about what was going on around the country, and that information is presented in the memo on pages 136–140. A DOJ survey, Mr. Wroblewski reported, revealed that about one fourth of the districts have some sort of policy on the decision whether or not to consent to a bench trial, and that

generally that policy is requiring supervisory approval. But half of the districts have no policy and about one fourth did not respond. Very few of the districts—only eight—indicated there was a backlog as a result of the COVID-19 emergency. One of the reasons given for the proposal was that it would help clear that backlog. But as Mr. Wroblewski said at our last meeting, there are other reasons to work hard on clearing those backlogs if they exist, apart from this proposal. The third question on which he surveyed attorneys around the country was whether there should there be a national policy. The answer, on page 137 of the Agenda Book, was that the reasons for bench trial requests differ significantly and an appropriate national policy is not obvious.

Some of the reasons for bench trial requests and refusals—from the defense perspective—were listed on pages 138–140. Professor King explained that because the respondents were promised that they wouldn't be identified, the information about exactly who was answering this set of questions had been limited to preserve anonymity. But we received fifteen responses from nine federal defenders and six CJA attorneys representing many different districts in many different circuits with a broad spectrum of practice. These ranged from districts where defense attorneys said they have never won a bench trial and would not request them, to districts where the attorneys responded that U.S. attorneys never consent, or that it was not a problem. She observed that there seemed to be no clear pattern to what is going on here.

Noting that this information supplemented the Committee's discussion at the spring meeting, Professor King said it was time to decide whether to continue to pursue this proposal. The proposal itself seeks an amendment that would (see page 162 of the agenda book) add the following section:

(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit the defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant's waiver of a jury trial without the government's consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.

She noted the proposal adds a procedural aspect and then states a standard for the court to reject the government's objection.

The questions for the Committee, Professor King said, are very similar to the ones discussed at the prior meeting. Is there a problem with the existing rule that a rule change would modify, and, if so, what should the modification look like? Should it be procedural change? Should there be something different than what is proposed here? Should there be some standard for rejecting a prosecution objection to a bench trial? How will it be reviewed?

Judge Dever expressed his appreciation for the additional information from the Department and from the defenders, and he added some comments regarding the leading case dealing with Rule 23 and its constitutionality. The constitutional challenge in *Singer v. United States* was decided in 1965. The case upheld Rule 23 (little changed since 1946), which requires that the defendant make a request for a bench trial in writing, that the government consent, and that the court approve. The Court in *Singer* added two important points. It acknowledged that the

way the rule was written, the Department of Justice did not have to provide a rationale. The Court stated that because of our confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the government articulate a reason for demanding a jury trial at the time that it refuses to consent. Nor should we assume that the federal prosecutors would demand a jury trial for an ignoble purpose. The second point the Court made (discussed in the memo and seen in some cases particularly during COVID), was that it was not determining whether the trial court could override the government's objection in certain compelling circumstances, if there was an inability to provide a fair trial. That point was raised in the transcript in the New York case (*United States v. Cohen*, 481 F.Supp.3d 122 (E.D.N.Y. 2020)) referenced in the memo and in the proposal. As members thought about whether to establish a subcommittee, he posed a question. Since the Constitution already provides an out to the rule as written in exceptional situations, what is the space between the proposal and what the Supreme Court has said already exists? If we draft a rule that had this procedural reference, he thought it would seem to be suggesting that there is some additional space beyond the need for a fair trial. But it is difficult to figure out what that would be, particularly in light of the backdrop of the jury trial being the gold standard in terms of adjudication, its presence in Article III, Section 2 before even the Sixth Amendment is adopted, and then in the Sixth Amendment itself. He asked for the views of committee members about whether we need to set up a subcommittee to further study it, and if so, what information is lacking.

Professor Beale added that you could view this as a procedural mechanism to allow the defense to raise the *Singer* problem. If they put in writing (e.g., "Here's the problem, this is why having a jury trial would be really bad in this case") then in determining whether to give relief the court can give the government a chance to respond that either there is not a serious problem or to explain how the court could act to ensure the fairness of the trial. *Singer* does say we are not going to assume that the government is doing anything for nefarious reasons, but she did not think the proposal necessarily assumed nefarious conduct. Rather it just gave the government a chance to respond to the defense statement explaining why a bench trial is so critical in the particular case.

Judge Bates responded that the proposal also says that the court must make this decision using the very vague standard "sufficient to overcome." He observed that in most cases both sides are either requesting a bench trial or resisting a bench trial because they think it is more likely that they will win. How, he asked, is the judge going to apply the standard "sufficient to overcome the presumption" when in reality both sides are saying, "Hey, I stand a better chance of winning" with the bench trial or without the bench trial?

Professor Beale responded that the idea is that it might be a good idea to draft an amendment as there is no procedure right now under Rule 23 to raise the kind of issues that *Singer* says are possibly enough to override the government's lack of consent. *Singer* doesn't tell you how that would work.

Judge Dever responded that people are raising these issues because they are being litigated. So lawyers know if you want the court to do something, you file a motion and you cite the Supreme Court case that says "Judge, you can actually look behind this in a compelling

circumstance.” A member added that the *Cohen* case is the example of that, where the judge agreed this is the extraordinary case.

A defense member stated that there are cases where defense counsel may not trust a jury to set aside some prejudicial issues that are not necessarily evidence of any guilt but can sway a jury. But, she said, there is another issue involving coercive plea agreements. The defendant may want to go to trial to preserve some legal issues, but not lose acceptance of responsibility. And sometimes the government may withhold acceptance, as a tactic, and perhaps gain two years on a sentence. She said we should allow the judge to make that decision and did not understand why the government can override a judicial decision about that. There may be a need for a procedural mechanism.

Judge Dever noted he had cases in which DOJ consented. But if the prosecutors would not agree to a conditional plea, he had given defendants acceptance of responsibility even after a jury trial where everyone in the courtroom (except the jury) knew the only reason for having the jury trial was to permit a suppression ruling to be appealed. The judge, he said, has ultimate control over acceptance, which is not really tied to a Rule 23(a) issue.

Another member said that the right to a jury trial is constitutional, exceptional circumstances are already in there, and adding this to Rule 23 would just encourage people to think that now we have exceptions. The right to a jury would be very much hampered, and the member was against changing the rule.

Another member wanted to go back to the foundational question of whether there is a problem. It is challenging to measure something that has not occurred, and it is difficult to develop empirical data. Of 94 districts, 25 have a policy of supervisor approval and 52 have no policy. But we don't know what the results are, so it is not clear that we've gained any empirical understanding of what's happening. The additional research added only 15 respondents to the 12 examples set forth in the proposal.

Another member agreed. She said she had been very surprised by the survey results from the defenders because in 28 years of practice, she was aware of only two cases that went to a bench trial. That was because the government had uniformly said it would not consent. And surveying her own CJA panel before this meeting she concluded they were not asking for bench trials. It was hard to measure the problem in districts where there has been a uniform practice of not consenting. She could not measure that in her district, and she doubted it was possible to measure whether there was a problem in the manner that had so far been proposed. She added that defendants do not get acceptance of responsibility. Even if they have a very narrow legal issue that they want to pursue, it has to go before a jury. She said her court had been very busy, had a very small bench, and in effect there was a tax on the clients who tried to pursue that issue.

Professor King mentioned another response in addition to those listed on pages 4–6 of the memo. The Committee received an email from Lisa Hay, a former member of the Committee, who had surveyed her FPD colleagues and reported 14 additional responses. But there was still not a lot of information.

A member asked what prevented the defense from filing a motion to say to the judge, “I’m only trying this legal issue, and it is really only the acceptance of responsibility question I’m concerned with.” Was it because judges on that bench are of the view that if the government doesn’t consent, you don’t get the waiver of jury trial?

A member responded that they do file that motion, but she did not think that would be an exceptional circumstance to overcome the government’s lack of consent simply because there’s going to be a trial penalty. The defense did make the court aware that they would be willing to have the bench trial, but when they moved for the acceptance points at sentencing, they seldom got them. Some of their judges had awarded acceptance points in that situation, but it was not a uniform practice and was certainly different with different judges. So there was a penalty at the end of it for their clients. Where there is an acceptance issue on a small narrow legal issue, usually there is a fair record made, but the member could not measure it because people did not really approach the government for the bench trial. It was just presumed that they would not consent. She thought that was probably not fair to the government. The member was not sure they are having robust conversations after all these years because of ongoing practice. She believed her district was not isolated in this and had been interested in the results of the survey of her colleagues because it was different than the experience in her district.

Another member noted that in addition to the acceptance issue, there was an issue concerning sentencing appeals. Plea agreements today have very strict statements of facts, on guideline amounts and so forth, and then include complete waivers of appeal unless the court imposes a sentence that is way beyond these guidelines. For example, a client may want to be able to challenge some factual matters that may apply at sentencing and not accept a plea agreement, and may be forced to go to trial in order to preserve those issues. The government’s position is “you sign our plea agreement or there is no plea agreement.” They will not do exceptions to standard appellate waivers simply because the defendant wants to contest enhancements for vulnerable victims, drug amounts, multiple victims, etc. So in those instances, a client may say “I want to go to trial,” and defense counsel may want to try it to a judge because what they really want to challenge are those factors that affect the defendant’s sentence and right to appeal. Mr. Wroblewski stated he was very sympathetic to the concern about acceptance of responsibility, but it was not obvious to him how having a bench trial would resolve it. If the defendant is contesting some of the government’s facts—whether in a jury trial, or a bench trial, or to the probation officer and the presentence report responses—it was not obvious why that should matter in terms of whether you get the two or three levels of acceptance of responsibility. He characterized that as an acceptance of responsibility problem that belongs in front of the Sentencing Commission.

Mr. Wroblewski said he was not aware of many efforts being made to try to take advantage of the exception that *Singer* allows, so he thought that was not the problem. What might be a problem? A district may have a uniform policy not to do bench trials or have no policy, and the resulting disparity around the country is conceivably some sort of concern. But the answer to that would be to ask the Attorney General to tell each U.S. Attorney’s Office to develop a policy and to consider all of the different circumstances. He commented that it was not

obvious that would be the right policy. Article III says all trials shall be by jury, and a prosecutor might say we are just following that, and unless there's a really, really good reason that is within the narrow *Singer* exception, there should be a jury trial. If you seek a uniform policy, he said, you should be careful what you wish for. The policy may be never to consent to a bench trial, as opposed to sometimes, after considering all the circumstances.

