MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Fort Lauderdale, Florida, on January 4, 2023. The following members attended:

Judge John D. Bates, Chair
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
Kosta Stojilkovic, Esq.
Judge D. Brooks Smith
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

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

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

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

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; Brittany Bunting–Eminoglu and Shelly Cox, Rules Committee Staff; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director of the 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 Bates called the meeting to order. He welcomed new Standing Committee members Judge D. Brooks Smith and Andrew Pincus; the new chairs of the Advisory Committees on Bankruptcy and Civil Rules, Judge Rebecca Connelly and Judge Robin Rosenberg; and the new Associate Reporter for the Civil Rules Committee, Professor Andrew Bradt. Judge Bates noted the departures of Judge Gary Feinerman from the Standing Committee and former Civil Rules Committee Chair Judge Robert Dow. He stated that he would work to find new members to fill the vacancies on the Standing and Civil Rules Committees. In addition, Judge Bates welcomed the members of the public who were attending remotely or in person.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the minutes of the June 7, 2022, meeting.**

Judge Bates highlighted pending rules amendments, including new emergency rules arising out of the CARES Act and amendments to Evidence Rules 106, 615, and 702. These amendments will take effect on December 1, 2023, assuming that the Supreme Court approves them and absent any contrary action by Congress.

For the legislative update, Judge Bates observed that with the end of the 117th Congress, all pending legislation had expired. Law clerk Christopher Pryby noted that, of the Fiscal Year 2023 National Defense Authorization Act provisions that he had highlighted at earlier Advisory Committee meetings, none remained in the enacted version of the bill.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. He thanked Professor Struve for her leadership on this project and her coordination among the Advisory Committees, and he invited her to provide an update on those discussions.

Professor Struve began by acknowledging the group effort that had gone into the project so far, especially from the FJC team, including Tim Reagan, Carly Giffin, and Roy Germano, who had done phenomenal work that culminated in a study released in 2022.

This project originated from several proposals about electronic filing for self-represented litigants. The current rules provide for electronic filing as a matter of course by those who are represented by lawyers, but self-represented litigants must file nonelectronically unless allowed to file electronically by court order or local rule. The proposals take two main forms: one advocates a national rule presumptively allowing self-represented litigants to file electronically, while the other advocates disallowing categorical bans on, and setting a standard for granting permission for, electronic filing by self-represented litigants.

Recounting the FJC's findings, Professor Struve noted that, in the courts of appeals, there is a close split between the circuits that presumptively give self-represented litigants access to the Case Management/Electronic Case Filing system ("CM/ECF") and those that allow that access

with permission; one outlier circuit currently has a local provision prohibiting self-represented litigants from filing electronically. In the district courts, the picture is more mixed—the bulk of districts allow self-represented litigants to file electronically with permission, a bit less than 10% presumptively permit self-represented litigants to file electronically, and about 15% do not allow it at all. And in the bankruptcy courts, it is rare for self-represented litigants to have access to CM/ECF.

The fall Advisory Committee meetings provided an opportunity to get members' senses about the current situation and their reactions to the possibility of adopting a default rule of presumptive access to CM/ECF for self-represented litigants. Those discussions also considered potential alternate means of electronic access for self-represented litigants, like those that courts experimented with during the COVID-19 pandemic. The discussions also included the possibility of policy changes not based on rules amendments as well as the need for coordination with other committees of the Judicial Conference.

A second question concerns the rules governing service of papers during a lawsuit. As between any pair of litigants who are both users of CM/ECF, service is simple, because the notice of electronic filing produced when the paper is filed in CM/ECF constitutes service. By contrast, a form of service other than the notice of electronic filing is necessary when the party to be served is not a CM/ECF user. But when a party that is not a CM/ECF user files a paper by some other means, must that party separately serve the parties who *are* users of CM/ECF? Those parties will receive the notice of electronic filing after the court clerk scans and uploads the nonelectronic filing to CM/ECF. The rules nevertheless appear to require the non-CM/ECF user to serve these parties. The questions before the committees were: Why? Is this burden on self-represented litigants necessary? Should the rules be amended to eliminate this requirement? Some districts have eliminated the requirement for service on parties who are CM/ECF users, and those districts have generally reported positive experiences with that change.