A member wanted to know if Mr. Wroblewski was suggesting there should be 94 different policies. Mr. Wroblewski said he was not. But if the problem the Committee saw was that the Department has no uniform policy, then we should have a uniform policy.

Judge Dever said that another way to ask this is whether changing Rule 23 responds to either the absence of a policy of the Attorney General or the absence of language in the guidelines commentary to Section 3E1.1 that clarifies that if a person goes to trial solely to preserve an appellate issue because of the inability to negotiate a conditional plea, the court may award acceptance of responsibility. If there is a trial solely because the defense wants to preserve the issue on a motion to suppress, the defendants do get acceptance of responsibility, at least in his district.

A member asked if the Committee could have the Sentencing Commission look at acceptance of responsibility policies. The member thought this seemed to be an acceptance of responsibility problem more than anything else. Could they do anything with the problem? Mr. Wroblewski responded that the Committee could write and ask the Commission to take it up, and the Commission could certainly take it up. It has amended acceptance of responsibility multiple times for all kinds of reasons. Indeed, there was an amendment going into effect next week. The member commented that where the defendant wants to appeal an issue and is pleading guilty on everything else, the Guidelines could include a statement that encouraged giving acceptance of responsibility.

Another member stated the view that this was not an acceptance of responsibility problem, but rather a lack of uniformity problem. Ninety-four different rules are not going to solve that problem. And it is a rare day that the judge cedes the court's power to the prosecutor in a courtroom so willingly. Having the judge make that decision (the rule change being proposed) would not increase the number of bench trials. The real issue is the lack of uniformity. It is difficult to measure whether that is a problem. The rule gives one party in a courtroom the almost absolute power, save the *Singer* exception, to determine whether there will be a bench or jury trial. And the judge is not the party with this power. The proposed change would not actually result in a terrible increase in bench trials, but it would result in more uniformity.

A member drew attention to the presumption for jury trial resolution, and the presumption against amending rules unless they respond to a substantial problem. He saw this as an amendment in search of a problem, not a solution for one.

Another member reiterated that the Committee did not even know the results in the 25 districts that have a policy or the 52 that do not have a policy. So the Committee still did not have the empirical data that everyone had been searching for. The member argued that a decision should not be made on the basis of an assumption, when the Committee lacked that foundational

understanding. Mr. Wroblewski asked the member to articulate what information she thought was lacking. The member responded. First, in the 25 districts that have a policy to go through the supervisor, what happens when the supervisor reviews them? Are those 25 districts routinely denying the request? What is the result? Second, in the 52 districts that have no policy at all, of the requests that are made, how many are granted?

Mr. Wroblewski noted that the data about the jury trials is from the courts. Judge Dever commented that the ACTL proposal says 11% of the cases tried were bench trials (page 159 of the agenda book). That suggested a lot of U.S. Attorneys consented. There would not have been bench trials if they not consented.

Professor King said that the questions that were presented to the defense attorneys resemble an initial list of questions for prosecutors that she had drafted when we were first thinking about questions that would get more information. That granular kind of survey conceivably could be given to prosecutors to get more detail. “How often do defendants ask? How often do you reject? What are the reasons you reject?” But, she emphasized, the question for the Committee was how that information would make a difference to the issue that it had to resolve. If a survey like that generated responses, what kind of responses would prompt members to say “OK, well, given this, we don’t need a subcommittee” or “OK, well, we do need a subcommittee.” How is the information pivotal?

The member responded that it was pivotal to understanding whether there is a problem. Eleven percent of trials are bench trials, but the Committee did not know the denominator (i.e., the number of defendants who wish to have a bench trial). The member said this was similar to Rule 17, where the Committee had learned that in many districts defense attorneys do not seek subpoenas because they know they will not be successful. Trying to identify some kind of percentage of success is difficult when the issue might be one of defense attorneys not even asking because they might be in a district where the U.S. Attorney’s Office never or rarely consents. The member thought the Committee was trying to measure something that was not happening. There were a number of defense attorneys and defenders who said that it is a problem, and the member credited those statements.

Judge Dever asked the member what space the member envisioned between the proposal and the *Singer* standard, which recognizes that the judge can override DOJ’s refusal in a compelling circumstance where a court concluded a defendant could not get a fair trial. What is the space beyond a fair trial that the Committee would be creating, and what problem does that space address in the proposed rule? The member responded that amending the rule would make that space. Judge Dever asked what other problem—beyond not getting a fair trial—would the rule address that the member wants to put in the hands of a judge? The member responded that she could not articulate another problem; the issue was a question of a fair trial and the court is able to identify that.

Another member asked even assuming that the Committee could define what constitutes an improper purpose for a prosecutor to deny a waiver, what was the likelihood of figuring out how often that improper purpose, whatever it may be, was happening? He said he could think of

really terrible reasons that very seldom occur. But if both sides are tribunal shopping, he asked, was that improper? Was it improper for a prosecutor to say, “I just prefer a jury over this judge”? And if that was improper, how could the Committee figure out from DOJ how often that was happening?

Another member was not yet convinced that there was a problem that a subcommittee could study and solve. The defendant already has the ability to file a motion, and the court can reach the exceptional circumstances case. The rest of the cases, the member observed, fall within the strategic category. As a judge, the member said, she wouldn’t want to know or be in the position of figuring out whether an attorney thought she was a defense-friendly judge or didn’t like her questions. The Committee would presume the government is acting in good faith and the defense is acting in the best interests of the client, and those are strategic calls. The court would do better to stay out of it. And the standard proposed is very amorphous: reasons sufficient to overcome the presumption in favor of the jury trial. The judge must ask the DOJ to justify why it thought a jury would be better. She thought that was very awkward. And it was in some ways very counterintuitive to the trial judge’s role of letting each side try its own case and make decisions on how to proceed, including whether strategically it is better to have a jury trial or a bench trial.

Another member said the current requirement of government consent was really not taking that decision out of the hands of the judge. Rather, the rule says before we have a bench trial, both parties have to consent. The rule requires a written request by the defendant. Requiring the government’s consent is just another way of saying we do not change the constitutional presumption of jury trial unless both parties consent and the judge approves. The member thought it seemed an eminently fair rule.

A member commented that it is nearly impossible to meet the existing “fair trial” standard for overriding the government’s insistence on a jury. Judge Dever observed that was the issue in the EDNY case. But if we amend the rule, Judge Dever asked for someone to articulate what that space would be beyond the fair trial. Is it an abuse of discretion standard? What would be a compelling reason?

The member continued that because the *Singer* exception is such a big hurdle, there are very few requests. When there is a request and the government says no, defense counsel seldom take that much further, because the problems the member had previously mentioned are not related to a fair trial. The defendant has a right to a jury trial. If the defendant wants to waive that, then the question is the community interest, the interest of society. The judge should make that decision and the government should not be able to override that decision. It was difficult to measure how often that was occurring because the Committee did not know how many defendants have abandoned that direction in the face of the government’s opposition. The member said that a number of people she contacted did not respond, which might indicate that was not a problem or an issue. Perhaps, she said, some of the reasons defense counsel were seeking bench trials on behalf of their clients were for other policy decisions that we’re trying to get around within the government itself. Maybe the problems were driving them toward no trials at all and this bench trial option. She said she was not sure how to solve those issues.

Professor Beale said that in April, two kinds of cases were brought up repeatedly, and they seemed to come up again in those comments from the group of Federal Defenders and CJA lawyers surveyed. One was child pornography cases, where the jury may be very, very offended by what they see and the defense thinks that the jurors won't be thinking about anything else. Another was the very complex case, where the jury may not be able to follow everything. Perhaps the defendant is really at an unusual disadvantage in these kinds of cases and ought to be able to decide that it is not in his or her interest to claim the jury right. And perhaps the government ought to not claim an almost unfair additional advantage, because the problem is jury prejudice or about the limits of what a lay jury can understand, and the government would be getting a little too much leverage there. That's part of what the proposal we received was about: the Sixth Amendment right rather than an Article III preference for the way things have to be. And at that point, we ought to go closer to letting the defendant make that decision. But of course Article III does state that preference, and there is a value to having jury involvement. If the Committee was going to send a subcommittee out to think about this, it ought to have some sense of what happens if an individual U.S. Attorney, or the DOJ as a whole, says "We like Article III and we're not going to consent to a bench trial unless we're convinced that this would be reversed on appeal as a trial that deprives the defendant of due process."

Judge Bates said the conversation had been very interesting and enlightening, and that the Committee must exercise care as to whether a change to Rule 23(a) would really address the acceptance of responsibility or the preservation of factual issues for sentencing problems. He thought these were problems more closely related to the plea process and sentencing. It should also be careful about putting an unworkable burden on the judge to figure out when the two sides are just saying things they don't really want to be said before the judge. The one issue that had been discussed as a reason for a rule amendment that falls somewhat outside of that—though it might not be a sufficient reason for the rule amendment—is the issue of uniformity. If uniformity is something that really is leading to unfairness in the system, perhaps it should be addressed. Whether a rule change or this particular rule change is the way to do that is not clear. Maybe, he said, the way to do it is to try to persuade the Attorney General to insist on some uniformity among the U.S. Attorney's Offices.

Judge Dever asked for each member's view.

All but three members opposed forming a subcommittee. Several noted the difficulty in defining what the problem is with the existing rule. One noted the case-by-case policy in his former district worked well, and another noted his former district's policy was to grant a jury waiver whenever one was requested. Of the three members in favor of a subcommittee to explore an amendment, one suggested the subcommittee could consider a modest change that would at least incorporate *Singer* and change the ultimate decider to the court.

Judge Dever then stated that the proposal would not be pursued further by subcommittee. Later in the meeting, he clarified that the item would be removed from the Committee's agenda.

Responding to comments from several members that the acceptance of responsibility situation is a problem and that the Sentencing Commission should be contacted, Judge Dever

said that he would recommend to the Standing Committee that the Sentencing Commission be made aware of the concern that arose during the Committee’s discussion. Specifically, several members suggested clarifying that judges may award acceptance of responsibility after a jury trial held solely to preserve an antecedent issue for appeal when the government would not accept a conditional plea or a bench trial.

Access to Electronic Filing by Self-represented Litigants

After the break, Judge Dever asked Professor Struve to present on the next issue, access to the courts by self-represented litigants, discussed in the Agenda Book beginning on page 185.

Professor Struve, who has been coordinating the efforts of an inter-committee working group, began by thanking some of the participants in the meeting (including Ms. Noble, the Committee’s clerk of court liaison, Judge Burgess, and the reporters) for their assistance. Professor Struve explained that the working group was studying (1) the ability of self-represented litigants to access the courts by means of various electronic avenues, including access to CM/ECF for filing, and (2) service of papers by self-represented litigants subsequent to filing. She drew the Committee’s agenda to her report in the Agenda Book, and did not attempt to repeat all of that information. She did note that recent developments included finalizing a report on interviews Professor Struve and Dr. Reagan from the Federal Judicial Center (FJC) conducted with personnel from nine districts.

On service by self-represented litigants, Professor Struve said the working group was developing a consensus that the national rules should no longer require self-represented litigants who had access to e-filing to make redundant and burdensome service on persons on CM/ECF, since they would already receive NEFs. Although draft language would not be available until the Committee’s spring meeting, Professor Struve said that one option was to bring the other rules (Civil, Bankruptcy, and Appellate) closer to the structure of Criminal Rule 49, which—unlike the other rules—begins with electronic service, which is now the dominant mode of filing.

Regarding self-represented litigants’ access to electronic filing, Professor Struve noted that current practices vary greatly, both at different court levels (with appellate allowing the greatest access and bankruptcy the least) and from district to district. She stated that the working group was considering a “minimalist” rule that would not mandate access for self-represented litigants, but would require districts that generally disallow access to make reasonable exceptions. She compared this to the approach taken in Criminal Rule 49(e) from 2011–2018. It required local rules to mandate electronic filing “only if reasonable exceptions are allowed.” She said this approach would recognize that districts may be in very different situations with regard to the availability of technology. Professor Struve then invited any comments.

Judge Burgess asked whether the interviews revealed any information related to the concerns that had previously been voiced on the Committee concerning problems with the accuracy of filings by self-represented litigants or burdens on the clerk’s office. Professor Struve first noted the potential for some selection bias because the interviews were conducted in districts that had removed the separate service requirement. But the sample did include districts that allowed access and others that allowed access only with permission. In the districts where

they conducted these interviews, there were few concerns about either of these issues. Some respondents did say that it was necessary to train and deploy staff to facilitate electronic filing by self-represented litigants, and to be sure there were adequate staff. On the other hand, allowing self-represented litigants to file electronically reduced burdens on the clerk's office to process and scan paper filings, and eliminated the need for the clerk's office to serve self-represented litigants who were filing electronically, since they would receive electronic filings. As to the accuracy of filings, the representatives who were interviewed did not see that as a major problem, and in one district, the representatives said the self-represented litigants made fewer errors than attorney filers. Professor Struve did note that some of the respondents said that it was important to include the ability to revoke credentials if necessary.

Professor Struve summed up the views of the persons they interviewed, saying that the districts that are allowing electronic filing by self-represented litigants are quite happy with it.

Judge Dever thanked Judge Burgess and Professor Struve for their efforts, and he expressed his appreciation for Ms. Noble's valuable input based not only on her experience in the Southern District of Florida, but also from her contacts throughout the country.

The E-Filing Deadline

Judge Dever asked Professor Beale to explain the recommendation, page 206, that this item be removed from the Committee's agenda.

Professor Beale drew the Committee's attention to the report from Judge Bybee and Professor Struve, Agenda Book page 207, reporting the views of the E-Filing Deadlines Joint Subcommittee. The Joint Subcommittee focused on the developments since Judge (now Chief Judge) Michael Chagares made the initial suggestion that the filing deadlines in the national rules be changed from midnight to an earlier time in the day. The Third Circuit recently adopted a new local rule that makes the presumptive deadline for most electronic filings 5:00 p.m. The new rule had produced strong negative reactions from some members of the bar, and an internal DOJ survey also elicited negative comments. Given these developments, she said, the Joint Subcommittee thought that this was not the time to move ahead with a national rule.

Judge Bates suggested, however, that although it had only been in effect for a few months, the Third Circuit had a sense the new local rule was working well, and there had not been a lot of resistance from the bar. He also pointed out that it would be easier to adopt such a change in the Third Circuit, which falls within a single time zone, than the Ninth Circuit, which spans several time zones.

In response, Professor Beale said the Joint Subcommittee had input from DOJ's internal survey, and it included a member from the Third Circuit. She commented that clearly there was not a ground swell of support for changing the national rules at this time.

Professor Struve provided information concerning the views of the sister rules committees. Bankruptcy, Civil, and Appellate all removed this item from their agendas at their fall meetings.

A Committee member from the Third Circuit who had served on the Joint Subcommittee reported that the bar’s response to the new local rule had been “vehemently negative.”

The Committee voted unanimously to remove the item from its agenda.

Rule 53

Judge Dever introduced the next item, page 218, a letter to Judge Mauskopf, requesting that the Judicial Conference explicitly authorize the broadcasting of the court proceedings in the cases of *United States v. Donald J. Trump*. Judge Mauskopf forwarded that letter to the Rules Office to be logged as a suggested amendment. Judge Dever said that the reporters’ memo concludes that the Committee has no authority to exempt or waive Federal Rule of Criminal Procedure 53, which currently provides that “the court must not permit . . . the broadcasting of judicial proceedings from the courtroom.” Moreover, construing the letter as a request to amend Rule 53, the memo concludes that even if the Committee were to move at “warp speed,” the change would not take effect for three or more likely four years because of the nature of the rulemaking process. Also, as the reporters’ memo noted, there is an excellent discussion of the history of the judiciary’s consideration of broadcasting (see footnote 17, page 222).

Professor Beale said she would provide a little more detail following this excellent summary. She commented that the reporters took pains to provide a clear explanation of their conclusion that the Committee lacked the authority to make any exception to allow broadcasting trials of exceptional public interest. The memo laid out the source of the Committee’s statutory authority under the Rules Enabling Act (REA). The REA authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the district courts. The REA also requires the Judicial Conference to authorize the appointment of a standing committee on practice, procedure and evidence, and that standing committee authorizes the appointment of additional committees to assist the conference by recommending rules. That, she said, is the authority that allows the appointment of this Committee and the other advisory committees. The Committee has statutory authority to assist the Judicial Conference by recommending rules, but no authority to recommend exceptions to existing rules and the REA.

The Committee’s only authority is to recommend rules, not to provide any exceptions to rules, and Rule 53 on its face is extremely clear. As quoted on page 219, it states that “Except 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” (emphasis added). No one has suggested that any statute would permit the requested broadcasting, and no one has suggested any other rule that might do so. Thus, we have an absolute rule. Our authority is limited to giving advice on and making suggestions on rules, and we have no authority to authorize exceptions to an across-the-board straight rule.

The reporters had also considered the Congressional letter as seeking an amendment to Rule 53 that would allow exceptions for particular cases of public importance. On pages 220–221, the memo discussed the question how quickly the Committee could move and how the process would work. Professor Beale summarized the necessary steps. After the Committee

initially approves a proposed amendment, it recommends the amendment to the Standing Committee. The Standing Committee, if it approves it, sends the proposed amendment out for publication and a period for public comment. After the comment period, the Committee reviews the public comments and decides whether to move ahead with the amendment. If the Committee then approves the amendment, either as published or with changes responsive to the comments, it presents its recommendation to the Standing Committee. At that point, if the Standing Committee approves a proposed amendment (such as a change in Rule 53 to allow the broadcasting of important cases), it then submits the proposed amendment to the Judicial Conference. If the Judicial Conference accepts the Standing Committee's recommendation, it forwards the proposed amendment to the Supreme Court. If the Supreme Court were to agree, under the REA by May 1 of any particular year, the Court would then transmit that recommendation to Congress. Finally, if Congress takes no contrary action by December 1, the amendment becomes law.

As their memo explained, Professor Beale said that even if the Committee were to act at "warp speed," an amendment to Rule 53 could not take effect until December 1, 2026. Moreover, it would probably take longer because the Committee would have to delve into the prior debates and discussion about the merits of broadcasting from the courtroom, as well as new issues, including changes in technology. So even if the Committee were to work as quickly as possible, the reporters had concluded that it would not be possible to amend Rule 53 before the completion of the particular trials that were the focus of the Congressional letter.

Judge Dever advised the Committee of a new proposal to amend Rule 53 from a coalition of media organizations that had not been received in time for consideration at the meeting (it was received after the Agenda Book had been prepared). The media organizations requested that Rule 53 be revised to permit broadcasting of criminal proceedings, or at least that it include an exception for extraordinary cases. He said the very thoughtful letter had been posted on the Committee's website for those who would like to review it now. He drew attention to current online resources on the history of cameras in the courtroom, cited in footnote 17 on page 222, and noted that there had been recent activity within the Judicial Conference in coordination with the Committee on Court Administration and Case Management (CACM) in connection with the broadcasting of civil proceedings.

Judge Dever announced he was appointing a subcommittee, chaired by Judge Conrad, to study the media coalition proposal. The other members would be Judge Burgess, Mr. Wroblewski, and the Committee's two new members, Judge Harvey and Ms. Mariano. Judge Dever thanked them all in advance for their work on this project.

Given the limitations on the Committee's authority (as explained by the reporters) and the fact that he was appointing a Rule 53 Subcommittee, Judge Dever commented that there would not be much for the Committee to discuss until it received a report from the Subcommittee. He asked Judge Bates if he had any comments.

Judge Bates asked whether the analysis just presented would preclude the Committee from drafting a new rule or amendment that would allow broadcasting under some circumstances

(not in a case-specific basis for the Trump case), either in an extraordinary case, in the discretion of the judge, or perhaps with the concurrence of the Judicial Council. He asked for confirmation that the reporters' analysis would not preclude this.