Professor Struve reported a fair amount of interest in investigating the possibility of eliminating that requirement. But there are still some details to be worked out: (1) How does the court make clear to a nonelectronic filer which parties are, and which are not, on CM/ECF—and, thus, who does and does not need separate service? (2) Would the three-day rule work seamlessly with this change, or would it need some wording adjustments? For example, the time calculation might need to be clarified or adjusted to ensure no unfairness to a party if there is some delay between when the clerk receives a filing and when the clerk dockets it in CM/ECF. Professor Struve believes this proposal contains the germ of an idea that may be appropriate for a possible rule amendment, and she expressed her hope that the Advisory Committees would continue working on the project in the spring.

Returning to whether there should be a change in the default rule governing self-represented litigants' access to CM/ECF, Professor Struve surveyed the reactions of the Advisory Committees on that proposal. The Bankruptcy Rules Committee took a positive view of the overall idea, viewing it as a matter of access to the courts. Notably, the court-clerk representative on that committee supported the proposal, saying that it is helpful for filings to be electronic whenever possible. But there was some division of views on the committee, with a couple of members expressing the need for caution and raising important questions that are detailed in the committee's minutes and reports.

The Appellate Rules Committee took a somewhat positive view of the overall concept of access to CM/ECF for self-represented litigants, in line with the current policies of the courts of appeals. Professor Struve thought that the interesting question for this committee was whether the Appellate Rules should be amended to reflect or encourage that outcome, given that the courts of appeals are already increasing CM/ECF access for self-represented litigants (with greater celerity than the lower courts). A default rule of access to CM/ECF for self-represented litigants might be easiest to adopt in the Appellate Rules, given the movement in that direction in the courts of appeals. A question for the Appellate Rules Committee may be how to balance that consideration against the value of uniformity across the national sets of rules.

Professor Struve reported that there were more skeptical voices in the Civil Rules Committee on the proposal relating to CM/ECF access. Some members wondered whether the matter might be more appropriately treated by another Judicial Conference actor such as the Committee on Court Administration and Case Management ("CACM"). Overall, there was much less momentum on the Civil Rules Committee for a rule change.

Turning to the Criminal Rules Committee, Professor Struve first noted that this committee's interest was different from that of the other Advisory Committees. There are very few nonincarcerated, self-represented litigants appearing in situations covered by the Criminal Rules. (Professor Struve noted that, even in the districts that presumptively allow self-represented litigants CM/ECF access, that presumption of access typically excludes incarcerated litigants because of the logistical particulars of carceral settings. So, at least in the near future, even the most expansive grant of electronic-filing permission to self-represented litigants would likely not encompass incarcerated self-represented litigants.) But the committee had an excellent discussion of the service issue, and the committee would be open to exploring that question further.

Professor Struve concluded by welcoming the input of the Standing Committee members on any of these topics. She noted that the project continues to operate in an information-gathering mode, especially on the service issue and the various ways by which electronic-filing access could be expanded for self-represented litigants, including by working in tandem with other Judicial Conference actors.

Judge Bates thanked Professor Struve and opened the floor to comments and questions.

A practitioner member suggested that greater access for self-represented litigants is a good thing, but also that some fraction of self-represented litigants would abuse electronic-filing access. This member asked which would be easier for courts to administer: a rule requiring courts to deal with requests for permission, or a rule granting access by default and leaving the courts to deal with the task of revoking that access in particular cases? Professor Struve noted that Dr. Reagan and his colleagues at the FJC had talked with clerk's offices around the country and would be in a good position to answer that question. Dr. Reagan reported that, in speaking with personnel in several districts that had recently expanded self-represented litigants' access to CM/ECF, he and his colleagues heard that court personnel's fears were not particularly realized. He also observed that self-represented litigants can disrupt the work of the court regardless of their filing method. In fact, some courts appreciated receiving documents electronically because they did not have to receive things in physical form that would be unpleasant to handle. And every court is quite capable of limiting improper litigant behavior.

A judge member appreciated the thoroughness of the FJC report in obtaining input from clerk's offices and considering the pros and cons of a change in the rules and other issues that would arise. The member thought that the primary focus of this project ought to be learning about the experiences of clerk's offices. The clerk's office of the member's court had strong views on this matter, especially on who should bear the burden of the work generated by noncompliant self-represented litigants.

Ms. Shapiro asked whether the FJC report looked at whether self-represented litigants complied with redaction and privacy-protection rules. Dr. Reagan responded that the report did not get into the weeds with this question, but he did note that this same problem occurs with represented litigants as well. One appellate clerk had mentioned locking a document and later posting a corrected version; he was not sure whether that had to do with redaction problems. He stated that there is a way to configure CM/ECF so that the court must "turn the switch" before a submitted filing is made available in the record.

Judge Rosenberg reiterated her comments from the October Civil Rules Committee meeting, which reflected feedback from her court's clerk: Most courts are not equipped to accept self-represented litigants' filings through CM/ECF. So, while it is a good idea to expand electronic filing to all litigants, until all courts can comply, it is not advisable to amend the federal rules to establish a presumption in favor of allowing electronic filing. Additionally, different courts use different versions of CM/ECF, and the version used affects both the court and the filer. Further, there is not a unique identifier for many self-represented litigants. By contrast, attorneys have unique bar numbers.

Professor Struve responded that, if a court would not be able to function with a presumption in favor of electronic access for self-represented litigants, then that court could adopt a local rule to opt out of the presumption. It is true that, if the bulk of districts opted out, that might lead one to question the wisdom of the rule. As to the point about identifiers, Professor Struve suggested that the districts currently allowing presumptive or permissive electronic access by self-represented litigants would have had to solve that problem, so it would be helpful to ask those districts for their experiences with that issue.

Judge Bates concluded by recognizing that cases involving self-represented litigants make up a large part of the civil and bankruptcy dockets in federal court, and this is a project that the committees will continue to work on. He hoped that the committees and reporters would continue to provide a high level of participation, and he thanked Professor Struve and everyone else who had worked on the project with her so far.

Presumptive Deadline for Electronic Filing

Judge Bates reported on a joint committee project that arose from a suggestion by Chief Judge Chagares of the Third Circuit, the former chair of the Appellate Rules Committee, that the committees consider changing the presumptive deadline for electronic filing from midnight to an earlier time. Judge Bates observed that the FJC had done excellent research for this project, and that one of the relevant FJC reports was included in the agenda book. The status of the project is uncertain. The Civil Rules Committee has recommended that the project be dropped. But the Appellate Rules Committee recommended that the question of how to proceed be posed, in the

first instance, to the Joint Subcommittee on E-filing Deadlines, because that Subcommittee has not convened recently. Judge Bates agreed that the Joint Subcommittee should be asked to undertake a careful review of the project, and he noted that he would also continue to seek Chief Judge Chagares's input.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in Washington, D.C., on October 13, 2022. The Advisory Committee presented several 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 134.

Information Items

Amicus Disclosures. Judge Bybee reported on this item. He described it as perhaps the highest-profile matter before the Advisory Committee. There has been a long exchange of correspondence between the Clerk of the Supreme Court and the chairs of the Senate and House Judiciary Committees over amicus practice, and, during the previous Congress, legislation was introduced in each house that would regulate amicus practice. The Supreme Court and its Clerk referred the matter to the Advisory Committee. The Advisory Committee has made some progress, but it seeks input from the Standing Committee on some important policy questions.