Professor Beale responded that the Committee was not precluded from considering such changes; indeed that was the reason that the reporters had analyzed the nature and time required to adopt such an amendment to Rule 53. She thought that the receipt of the new media consortium proposal—which clearly proposed such a change—was the catalyst for Judge Dever's decision that it was time to appoint a subcommittee.

Judge Dever agreed with Professor Beale's comments, noting that the reporters' memo summarized the authority of the Committee to act. The Committee certainly has the authority to consider the media proposal (as well as the letter of the members of Congress if viewed as alternatively requesting that we consider a potential rule change dealing with extraordinary cases or more generally). The Subcommittee would explore all of those topics. He added that the Committee had not studied the issue of broadcasting for 29 years, and it also raised issues under study by other committees, particularly CACM.

In response to a query from a member, Judge Dever agreed this would not be done at "warp speed." As discussed in connection with Rule 17, deliberative, thoughtful study of issues was a feature and not a bug of the process under the REA, because once a rule is amended, that becomes the law, not merely advice. So in considering whether to amend Rule 53, the Committee would continue to be thoughtful and deliberate. It would begin, as always, with the question whether there was a problem under the current rule, and, if so, what the solution might be.

Judge Conrad (the new Subcommittee chair) asked whether to anticipate parallel reviews by other advisory committees. Judge Bates said that he was aware only of CACM, and that committee would not be looking at a change to Rule 53. CACM is looking at remote proceedings more generally, not specifically in the criminal context but more in the civil context, bankruptcy context, and also with respect to possible changes in terms of public access, which have already been made through the Judicial Conference policy. So there were things going on in this general area but not with respect to the specific question of broadcasting criminal proceedings. Judge Bates also observed that the media request was actually for broadcasting of criminal proceedings, not just criminal trials, and Rule 53 applies to criminal proceedings, not just trials. But again, neither CACM nor any other committee was looking at broadcasting of criminal proceedings.

As a follow up to Judge Bates' point, Judge Dever said that the Subcommittee would be developing an understanding of the historical part, including what this Committee had done, what CACM has done, and what the Judicial Conference has done with regard to broadcasting generally. He anticipated the Subcommittee would receive information from CACM.

A member asked about his recollection of testing of broadcasting judicial proceedings and a pilot program in the Ninth Circuit. Professor Beale responded that the pilot had included only civil proceedings, and it was possible because the Civil Rule, unlike Rule 53, does not forbid broadcasting across the board. That made the pilot program in some districts possible.

Although a recommendation came out of a pilot program to move toward more availability of broadcasting as a national rule, that recommendation was not successful. Professor Beale thought it was at that point—when the proposal to amend the Civil Rules was rejected—that our Committee ended its consideration of a parallel change to the Criminal Rules. Noting that the Subcommittee would review the history thoroughly, Professor Beale suggested that anyone who wanted to know more about that see the online history linked from footnote 17, Agenda Book page 220. She characterized it as very interesting reading that details the actions of different groups, including the Judicial Conference and CACM, and she noted that the Federal Judicial Center had been very involved at different points in time.

Judge Dever said that Mr. Byron, who had been coordinating with CACM on issues relating to civil or bankruptcy proceedings and public access, would continue those efforts and be a resource for the new Subcommittee.

A member asked with respect to the Congressional letter, would the Committee communicate that directly back to the authors of the Congressional letter? Similarly, how would it communicate its decision not to form a subcommittee to consider an amendment to Rule 23, and to remove that item from its agenda?

Professor Beale responded that was up to the chair. Judge Dever stated his view that if someone had taken the time to ask the Committee to consider something, the Committee should write back to them once it had considered the suggestion. If the Committee has decided not to move forward, it communicates that. He noted that occasionally the Committee has received suggestions from judges who raise a variety of issues, and the Committee will seek to determine whether this is more than an isolated one-off example. If it decides to remove the item from its agenda, the chair historically writes the judge or other person who made the suggestion to let them know of the Committee's decision.

Judge Bates commented a communication would be made regarding a decision, particularly where, as here, the suggestion came from Congress and was rather to the Director and not directly to the Committee. In response to a member's concern about the difficulty of explaining the Committee's decision to appoint a subcommittee that would be looking at a proposal to allow broadcasting in the future—but not in the Trump trials which were the focus of the Congressional letter—Judge Bates assured the Committee that the communication would be made with care.

Social Security Numbers

Mr. Byron provided an oral report. He explained that under Professor Struve's leadership last year the Rules Office prepared a statutorily required report to Congress on the adequacy of the privacy rules in all of the rules settings. One of the things that was addressed in that report last year was the redaction requirements for Social Security numbers. Also last year, the committees received a letter from Senator Wyden asking the committees to consider again the question whether the last four digits of Social Security numbers need to be or should be allowed to be included in court filings, or alternatively, whether the full Social Security number should be required to be redacted under the rules.

As that report to Congress laid out, when the original privacy rules were considered and adopted in 2005 and took effect in 2007, the Bankruptcy Rules Committee deemed it important to have those last four digits for identification purposes in a variety of contexts in bankruptcy cases. And the other committees, including the Criminal Rules Committee, as well as Civil and Appellate, determined that the value of uniformity across the rule sets outweighed any concerns that might differ in those contexts from the bankruptcy situation.

That issue was reconsidered following the FJC's study concerning compliance with the redaction requirements in 2015. This Committee, as well as Civil and Appellate, again concluded that the value of uniformity outweighed any particularized privacy concerns in the context of those different rule sets other than Bankruptcy. And the Bankruptcy Rules Committee once again determined that it was important to retain the permissive use of those four last four digits in certain filings.

So now the issue is back to all four committees. Last year, the decision was made to allow the Bankruptcy Rules Committee to consider whether they were still of the view that the last four digits of Social Security numbers served a valuable purpose in some capacity in the bankruptcy context. The Bankruptcy Rules Committee discussed that question in the last two meetings and reached the tentative conclusion that there are at least some situations in bankruptcy cases where that identifying information can be valuable both to the debtor and sometimes to creditors as well. At this point, the Bankruptcy Rules Committee is going to continue to study the issue, but Mr. Byron said it seems unlikely that they would adopt a revision of the Bankruptcy Rule 9037 to require complete redaction of Social Security numbers. And to the extent they make any other changes to redaction requirements in their rules, it would take additional time for study about when and in what situations it is valuable to have that information.

Mr. Byron said that finding teed up for this Committee (as well as Civil and Appellate Rules) the question whether that uniformity goal remains paramount. Or, in light of the passage of time, the continued concerns in this area, and the suggestion from Senator Wyden, should the Committees now consider whether to adopt a requirement that differs from the Bankruptcy Rules and requires redaction of the full Social Security number in filings subject of course to the other provisions and exceptions (of which there are several) in Criminal Rule 49.1?

Mr. Byron described the latest developments, which included a meeting of the reporters for all of the committees that started an initial discussion of what might happen next and the timeline. There would be continued communications among the reporters for the advisory committees, with the assistance of Professor Struve, with the hope that it might be possible to bring a proposal to the committees' spring meetings if there was room on their agendas. He hoped to have some more news on that timeline in advance of the spring committee meetings. In the meantime, he said they would be very interested in any feedback, reactions, or guidance from this Committee about whether it would be valuable either to retain a uniform approach across the rulesets, or at least as between Criminal and Bankruptcy, or whether the privacy concerns that have been raised warrant considering a full redaction requirement or some other provision. He

invited any comments at the meeting and encouraged members to send any further thoughts to him or to the reporters.

Concluding Remarks

Judge Dever said that the Committee’s next meeting would be in Washington, D.C., on April 18, 2024, and he noted that the work of the subcommittees would continue between the meetings. He also thanked the reporters, and Ms. Cox, Mr. Byron, and the members of the team at the Administrative Office, as well as St. Thomas for hosting the Committee.

Judge Dever then announced that the meeting was adjourned.

Draft

TAB 7

TAB 7A

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

JOHN D. BATES
CHAIR

H. THOMAS BYRON III
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

ROBIN L. ROSENBERG
CIVIL RULES

JAMES C. DEVER III
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 2023

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on October 27, 2023, at the University of St. Thomas School of Law in Minneapolis. On the morning of the meeting, the Committee convened two panels to get input on possible amendments to the Evidence Rules. The first panel consisted of five Evidence scholars, who provided suggestions for various amendments. The second panel consisted of two experts on Artificial Intelligence who provided an explanation of AI and suggested an amendment to deal with the widespread use of deepfakes. At its subsequent meeting, the Committee processed the comments of the panelists and gave preliminary consideration to two other amendments.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report. A transcript of the panel discussions will be published in the Fordham Law Review this Spring.

II. Action Items

No action items.

III. Information Items

A. Panel Discussions

1. Scholars' Suggestions for Change to the Evidence Rules

Five outstanding Evidence scholars were invited by the Committee to make a presentation on what amendment to the Evidence Rules each thought was most needed. Professor Jeffrey Bellin proposed the abrogation of (or, alternatively, the limitation of) Rule 609, the rule allowing impeachment with prior convictions. Professor Ed Imwinkelried suggested certain minor changes to the process of impeaching a witness with prior bad acts under Rule 608. Professor Hillel Bavli recommended an amendment to Rule 404(b) to clarify that a bad act cannot be admissible for a proper purpose unless the prosecution can show that the evidence is probative of the proper purpose without proceeding through a propensity inference. Professor Erin Murphy suggested adopting a rule to govern the admissibility of false accusations of sexual assault. Finally, Professor Andrea Roth proposed amendments to several rules, including Rule 702, to help courts in reviewing the admissibility of machine-based evidence.

The Committee had a lively discussion with the professors regarding their proposals. At its later meeting, the Committee decided to consider the following possible changes at the Spring 2024 meeting:

1. An amendment to Rule 609 that would delete Rule 609(a)(1), which allows admission of felony convictions not involving dishonesty or false statement --- on the ground that such convictions can be very prejudicial and are not very probative of the witness's willingness to lie under oath. That amendment would have the virtue of applying equally to the prosecution witnesses and to the defendant and the defendant's witnesses, and it would retain the automatic admissibility of convictions that actually involve dishonesty or false statement, as provided by Rule 609(a)(2).

2. An amendment that would add a new Rule 416 to the Evidence Rules to govern the admissibility of false accusations. The Committee resolved to consider options such as

whether to cover all false accusations; whether to limit the rule to false accusations of sexual assault; and whether the rule would be applicable to civil as well as criminal cases.

The Committee decided to defer any consideration of Rule 404(b), as the amendment to the notice requirement of that Rule has been in effect for only three years. The Committee determined it was prudent to wait and see whether the 2020 amendment --- which requires the prosecution to explain how the bad act is probative for a permissible purpose without relying on a character inference --- will provide some of the protections suggested by Professor Bavli.

Finally, the Committee decided that while regulating machine-based evidence was very important, more information was needed on machine-based evidence (specifically how it is generated, what the reliability problems can be, and how human input affects machine data) before any rule could be proposed.

2. Artificial Intelligence and Deepfakes

The Committee invited Dr. Maura Grossman and former Judge Paul Grimm to provide it with background information about Artificial Intelligence and the problems posed by deepfakes. Dr. Grossman provided information on how AI generates information and noted that the ability to detect deepfakes is likely to lag behind the developments in improving and refining deepfakes. Judge Grimm presented a suggestion for an amendment to Rule 901(b)(9) (which provides for authentication of a process or system) that would require the proponent to describe the system and show how it reached a reliable result as to the proffered item. The proposal also provides that an inquiry into authenticity of an alleged deepfake would only occur if the opponent presents some factual foundation for doubting the authenticity of the video or audio.

The Committee recognized the importance of considering an amendment to deal with deepfakes and other AI issues (such as the questions about machine-based evidence raised by Professor Roth). But the Committee decided it needed more information to determine what kind of amendment, if any, would be necessary --- and whether any amendment proceeding through the rulemaking process would be outmoded by the time it was enacted. Therefore, the Committee resolved to hold a conference next fall, inviting experts to discuss how AI generates information, how machine output is affected by human input, and how to treat the evidence issues raised by AI. The Committee believes it needs further guidance before it can proceed in this difficult and complicated area.

B. Rule 801(d)(1): Prior Statements of Testifying Witnesses as Hearsay

At the meeting, the Reporter presented a memorandum suggesting that the Committee consider a possible amendment to Rule 801 that would provide for broader admissibility of prior

statements of testifying witnesses. Prior statements of testifying witnesses are problematic candidates for hearsay, because the declarant of such a statement is by definition available at trial to be cross-examined about it. Currently, Rule 801(d)(1) provides substantive admissibility for only a relative few prior statements of witnesses: (A) only those prior inconsistent statements made under oath at a formal proceeding; (B) only those prior consistent statements that rehabilitate a witness after the witness's credibility has been attacked; and (C) all statements of prior identification.

After discussing the Reporter's memo, the Committee resolved, as a preliminary matter, to consider at the next meeting two different proposals to expand the admissibility of prior statements over a hearsay objection: 1) an amendment that would provide an exception to the hearsay rule for all prior statements of testifying witnesses, leaving any concern about overuse of prior statements to Rule 403; and 2) a narrower amendment that would retain the existing rules on prior consistent statements and prior identifications, but would provide a hearsay exception for all prior inconsistent statements. The Reporter will prepare a memorandum for the next meeting covering both options.

C. Rule 803(4): Statements Made to Doctors for Purposes of Litigation

Rule 803(4) provides a hearsay exception for statements made for purposes of medical treatment or diagnosis. A recent law review article suggests that the Rule should provide that statements made to a doctor for purposes of litigation are excluded from this exception. Currently, statements to litigation doctors are within the exception because the purpose of the communication is for the doctor-witness to diagnose the plaintiff. Professor Richter prepared a memorandum for the Committee on the proposal to narrow the exception. After discussion, the Committee decided not to propose any changes to Rule 803(4). The Committee reasoned that statements to doctors after an injury are often made with mixed motivations, and it could be hard to distinguish those that are primarily motivated for litigation from those that are not. Moreover, if a statement to a doctor is made solely for litigation purposes, the opponent can raise that on cross-examination of the doctor, and the jury should then be able to weigh the statement accordingly.

IV. Minutes of the Fall, 2023 Meeting

The draft of the minutes of the Committee's Fall, 2022 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Draft Minutes of the Fall, 2023 meeting of the Advisory Committee on Evidence Rules.

TAB 7B

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 27, 2023

University of St. Thomas, School of Law

Minneapolis, Minnesota

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 27, 2023, at the University of St. Thomas School of Law in Minneapolis, Minnesota.

The following members of the Committee were present:

Hon. Patrick J. Schiltz, Chair

Hon. Valerie E. Caproni

Hon. Mark S. Massa

Hon. Edmund A. Sargus, Jr.

Hon. Richard J. Sullivan

James P. Cooney III, Esq.

John S. Siffert, Esq.

Rene Valladares, Esq., Federal Public Defender

Elizabeth J. Shapiro, Esq., Department of Justice (ex officio)

Also present were:

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)

Professor Catherine T. Struve, Reporter to the Standing Committee

Hon. Edward M. Mansfield, Liaison from the Standing Committee

Professor Daniel J. Capra, Reporter to the Committee

Professor Liesa L. Richter, Academic Consultant to the Committee

Timothy L. Lau, Esq., Federal Judicial Center

Bridget M. Healy, Esq., Counsel, Rules Committee Staff

Allison A. Bruff, Esq., Counsel, Rules Committee Staff

Zachary Hawari, Esq., Rules Law Clerk

Professor Paul W. Grimm

Professor Maura R. Grossman

Professor Jeffrey Bellin

Professor Hillel J. Bavli

Professor Erin E. Murphy

Susan Steinman, Esq., American Association for Justice

Present Via Microsoft Teams

Professor Daniel R. Coquillette, Consultant to the Standing Committee

Hon. M. Hannah Lauck, Liaison from the Civil Rules Committee

Professor Edward J. Imwinkelried

Professor Andrea Roth

Shelly Cox, Management Analyst, Rules Committee Staff

John G. McCarthy, Esq., Smith Gambrell & Russel LLP

John Hawkinson

Ted Fowles
Jamel Gross-Cassel, Esq., Smith Gambrell & Russel LLP
Kaiya Lyons, Esq., American Association for Justice
Sara Merken, Reuters
Afton Pavletic
Rebekah Petroff, Supreme Court Fellow, Federal Judicial Center
Daniel Steen, Esq., Lawyers for Civil Justice
Jacqueline Thomsen, Bloomberg
Jessica Tyler, Delaware Supreme Court
David White, Delaware Supreme Court
Avalon Zoppo, National Law Journal
Angela Brown, Court Reporter
Scott Myers, Esq., Counsel, Rules Committee Staff
Tim Reagan, Esq., Federal Judicial Center

I. Opening Business

Judge Schiltz opened the meeting by welcoming everyone to Minneapolis and to the University of St. Thomas School of Law. He noted that it was wonderful to host the Committee in his home city and in the law school he helped to found. He explained that the Dean of St. Thomas was unavailable and that the Associate Dean was also unable to personally welcome the Committee, but that both had asked Judge Schiltz to welcome the Committee to St. Thomas on their behalf.

The Chair then introduced and welcomed three new distinguished members of the Committee: Judge Valerie Caproni, Judge Edmund Sargus, and John Siffert, Esq. The Chair also welcomed Justice Edward Mansfield, the new liaison from the Standing Committee, and Zachary Hawari, the new Rules Law Clerk.

The Chair opened the morning session with an overview of the meeting agenda. He explained that the work of the Committee is cyclical in nature and that two Rules packages had recently made their way through the Committee process. One package, including a proposal to amend Federal Rule of Evidence 702, is scheduled to take effect on December 1, 2023. A second package of amendment proposals has been approved by the Judicial Conference and sent to the Supreme Court and is scheduled to take effect on December 1, 2024, pending necessary approval. Because the Committee had recently completed consideration of these amendment packages and cleared most of its agenda, the Chair stated that this meeting would be a “thinking” meeting rather than an “acting” meeting. He explained that the Reporter had invited several top evidence scholars to make presentations to the Committee regarding amendments they would like to see made to the Evidence Rules, and that he also invited Professor Maura Grossman and Judge Paul Grimm to make a separate presentation on the problems posed by deepfakes. Following all these presentations, the Committee would hold its meeting in the afternoon, to discuss the proposals and to plan the upcoming work of the Committee.

II. Evidence Scholars Presentations

Professor Jeffrey Bellin of the William & Mary Law School gave a presentation urging the abrogation or narrowing of Federal Rule of Evidence 609.

Professor Edward Imwinkelried of the University of California at Davis School of Law gave a presentation urging clarifications to Federal Rule of Evidence 608(b).

Professor Hillel Bavli of the Southern Methodist University Dedman School of Law gave a presentation urging amendments to Federal Rule of Evidence 404(b)(2) to curb the admission of other-act evidence where its probative value is based upon character reasoning.

Professor Erin Murphy of the New York University School of Law gave a presentation on the admissibility of evidence of prior false accusations, suggesting amendments to bring clarity and uniformity to the admission of such evidence.

Professor Andrea Roth of the University of California at Berkeley School of Law gave a presentation on machine-generated evidence and the need for evidentiary protections to ensure the reliability of such evidence presented at trial.

Judge Grimm, Director of the Bolch Judicial Institute at Duke Law, and Professor Grossman of the University of Waterloo, gave a presentation on machine learning and artificial intelligence and on the need for authentication standards that account for deepfakes.

A transcript of these presentations has been prepared and will be published in the Fordham Law Review in Spring 2024.

III. Committee Meeting

A. Approval of Minutes

The Chair opened the afternoon session by asking for approval of the minutes of the Spring 2023 meeting of the Committee. The minutes were unanimously approved.