Judge Bybee directed the Standing Committee's attention to draft Rules 29(c)(3) and (c)(4) as set out in the agenda book; he noted that this was a working draft, not yet a proposal. Draft Rule 29(c)(3) would require an amicus to disclose any party that has a majority interest in or control of the amicus. Draft Rule 29(c)(4) would require the amicus to disclose any party that has contributed 25% or more of the amicus's gross annual revenue over the last 12 months. The Advisory Committee sought input on two questions: (1) Is 25% the right number? (2) Is the last 12 months the right lookback period, or should it be the previous calendar year? As to question (1), at the October 2022 Advisory Committee meeting, some members had expressed concern that, if the rule set one particular percentage—such as 25%—as the trigger for disclosure, then where a party's contributions were anywhere above that single threshold the amicus might not file a brief out of concern that the court would assign the brief little weight. An alternative suggestion was to require an amicus to disclose that the contribution percentage lay within some "band" of amounts—such as from 20% to 30%, 30% to 40%, and so on.

A practitioner member wondered whether there was a need to regulate this area. However, given that Congress has expressed an interest in the topic, the member suggested that perhaps it did make sense for the committees to consider possible rule amendments. The member thought 25% was a reasonable number because, in the member's experience, that contribution level would be highly unusual and could indicate that the amicus is acting as a front for a party. The member also thought it more administratively feasible to use the last calendar year than the last 12 months.

Judge Bates asked whether the current draft Rule 29(c)(3) would capture a situation in which a party and the party's counsel each had a one-third interest in the amicus. Should the rule capture that situation? The draft wording—"whether a party or its counsel has (or two or more

parties or their counsel collectively have) a majority ownership interest"—addresses a situation in which "two or more parties or their counsel" have a collective interest, but it is not clear if it captures situations in which a single party and its counsel have a collective interest. Should "a party or its counsel has" be "a party and/or its counsel have"?

Professor Garner opined that a hard contribution threshold might encourage parties to structure their contributions in such a way as to avoid meeting the threshold. He suggested that the Advisory Committee instead consider a rule requiring disclosure of "the extent to which" a party has contributed to the amicus. The court could decide for itself what contribution amount was de minimis. And an organization that goes to the trouble of preparing an amicus brief would be able to answer the contribution question with a fair degree of certainty.

Professor Hartnett responded that the Advisory Committee had some concern about requiring that amount of precision. Instead, requiring disclosure within a band of contribution percentages tried to address the structuring issue. The Advisory Committee also wanted to build into the rule a floor beneath which amici need not worry about having to make a disclosure.

Judge Bates noted that the rule could also be tweaked to require disclosure of a precise percentage above a floor. Those below that floor would not have to make a disclosure.

A practitioner member commented on the general view of practitioners in this area: If an amicus must make a disclosure, then its brief will probably not get much attention. A rule that requires a disclosure suggests that a brief containing that disclosure is tainted in some way. In many of these situations, an amicus would likely choose not to file a brief rather than to make a disclosure. So there should almost certainly be a floor before disclosures are required. There is also a First Amendment interest in this area (the member noted the decision in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021))—and whatever rule is adopted must be examined through that lens. That interest further weighs in favor of a floor below which no disclosure is required. Because the disclosure requirement will change the dynamics of amicus filings, the calculus on whether and how to amend the rule should consider whether the benefits of disclosure outweigh the harm of deterring amicus filings.

Judge Bates agreed that the goal is not to dissuade the filing of amicus briefs but rather to provide information to the courts and public with respect to those who file these briefs.

A judge member had difficulty recalling any amicus briefs as to which it was not obvious who was filing the brief and as to which more information about the amicus would have made a difference. It is the brief's contents that matter, not its author. If other appellate judges feel similarly, then the member would not worry about trying to craft a rule that would require complete disclosure of all details about the amicus.

Judge Bybee noted that one concern is that parties are evading their own page limits by inserting their arguments into amicus filings. The judge member suggested skepticism about the gravity of that particular concern. He conceded that Congress's interest in the amicus-disclosure issue weighs in favor of careful consideration of a possible rule amendment. But, he suggested, if the courts of appeals generally feel that they are not being hoodwinked by amici or deluded into believing something about which they otherwise would have been more suspicious had amici's

relationships with the parties been apparent, that should temper the rulemakers' zeal for pursuing an all-encompassing, exhaustive disclosure requirement.

Another judge member disclaimed knowledge as to whether the 25% figure was "right," but stated that this figure was "not wrong." The member suggested that searching for the precisely "right" number was not worthwhile. Responding to Professor Garner's prior suggestion, this member warned against building into the rule any subjectivity that would allow a court to decide whether to require disclosure based on who the participants are. If a proposal is adopted, it should use an objective number rather than a moving target. As to the lookback period, the member suggested that the prior fiscal or calendar year would be more administrable than a moving 12-month period; the latter would require a lot of research and calculation.

A practitioner member acknowledged the focus on drawing a line between helpful disclosure requirements and unhelpful, unwarranted disclosure requirements. But the member also wondered whether a lower threshold might normalize disclosure, making it not such a negative thing. A lower threshold like 5% or 10% would generate a lot more disclosures, but such a disclosure would not necessarily discredit a brief as much as a disclosure in response to a higher threshold that is only infrequently met.

A judge member thought that a threshold above 25% would be too high. And if the threshold were set higher than 25%, a disclosure would really mark the amicus brief because it would be extremely unusual. The member also suggested that judges' views on the optimal level of disclosure are not the only consideration. Members of the public may not have the same information or reactions that judges do. Part of the value of the disclosures was to let the public know who is responsible for filing amicus briefs. This transparency concern is particularly strong when amicus filings are cited by judges as persuasive in their decisionmaking.

A practitioner member expressed doubt about the idea of normalizing disclosures. The purpose of a disclosure is to flag something relevant about a brief. The member questioned whether lowering the threshold would serve that purpose. Instead, the goal should be to identify a category of briefs to treat with caution.

Another practitioner member thought that more regulation of amicus briefs was not a good idea. If a relevant industry group files an amicus brief in a case on appeal, that tells the court that the industry is concerned about some issue—it does not matter only to the parties. The rule should encourage filing amicus briefs. Judges can pay attention to what they want to in those briefs. The member thought that 25% was the right threshold because it is objective and because, if a party is paying for 25% or more of the amicus organization's cost, it is largely a party-controlled organization. As to most big organizations that routinely file amicus briefs, the number would probably be 5% or less. The member also agreed that required disclosures may chill the filing of amicus briefs.

Professor Garner suggested that a rule requiring disclosure of "the extent to which" a party has contributed to the amicus could be combined with a provision stating a presumption that any contribution over 25% would be excessive. Judge Bates noted that this presumption would change the thrust of the rule by expressly stating how the court would view the brief. Judge Bybee did not think the Advisory Committee had been going in that direction; he could not remember a judge

having said anything like, "if the party contributes over 50%, I won't consider the brief." Instead, some judges have suggested that it is important to have more information, not less. Professor Hartnett agreed that the rule has governed only when disclosure is required; discounting a brief's weight has not been addressed in the rule's text. This kind of modification would significantly change how the rule operates.

Professor Hartnett sought more comment on the banding idea. He thought it might mitigate the risk of using a single number—if that number is too high, it works like an on–off switch; if too low, it does not give enough information because a court cannot tell how far the contribution amount is above the threshold. Banding would provide more information than a single threshold, while not requiring the same degree of precise calculation as the "extent to which" option. Would this idea work as a compromise?

Judge Bates agreed that using banding would require more information from an amicus than would a single percent threshold above which disclosure is required.

A practitioner member stressed that the disclosure requirement would need to include a floor beneath which disclosure is not required. This member suggested that, once there is a floor, having banding in addition would not do much work, especially if the floor is as high as 25%.

Another practitioner member liked the banding approach because it would provide more information to the courts and public. The question would then be where to start and end each band. More disclosure is better, and so long as it remains up to the judges to decide at what level a disclosure matters, then the rule introduces no presumption of taint.