B. Standing Committee Report

The Chair then gave a report on the June 2023 meeting of the Standing Committee. He explained that all amendments proposed by the Committee had been approved by the Standing Committee with very minor tweaks to either rule or committee note language. The Chair informed the Committee that the amendment creating Rule 107, covering the use of illustrative aids, had received the most attention from the Standing Committee. He noted that discussion revolved around concerns regarding a notice requirement for illustrative aids. The Chair reminded the Committee that it had removed any notice requirement from the text of proposed Rule 107 before sending it to Standing, but that the Standing Committee had continuing concerns regarding the discussion of notice in the proposed committee note. He explained that the committee note had been revised as reflected on page 285 of the Agenda materials to remain neutral with respect to

providing advance notice of illustrative aids. The Chair also noted that there was some discussion about the improper use of illustrative aids to get inadmissible evidence before a jury. He explained that it is impossible to write a rule to address this concern where the whole point of illustrative aids is that they are not admissible evidence. He also pointed out that judges already have ample tools for preventing juries from being tainted by inadmissible evidence --- tools that judges already use in almost every trial. The Chair noted that, notwithstanding this discussion, Rule 107 and all other proposed amendments had been approved by the Standing Committee and then later by the Judicial Conference.

C. Discussion of Scholar Presentations

The Chair next raised the topic of the scholar presentations, noting that they had all been fantastic and had made for a very interesting morning. The Chair applauded Judge Grimm and Professor Grossman for delivering a very helpful presentation on AI that was pitched at an accessible level. He expressed his view that the topic of machine-generated evidence merits closer attention and a day-long seminar where there could be an even fuller airing of the hearsay, expert testimony, and authentication issues that it presents. The Chair proposed that the Committee host a full-day seminar on machine-generated evidence, including deepfakes and authentication, at its Fall 2024 meeting. He noted that this would give the Reporter a full year to plan the seminar and that the Fall 2024 meeting will be the first for the next Committee Chair. The Committee unanimously agreed to a seminar on machine-generated evidence and deepfakes in Fall 2024, with several members expressing interest in potential amendments that would address AI and machine-generated information. The Reporter thanked Judge Grimm and Professor Grossman for their excellent presentation and promised to stay in touch with them regarding potential amendments to address AI. Mr. Lau informed the Committee that a new edition of the *Reference Manual on Scientific Evidence*, including a chapter on the admissibility of artificial intelligence, would be forthcoming in 2024 and may be a valuable resource for the Committee's consideration.

The Chair then asked the Committee members whether there were other proposals presented by the scholars that would merit further attention from the Committee.

1. Rule 404(b) Proposal

The Federal Public Defender noted that Rules 404(b) and 609 are both critical to defense lawyers and said that the proposed amendments to those rules should be considered. The Committee first discussed the possibility of studying Rule 404(b) with an eye toward an amendment. The Reporter reminded the Committee that Rule 404(b) had been amended in 2020 to add a new notice provision, which requires the prosecution in a criminal case to articulate the non-character reasoning supporting other-acts evidence. He also noted that substantive changes to Rule 404(b) to curb the admissibility of other-acts evidence were considered over a multi-year amendment process and that the Committee had ultimately rejected those substantive changes in favor of the amended notice provision. Ms. Shapiro noted that the issues raised by Professor Bavli's presentation were the same ones that caused the Committee to study and amend Rule 404(b) in 2020. She reminded Committee members that the Rule 404(b) project lasted for several years and raised many substantive amendment proposals that were rejected in favor of a new notice provision. She further opined that the notice amendment is still too new for the Committee to

consider yet another amendment to Rule 404(b). The Reporter suggested that the Committee may want to consider a substantive amendment to Rule 404(b) if the notice amendment has not succeeded in reining in other-acts evidence. Ms. Shapiro noted that Professor Imwinkelried had suggested in his morning presentation to the Committee that federal courts are “tightening” their application of Rule 404(b).

The Federal Public Defender opined that the Rule 404(b) notice provision is helpful, but that lawyers are not seeing a change in the substantive admissibility of other-acts evidence. The Chair agreed that no substantive contraction in the admission of other-acts evidence was apparent in the federal cases. The Reporter noted that the Third and Seventh Circuit Courts of Appeal were restricting admissibility of other-acts evidence *before* the 2020 amendment to Rule 404(b), which prompted the Committee’s consideration of the provision. Ms. Shapiro noted that the committee’s note to the Rule 404(b) notice provision already tracks the language of the Seventh Circuit requiring non-propensity reasoning to support the admission of other-acts evidence. Another Committee member stated that the presentation and discussion had opened his eyes to concerns regarding other-acts evidence and that he would welcome an examination of Rule 404(b). Another Committee member opined that the Committee had already made recent changes to Rule 404(b) and that it should focus on topics like deepfakes for now and wait to see how Rule 404(b) precedent evolves following the 2020 amendment. Two other Committee members opined that the language of Rule 404(b) was not the problem with the provision; rather it is judicial applications of the text that create concerns. One Committee member suggested that adding a requirement that the defendant “actively contest” a point for which other-acts evidence is offered could be beneficial. The Reporter noted that the Committee had explored an “active contest” requirement in considering the 2020 amendment and had rejected it as unworkable.

The Chair expressed reluctance to take up potential amendments to Rule 404(b) at this time. He stated that he agreed that the Rule is misused but that he is not sure it is a problem of misunderstanding. The Chair noted that it made sense to amend Rule 702 to clarify the application of the preponderance standard because lawyers and judges had to travel through Rule 104(a), the *Bourjaily* case, and the committee’s notes to find the preponderance standard prior to the most recent Rule 702 amendment. He opined that it was not worth another Rule 404(b) project just to offer modest clarifications, suggesting that it would invite a great deal of controversy for very little return. The Chair suggested that he could envision more substantive changes, such as adding a “primary purpose” test to Rule 404(b)(2), but that such significant changes could pose insurmountable rulemaking obstacles. The Federal Public Defender suggested that the Committee could study Rule 404(b) cases to better understand why the provision is misused. The Reporter noted that he had prepared many research memoranda regarding the application of Rule 404(b) in connection with the 2020 amendment and offered to prepare an overview of the caselaw since the 2020 amendment. In the end, the Committee determined that it would monitor Rule 404(b) case law but would not at this time proceed with any amendment to the rule.

2. Rule 609 Proposal

Several Committee members expressed an interest in examining Rule 609. One Committee member opined that it is important to collect data about how often the possibility of prior-conviction impeachment actually causes criminal defendants to plead guilty or to decline to testify

at trial when they otherwise would. Ms. Shapiro noted that she would be reluctant to consider an amendment to Rule 609. She noted that she was not speaking for the Department on the issue at this preliminary juncture and that she personally supports the ability of a person to move on with his or her life after serving a sentence for a criminal act. That said, she expressed doubt as to whether an amendment to Rule 609 is justified. Specifically, Ms. Shapiro explained that she had doubts about Professor Bellin's assertion that jurors presume that a criminal defendant is guilty when he takes the stand, opining that jurors understand the presumption of innocence. The Reporter responded that Professor Bellin was not suggesting that jurors presume a criminal defendant's guilt of the charged offense. Rather, he was noting that a criminal defendant takes the stand already impeached by his inherent bias to avoid conviction, thereby reducing the need for prior-conviction impeachment. The Reporter analogized it to a defendant's impeachment with a prior inconsistent statement, explaining that there would be less need for prior-conviction impeachment if the defendant had already been impeached with a prior inconsistency. According to Professor Bellin, a criminal defendant takes the stand pre-impeached, thus reducing the prosecution's need to impeach him further with prior convictions.

Another Committee member noted that there are constituencies that would oppose the complete abrogation of Rule 609 as suggested by Professor Bellin. The Committee member explained that there are some types of prior-conviction impeachment that could be fine-tuned to create fairer and more consistent results across cases. For example, he noted a trial in which a jury was informed that a plaintiff in a civil case had "spent a substantial amount of time in jail" instead of being told that the witness had a prior murder conviction. He suggested that the Committee could explore amendment possibilities to fine-tune Rule 609, rather than eliminate it altogether. Another Committee member agreed that he would like to examine Rule 609 with an eye toward tempering it rather than eliminating it. Another Committee member expressed reluctance to consider Rule 609 at all.

The Reporter outlined three possibilities for amending Rule 609. "Plan A" would be to "burn it down" and eliminate Rule 609 altogether as proposed by Professor Bellin. A "Plan B" would be to eliminate Rule 609(a)(1) felony impeachment for *all* witnesses, preserving automatic impeachment under Rule 609(a)(2) for crimes of dishonesty as to all witnesses, including criminal defendants. A "Plan C" could be to fine-tune the balancing test applicable to criminal defendants under Rule 609(a)(1)(B) to eliminate problematic applications that admit prior convictions very similar to the charged offense. The Reporter suggested that the "Plan A" "burn it down" option would not be workable. The Chair opined that there would be no point in the Committee proposing the elimination of Rule 609 because it would never get through the rulemaking process. He suggested that the Rule is misused because it is a credibility provision that is often used to admit convictions that are tangential to credibility. He further noted the high cost of misuse of the Rule when it prevents a defendant from taking the stand in his own defense. The Chair suggested that it might be possible to narrow Rule 609 to admit only convictions that truly bear on character for truthfulness.

Ms. Shapiro inquired about the direction of the Committee's examination of Rule 609, asking whether complete elimination of Rule 609 was being "taken off the table" and whether any proposal would apply to all witnesses or just to criminal defendants who testify. The Chair opined that any proposed amendment limiting Rule 609 should apply to all witnesses, as it would be unfair

to completely protect the criminal defendant from impeachment while allowing the government witnesses to be freely impeached. The Reporter clarified that a “Plan C” that would tweak the balancing test applicable to criminal defendants under Rule 609(a)(1)(B) would apply to criminal defendants only because that test is reserved for them exclusively. In the end the Committee resolved to consider a possible amendment affecting Rule 609(a)(1) at the next meeting, while retaining Rule 609(a)(2).