A third practitioner member remarked that a member of a big amicus organization generally must undergo a rigorous application process before the organization will sign onto an amicus brief for that member. That process is useful because courts can then take that organization's reputation as a signal—if it signs a brief, then the issue is one that matters to more than just the litigants. The member liked the 25% threshold because it indicates that the amicus is not really a broad-based group that represents the industry. Lowering the threshold defeats the purpose of having amicus briefs and introduces a false perception of taint if there is a disclosure of a low percentage. The lower threshold would lead to too much micromanaging of amici. The member also expressed concern that a lower threshold could disadvantage plaintiff-side amici because bigger organizations tend to be on the defense side. And one can look at the website of a large organization to see if a party is a member.

An academic member expressed a preference for keeping the rule as simple as possible. That militates in favor of a single number. The member liked 25%—it is high enough that if an amicus is above that threshold, it will raise eyebrows. The difficulty with banding is that compliance could be complicated, particularly if there is no lower bound. Without a lower bound, if a party had bought a single table at a fundraiser for the amicus, the amicus would then have to divide the value of the contribution associated with buying that table by the amicus's overall revenue in order to determine the percentage value of its contribution. A disclosure requirement without a lower bound would discourage potential amici from filing. It would signal that courts do not want to hear their voices.

The conversation then turned to draft Rule 29(e). Judge Bybee introduced this draft rule, which appeared on page 137 of the agenda book. The draft rule would require an amicus to disclose any nonparty that contributed over $1,000 to the amicus with the intent to fund the amicus brief. Judge Bybee asked two questions: (1) Is the $1,000 figure the right threshold? This figure was meant to exclude disclosures for crowdfunded briefs. (2) Should the draft rule contain provisions like those in draft Rules 29(c)(3) and (c)(4), requiring disclosures of contributions even if they are not earmarked for funding an amicus brief?

Judge Bates remarked that a $1,000 cutoff, although high enough to address the crowdfunding issue, seems very low.

A judge member thought that this draft rule would require amici to make greater disclosures than parties themselves must. Parties may obtain funding from undisclosed sources, raising issues about third-party litigation funding. The draft rule overemphasizes the importance of amicus briefs and mistakenly suggests that courts are more concerned with who is speaking than with the merits of the argument. The member also thought that this is a policy question that should be deferred until the discussion of third-party litigation funding of parties; in the meantime, this member suggested, subpart (e) should be deleted from the draft. Professor Hartnett observed that the current rule requires disclosure if someone other than the amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The member acknowledged that fact, but argued that proposed subdivision (e) would heighten the issue.

Judge Bates remarked that there may be greater First Amendment issues in requiring disclosure of nonparty contributions than in requiring disclosure of party contributions.

A practitioner member stated that adopting draft Rule 29(e) would be a mistake. It would open up a hornet's nest concerning intentionality. How can you determine whether someone intended to fund a brief? Suppose an organization told potential donors the topics of ten amicus briefs it intended to file over the coming year. Or suppose that a donor bought a ticket to a dinner at which a representative of the organization discussed some of its amicus filings. The member also thought that $1,000 was a low threshold.

Another practitioner member commented that the innovation in draft Rule 29(e) is really about contributions by members of amicus organizations—there is already a disclosure requirement as to contributions by nonmembers. The member differentiated two types of amicus organizations: larger organizations with annual budgets that include a chunk of money for amicus briefs, and organizations (typically smaller) that "pass the hat" to fund a particular amicus brief. Draft Rule 29(e), this member suggested, would unfairly burden such smaller organizations by requiring them to make disclosures, whereas dues payments probably would not have to be disclosed. Draft Rule 29(e) would make it harder for those smaller amici to file briefs.

A judge member thought that the draft rule could lead to an escalation of corporate screens and shielding to evade required disclosures. A would-be funder might set up an LLC to make the donation; would the rule also have to require disclosure of the LLC's funding? This judge sees briefs from a number of amici for which the funding is unknown. The draft rule aims for more disclosure than is currently required for dark-money contributions to political campaigns. There is a public interest in disclosure, but there are practical limitations on what the committees can do.