3. Prior False Accusations Evidence

Several Committee members expressed an interest in exploring potential amendments to address the admissibility of a victim’s prior false accusations as discussed by Professor Erin Murphy. The Reporter stated that it would be important to determine how frequently such evidence is proffered. He also opined that prior false accusations evidence would be better addressed by an amendment to Article IV, such as a new Rule 416, rather than an amendment to Rule 608(b) because victims may not be testifying witnesses subject to Rule 608. He suggested that a new Rule 416 governing evidence of prior false accusations might simplify the admissibility standards for such evidence. Several Committee members agreed that such an amendment could serve to make trials cleaner and easier and expressed a strong interest in pursuing the project. The Chair agreed that it would be worthwhile to study potential amendments to clarify the admissibility of prior false accusations. He opined that a workable rule could prove difficult to draft, however. Still, he suggested that any amendment belonged in Article IV rather than Article VI and was worth pursuing. In the end the Committee resolved to consider an amendment that would add a new Rule 416 to cover the admissibility of evidence of false accusations.

D. Discussion of Other Potential Amendment Projects

1. Prior Statements of Testifying Witnesses

The Reporter next directed the Committee’s attention to Tab 5 of the Agenda materials and the problems with treating the prior statements of testifying witnesses as hearsay. The Chair explained that this issue had always been his pet peeve. He noted that he used to teach Evidence and that students never could understand why the statements made by witnesses who show up to testify are treated as hearsay. He said that students would ask: “don’t we exclude hearsay because the declarant cannot be tested through cross-examination? If a declarant shows up and testifies under oath, he is subject to cross-examination about his prior statements, so why treat them as hearsay at all?” The Chair noted that it was difficult to explain why all prior witness statements should be classified as hearsay. The Chair said that he understood why a trial judge would not want to admit all the prior statements a defendant had made to his family professing his innocence, for example, but noted that Rule 403 would keep out the prior statements that do nothing but bolster the witness.

The Reporter directed the Committee’s attention to pages 365-367 of the Agenda materials and to amendment proposals that would allow *all* prior witness statements to be admitted over a hearsay objection. He explained that one possibility would be to modify the definition of hearsay to remove witness statements from its ambit. Another possibility would be to retain the current definition of hearsay but exempt all witness statements from the rule in Rule 801(d)(1).

The Reporter noted that both options would permit all *prior consistent statements* made by testifying witnesses to be admitted for their truth. He explained that the substantive admissibility of prior consistent statements is currently tied to rehabilitation under Rule 801(d)(1)(B). If a prior consistent statement will serve to rehabilitate a witness after an impeaching attack by an adversary, it may come in – not only to rehabilitate, but also for its truth. The idea behind the existing exception for prior consistent statements is that they should be admitted substantively when they will be given to the jury to help evaluate credibility in any event. The Reporter explained that the original rule had allowed the substantive use of prior consistent statements in only one narrow circumstance, and that Rule 801(d)(1)(B) had been expanded in 2014 to reach all prior consistent statements that serve to rehabilitate. He suggested that existing Rule 801(d)(1)(B) may be the optimal way to treat prior consistent statements.

The Reporter opined that the real problem with prior witness statements is with the treatment of prior inconsistent statements under Rule 801(d)(1)(A). He noted that one potential amendment to Rule 801(d)(1)(A) might allow all prior inconsistent witness statements to be admitted for their truth. He noted, however, that cross-examination of the witness at trial is the safeguard justifying admissibility of the prior statement and that some have argued that concerns arise in cases where the witness testifies that he never made the prior inconsistent statement. He explained that Congress added the “under oath” and “prior proceeding” requirements to Rule 801(d)(1)(A), in part, to ensure that the prior inconsistent was actually made. If the Committee is concerned about ensuring that the statement was made, it could consider amendment proposals that would expand the methods for ensuring that the statement was actually made akin to the drafts on pages 369-370 of the Agenda materials. An amendment might permit substantive admissibility of a prior inconsistent statement when a witness acknowledges making it or when the statement was recorded in some way, in addition to when it is made under oath in a proceeding.

The Chair opined that whether the witness acknowledges the prior statement should not be a concern. He noted that witnesses deny things all the time and that lawyers have tools to address such denials. The Chair explained that prior inconsistent statements are no different from other types of evidence in that respect. A Committee member agreed that when a witness falsely denies making a prior inconsistent statement, cross-examination can be very effective.

The Reporter noted that the cleanest amendment alternative would be one that allows substantive admission of all witness prior inconsistent statements. The Chair stated that he would support such an amendment but that the question is whether the Committee thinks such an amendment is worth pursuing. The Reporter stated that if he had been asked to make a presentation, like the evidence scholars, about the number one rule that needs fixing, he would have chosen Rule 801(d)(1)(A).

Committee members unanimously agreed that they would be interested in considering an amendment that would make all prior inconsistent statements of testifying witnesses substantively admissible. One Committee member expressed support for an amendment that would make all prior witness statements (consistent or inconsistent) substantively admissible. The Chair noted that making all witness statements admissible would eliminate the need for the rehabilitation inquiry under Rule 801(d)(1)(B). The Reporter agreed to write up two potential amendment alternatives for the spring meeting – one akin to the draft on page 367 of the Agenda materials that would make

all prior witness statements admissible – and one akin to the draft on page 369 that would make all prior inconsistent statements admissible.

2. Statements Made for Purposes of Medical Treatment or Diagnosis

Professor Richter directed the Committee’s attention to Tab 6 of the Agenda materials and a memorandum regarding the admissibility of statements made for purposes of medical treatment or diagnosis under Federal Rule of Evidence 803(4). She explained that a recent law review article in the *Boston College Law Review* had pointed out some anomalies in the admissibility of hearsay statements under the exception. First, she explained that the exception had been expanded beyond the common law when it was enacted as part of the original Evidence Rules to encompass statements made to testifying medical experts to secure a medical diagnosis for trial. Professor Richter noted that the recent law review article had pointed out the inherent unreliability of such statements made in anticipation of litigation. She explained that the original Advisory Committee had broadened Rule 803(4) to include such unreliable statements made in anticipation of litigation because it assumed that those patient statements would be revealed to the jury at trial as the basis for the testimony of the medical expert. The Advisory Committee’s notes reason that such statements might as well be admissible for their truth if they are going to be disclosed to the jury in any event. Professor Richter explained that the subsequent 2000 amendment to Rule 703 governing the disclosure of the basis for an expert opinion undermined that assumption, because it prohibits the disclosure of otherwise inadmissible basis unless a stringent balancing test is satisfied. She explained that the Committee could consider amending Rule 803(4) to prevent the admission of unreliable hearsay statements made to a testifying medical expert to obtain an opinion for trial, in light of that change to Rule 703. Professor Richter explained that the law review article had also criticized federal decisions uniformly excluding statements made by medical providers to one another or to their patients even when those statements otherwise satisfy the requirements of Rule 803(4). She noted that the Committee could consider clarifying amendments to Rule 803(4) to authorize admissibility of provider statements that satisfy Rule 803(4)’s requirements.

Professor Richter directed the Committee’s attention to several potential amendments to Rule 803(4) on pages 387-393 of the Agenda materials, including a draft that would require statements to be made for the “primary purpose” of obtaining medical treatment or medical diagnosis in contemplation of treatment. She noted that such an amendment would eliminate statements made primarily to obtain an expert diagnosis for trial and would also dovetail with the Sixth Amendment standard in criminal cases, ensuring that statements admitted through Rule 803(4) are nontestimonial by definition.

The Reporter opined that the “primary purpose” amendment alternative would be the best option given its consistency with the Sixth Amendment standard. A Committee member expressed ambivalence about an amendment to Rule 803(4) to cover statements by providers, opining that doctors are not entitled to their own hearsay exception. The Chair added that it would be difficult to amend Rule 803(4) to restate its existing requirements with respect to statements made by medical providers. He also noted that the issue of which patient statements are pertinent to a psychological diagnosis can be particularly vexing but that lawyers are handling such issues. He opined that a “primary purpose” amendment would be the best route but that it could create new litigation problems of determining when the purpose for litigation was primary. In sum, he

concluded that an amendment to Rule 803(4) would not be worth pursuing. A Committee member concluded that if the statement to the doctor is made solely or primarily for litigation, that fact will be brought out on cross-examining the doctor, and the jury will be able to discount the patient's statement in light of the litigation motivation. Another Committee member noted that the evidence rules in many states track the Federal Rules and that states are handling these issues well under their existing rules. He expressed concern that an amendment to Federal Rule of Evidence 803(4) could disrupt state practice. Another Committee member expressed some interest in thinking about the admissibility of provider statements under the exception, noting that medical professionals practice in teams and communicate in the course of providing care. Still, he stated that he was sensitive to the concerns about creating special rules for doctors. The Chair voiced concerns that admitting such chains of provider hearsay could result in fewer trial witnesses on important topics.

In light of these concerns and issues, the Committee concluded that it would not pursue potential amendments to Rule 803(4).

IV. Closing Matters

The Chair concluded the meeting by explaining that the Committee will consider potential amendments to Rule 609 and Rule 801(d)(1) at the Spring 2024 meeting, as well as a potential new Evidence Rule governing prior false accusations by a victim. He noted that Rule 404(b) and Rule 803(4) will not be on the Committee's Spring agenda and that the Reporter will plan a symposium on artificial intelligence and machine generated evidence for the Fall 2024 Committee meeting. The Chair thanked the Committee for a productive day and informed the Committee that the Spring 2024 meeting will be on April 19, 2024, in Washington DC. The meeting was then adjourned.