The member cautioned against increasing the complexity of the disclosure scheme (for example, with banding)—such new hurdles could be leapt over as easily as the current ones.

A practitioner member supported omitting draft Rule 29(e). Congress, this member suggested, is concerned about parties, not nonparties. Nonparties do not implicate the same concerns. The member also noted that, under the current Rule (as well as under draft Rule 29(c)(2)), if a party contributes any money intended to fund an amicus brief, the fact of the contribution must be disclosed.

Judge Bates asked why, in draft Rule 29(d), the language is limited to only a *party*'s awareness. Draft Rule 29(c) is worded in terms of *party or counsel*; why should 29(d) be different? Judge Bybee agreed with that wording change and, more generally, thanked the Standing Committee for its input.

Rule 39 (Costs). Judge Bybee briefly covered this and the remaining items. The Supreme Court suggested in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628, 1638 (2021), that "the current Rules . . . could specify more clearly the procedure that . . . a party should follow" to bring its arguments about costs to the court of appeals. The real problem in this situation is a narrow one that is nevertheless important in some big cases. It involves the disclosure to parties of the consequences for costs on appeal if a supersedeas bond is filed or another means of preserving rights pending appeal is used. A subcommittee is currently working on this issue. It may be useful for the Appellate Rules Committee to coordinate with the Civil Rules Committee to see whether the Civil Rules might also require changes.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis ("IFP")). Form 4 concerns the disclosures required of a party seeking IFP status on appeal. The Advisory Committee has tried to simplify the form. Many of the circuits have ignored the form for years and have their own forms. The Advisory Committee is not purporting to change that fact, only to simplify the current national form. Also, the Supreme Court has incorporated the form by reference in Supreme Court Rule 39.1, so it would be advisable to ask if the Court has any input on changing the form.

Appellate Rule 6 (Appeal in a Bankruptcy Case) and Direct Appeals in Bankruptcy. Judge Bybee adverted briefly to this project, which dovetails with the Bankruptcy Rules Committee's project (discussed later in the meeting) to amend Bankruptcy Rule 8006(g) to clarify that any party may request permission to appeal directly from the bankruptcy court to the court of appeals. He noted that the Appellate and Bankruptcy Rules Committees are coordinating their work on Bankruptcy Rule 8006(g) and Appellate Rule 6.

Striking Amicus Briefs; Identifying Triggering Person. Rule 29(a)(2) allows a court to refuse to file or to strike an amicus brief that would lead to a judge's disqualification. A suggestion was made to modify this rule to require the court to identify the amicus or counsel who would have triggered a disqualification. After extensive discussion, the Advisory Committee removed this item from its agenda.

Appeals in Consolidated Cases. A suggestion to amend Rule 42 arose following *Hall v. Hall*, 138 S. Ct. 1118 (2018). After thorough discussion, the Advisory Committee removed this item from its agenda.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report. Hearing none, he invited the Bankruptcy Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in Washington, D.C., on September 15, 2022. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 175.

After Judge Connelly recognized the work of Judge Dennis Dow, the Advisory Committee's previous chair, the committee began its report.

Action Item

Publication of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The Advisory Committee sought the Standing Committee's approval to publish for public comment an amendment to Official Form 410. A creditor must file this form for the creditor's claim to be recognized in a bankruptcy case. Official Form 410 contains a field for a uniform claim identifier ("UCI"), which a creditor may fill in for electronic payments in Chapter 13 cases. The Advisory Committee has proposed a revision to remove both the specification of electronic payments and the reference to Chapter 13 cases, allowing a creditor to list a UCI for paper checks or electronic payments in any bankruptcy case.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the publication for public comment of the proposed amendment to Official Form 410.**

Information Items

Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Professor Bartell reported on this item. As amended in 2005, 28 U.S.C. § 158 provides for direct appeals of final judgments, orders, or decrees from the bankruptcy court directly to the court of appeals upon appropriate certification and subject to the court of appeals' discretion to hear the appeal. Bankruptcy Rule 8006(g) requires that, within 30 days after certification, "a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with" Appellate Rule 6(c). The bankruptcy rule is in the passive voice and does not specify who may file that request for permission. Bankruptcy Judge A. Benjamin Goldgar proposed an amendment to clarify what he—and the Advisory Committee—believed to be the meaning of the rule: any party, not just the appellant, may file the request for permission.