Respectfully Submitted,
Liesa L. Richter
Daniel J. Capra

TAB 8

TAB 8A

**Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)**

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
A bill to provide remote access to court proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland	<p>H.R. 6714 <i>Sponsor:</i> Van Drew (R-NJ)</p> <p><i>Cosponsors:</i> Nadler (D-NY) Smith (R-NJ)</p> <p>S. 3250 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Cosponsor:</i> Gillibrand (D-NY)</p>	CR 53	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/s3250/BILLS-118s3250es.pdf</p> <p>Summary: Would provide remote access to criminal proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland notwithstanding any provision of the Federal Rules of Criminal Procedure or other law or rule to the contrary.</p>	<ul style="list-style-type: none"> 12/11/2023: H.R. 6714 introduced; referred to Judiciary Committee 12/11/2023: S. 3250 received in the House and held at the desk 12/06/2023: S. 3250 passed in the Senate with an amendment by unanimous consent 12/06/2023: Senate Judiciary Committee discharged by Unanimous Consent 11/08/2023: S. 3250 introduced in Senate; referred to Judiciary Committee
National Guard and Reservists Debt Relief Extension Act of 2023	<p>H.R. 3315 <i>Sponsor:</i> Cohen (D-TN)</p> <p><i>Cosponsors:</i> Cline (R-VA) Dean (D-PA) Burchett (R-TN)</p> <p>S. 3328 <i>Sponsor:</i> Durbin (D-IL)</p> <p><i>Cosponsors:</i> 8 bipartisan cosponsors</p>	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr3315/BILLS-118hr3315eh.pdf https://www.congress.gov/118/bills/s3328/BILLS-118s3328is.pdf</p> <p>Summary: Would extend the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023.</p>	<ul style="list-style-type: none"> 12/11/2023: H.R. 3315 passed in the House 11/29/2023: H.R. 3315 reported by the House Judiciary Committee 11/15/2023: S. 3328 introduced; referred to Judiciary Committee 05/15/2023: H.R. 3315 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	<p>H.R. 926 <i>Sponsor:</i> Johnson (D-GA)</p> <p><i>Cosponsors:</i> 104 Democratic cosponsors</p> <p>S. 359 <i>Sponsor:</i> Whitehouse (D-RI)</p>	AP, BK, CV, CR	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf</p> <p>Summary: Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges;</p>	<ul style="list-style-type: none"> 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee 02/09/2023: S. 359 introduced in Senate;

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
	<p><i>Cosponsors:</i> 40 Democratic or Democratic-caucusing cosponsors</p>		<p>(b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.</p>	<p>referred to Judiciary Committee</p> <ul style="list-style-type: none"> 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
<p>Government Surveillance Transparency Act of 2023</p>	<p>H.R. 5331 <i>Sponsor:</i> Lieu (D-CA)</p> <p><i>Cosponsor:</i> Davidson (R-OH)</p>	<p>CR 41</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf</p> <p>Summary: Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization.</p> <p>Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.</p>	<ul style="list-style-type: none"> 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee
<p>Protecting Our Democracy Act</p>	<p>H.R. 5048 <i>Sponsor:</i> Schiff (D-CA)</p> <p><i>Cosponsors:</i> 131 Democratic cosponsors</p>	<p>CR 6; CV</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf</p> <p>Summary: Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena.</p> <p>Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.</p>	<ul style="list-style-type: none"> 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees
<p>Back the Blue Act of 2023</p>	<p>H.R. 355 <i>Sponsor:</i> Bacon (R-NE)</p> <p><i>Cosponsors:</i> 18 Republican cosponsors</p> <p>H.R. 3079 <i>Sponsor:</i> Bacon (R-NE)</p>	<p>§ 2254 Rule 11</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf</p> <p>Summary: Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: “Rule 60(b)(6) of the Federal Rules of Civil</p>	<ul style="list-style-type: none"> 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
	<p><i>Cosponsors:</i> 19 Republican cosponsors</p> <p>S. 1569 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Cosponsors:</i> 41 Republican cosponsors</p>		<p>Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p>	
<p>Restoring Artistic Protection (RAP) Act of 2023</p>	<p>H.R. 2952 <i>Sponsor:</i> Johnson (D-GA)</p> <p><i>Cosponsors:</i> 30 Democratic cosponsors</p>	<p>EV</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf</p> <p>Summary: Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant’s creative or artistic expression against such defendant.</p>	<ul style="list-style-type: none"> • 04/27/2023: Introduced in House; referred to Judiciary Committee
<p>Sunshine in the Courtroom Act of 2023</p>	<p>S. 833 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Cosponsors:</i> Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)</p>	<p>CR 53</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf</p> <p>Summary: Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.</p>	<ul style="list-style-type: none"> • 03/16/2023: Introduced in Senate; referred to Judiciary Committee
<p>Bankruptcy Venue Reform Act</p>	<p>H.R. 1017 <i>Sponsor:</i> Lofgren (D-CA)</p> <p><i>Cosponsor:</i> 7 Democratic & 2 Republican cosponsors</p>	<p>BK</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf</p> <p>Summary: Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.</p>	<ul style="list-style-type: none"> • 02/14/2023: Introduced in House; referred to Judiciary Committee

**Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)**

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Indigenous Peoples’ Day Act	<u>H.R. 5822</u> <i>Sponsor:</i> Torres (D-AL) <i>Cosponsors:</i> <u>84 Democratic cosponsors</u>	AP 26, 45; BK 9006; CV 6; CR 45, 56	Most Recent Bill Text: <u>https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf</u> Summary: Would replace the term “Columbus Day” with the term “Indigenous Peoples’ Day” as a legal public holiday.	<ul style="list-style-type: none"> 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee
Diwali Day Act	<u>H.R. 3336</u> <i>Sponsor:</i> Meng (D-NY) <i>Cosponsors:</i> <u>15 Democratic & 1 Republican cosponsors</u>	AP 26, 45; BK 9006; CV 6; CR 45, 56	Most Recent Bill Text: <u>https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf</u> Summary: Would make Diwali (a/k/a Deepavali) a federal holiday.	<ul style="list-style-type: none"> 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
September 11 Day of Remembrance Act	<u>H.R. 2382</u> <i>Sponsor:</i> Lawler (R-NY) <i>Cosponsors:</i> <u>4 Democratic & 1 Republican cosponsors</u> <u>S. 1472</u> <i>Sponsor:</i> Blackburn (R-TN) <i>Cosponsor:</i> Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	Most Recent Bill Text: <u>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf</u> <u>https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf</u> Summary: Would make September 11 Day of Remembrance a federal holiday.	<ul style="list-style-type: none"> 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Workers’ Memorial Day	<u>H.R. 3022</u> <i>Sponsor:</i> Norcross (D-NJ) <i>Cosponsors:</i> <u>11 Democratic cosponsors</u>	AP 26, 45; BK 9006; CV 6; CR 45, 56	Most Recent Bill Text: <u>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf</u> Summary: Would make Workers’ Memorial Day a federal holiday.	<ul style="list-style-type: none"> 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
St. Patrick’s Day Act	<u>H.R. 1625</u> <i>Sponsor:</i> Fitzpatrick (R-PA) <i>Cosponsor:</i> Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	Most Recent Bill Text: <u>https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf</u> Summary: Would make St. Patrick’s Day a federal holiday.	<ul style="list-style-type: none"> 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Lunar New Year Day Act	<p>H.R. 430 <i>Sponsor:</i> Meng (D-NY)</p> <p><i>Cosponsors:</i> 58 Democratic cosponsors</p>	AP 26, 45; BK 9006; CV 6; CR 45, 56	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf</p> <p>Summary: Would make Lunar New Year Day a federal holiday.</p>	<ul style="list-style-type: none"> 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	<p>H.R. 308 <i>Sponsor:</i> Sewell (D-AL)</p> <p><i>Cosponsors:</i> 112 Democratic cosponsors</p>	AP 26, 45; BK 9006; CV 6; CR 45, 56	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf</p> <p>Summary: Would make Rosa Parks Day a federal holiday.</p>	<ul style="list-style-type: none"> 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee

TAB 8B

JUDICIARY STRATEGIC PLANNING (ACTION)

Background

Strategic planning is among the oversight and policy advisory functions of Judicial Conference committees. Planning efforts are facilitated and coordinated by the Executive Committee of the Conference, which designates a planning coordinator. Chief Judge L. Scott Coogler, a member of the Executive Committee, currently serves as the judiciary planning coordinator.

The [*Strategic Plan for the Federal Judiciary*](#) (*Plan*), updated by the Judicial Conference in September 2020 (JCUS-SEP 2020, pp. 13-14), identifies strategies and goals to enable the federal judiciary to continue as a model in providing fair and impartial justice. The approach to strategic planning, approved by the Conference when the *Plan* was first adopted, provides for the Executive Committee's identification, every two years, of strategies and goals from the *Plan* that should receive priority attention, with suggestions from Conference committees (JCUS-SEP 2010, pp. 5-6).

Strategic Initiatives

The primary means for integrating the *Plan* into committee planning and policy activities is through the development and implementation of committee strategic initiatives: projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Plan*. Committees are encouraged to demonstrate the link between their respective initiatives and one or more of the planning priorities identified by the Executive Committee. Strategic initiatives are intended to be distinct from the ongoing work of committees, for which there are already a number of reporting mechanisms, including committee reports to the Judicial Conference.

At its June 2023 meeting, this Committee approved a report on the progress of the following initiatives:

- Evaluating the Rules Governing Disclosure Obligations in Criminal Cases.
- Evaluating the Impact of Technological Advances.
- Bankruptcy Rules Restyling.
- Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation.

- Consideration of Possible Emergency Rules in Response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Progress reports from all committees were provided to Chief Judge Coogler during the summer of 2023. Based on these reports, in August 2023, Chief Judge Coogler provided an update to the Executive Committee on the progress of efforts to implement the *Strategic Plan*.

Long-Range Planning Meeting and Request for Topics for Discussion

Since 1999, the approach to strategic planning for the Judicial Conference and its committees has relied upon the leadership of committee chairs, with facilitation and coordination by the Executive Committee.¹ On the afternoon before most Judicial Conference sessions, a long-range planning meeting is held to discuss selected strategic planning issues and the judiciary's strategic planning efforts. A particular emphasis is placed on topics that cross areas of committee jurisdiction and responsibility. Participants in long-range planning meetings include the chairs of Conference committees, members of the Executive Committee, the Director of the Administrative Office, and the Director of the Federal Judicial Center.

The next long-range planning meeting is scheduled to be held on March 11, 2024.

Committees are invited and encouraged to suggest topics for discussion for this upcoming meeting and for future long-range planning meetings.

Assessment of the Implementation of the Strategic Plan

An important step in updating the *Strategic Plan* will be to assess the judiciary's progress in achieving the current plan's strategies and goals. During the summer of 2024 all committees will be asked to complete an assessment of the judiciary's progress implementing the *Strategic Plan*, as well as provide ideas about the proposed approach to updating the *Plan*. This approach will be discussed at the Long-Range Planning meeting on September 16, 2024.

¹ *The Judicial Conference and its Committees*, August 2013, pp. 5-6.