At Professor Struve's request, the Bankruptcy and Appellate Rules Committees have worked together to draft amendments to ensure that Rule 8006(g) is compatible with Appellate

Rule 6(c). The Bankruptcy Rules Committee has approved an amendment to Rule 8006(g) that was the product of that collaborative effort. Because the Appellate Rules Committee has created a subcommittee to consider related amendments to Appellate Rule 6(c), the Bankruptcy Rules Committee will wait to seek approval for publication of amended Rule 8006(g) until publication is also sought for an amendment to the appellate rule.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Professor Gibson reported on this item. Bankruptcy Rule 3002.1 requires the holder of a mortgage claim against a Chapter 13 debtor to provide certain information during the bankruptcy case. This information lets the debtor and the trustee stay up-to-date on mortgage payments. Significant proposed amendments to Rule 3002.1 were published in August 2021, and the Advisory Committee received very valuable comments. The Advisory Committee has improved the proposal in response to those comments. Because the post-publication changes are substantial, re-publication would be helpful. The Advisory Committee still needs to review comments on proposed amendments to related forms. The committee will likely seek approval to republish the amended rule and related forms at the Standing Committee's June 2023 meeting.

Electronic Filing by Self-Represented Litigants. Professor Gibson reported on this item as well. She agreed with Professor Struve that the Advisory Committee had a positive response to the prospect of expanding electronic filing by self-represented litigants. Professor Gibson noted her surprise at this response, given that bankruptcy courts are currently the least likely to allow self-represented litigants to file electronically. She concurred with Professor Struve that there were a couple of committee members who raised concerns, particularly about improper filings. Other committee members noted that self-represented litigants could make improper filings even in paper form. The Advisory Committee needs to think about the serious privacy concerns raised earlier. But, overall, the Advisory Committee supported looking at how to extend electronic-filing access to self-represented litigants in coordination with the other Advisory Committees.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Civil Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus, Bradt, and Cooper presented the report of the Advisory Committee on Civil Rules, which last met in Washington, D.C., on October 12, 2022. 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 203.

After Judge Rosenberg recognized the work of Judge Robert Dow, the Advisory Committee's previous chair, and welcomed Professor Bradt as the new Associate Reporter, the committee began its report.

Action Items

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

Discovery). Judge Rosenberg reported on this item. The Advisory Committee sought the Standing Committee's approval of proposed amendments to Rules 16(b)(3) and 26(f) for publication for public comment. These amendments would require the parties to focus at the outset of litigation on the best timing and method for compliance with Rule 26(b)(5)(A)'s privilege-log requirement and to apprise the court of the proposed timing and method. It can be onerous to create and produce a privilege log that identifies each individual document withheld on privilege grounds. The original submissions advocated revising the rule to call for the identification of withheld materials by category rather than identifying individual documents. The Advisory Committee examined that proposal as well as competing arguments for logging individual documents. Judge Rosenberg noted that there is a divide between the views of "requesting" and "producing" parties. The Advisory Committee concluded that the best resolution was to direct the parties to address the question in their Rule 26(f) conference, which would give the parties the greatest flexibility to tailor a privilege-log solution appropriate for their case. Thus, the proposed amendment to Rule 26(f)(3)(D) would add "the timing and method for complying with Rule 26(b)(5)(A)" to the list of topics to be covered in the proposed discovery plan. The proposed amendment to Rule 16(b)(3)(B)(iv) would make a similar addition to the list of permitted contents of a Rule 16(b) scheduling order. The proposed committee notes to the amendments stress the importance of requiring discussion early in the litigation in order to avoid later problems. The committee note to the Rule 26 amendment also references the discussion (in the 1993 committee note to Rule 26(b)(5)(A)) of the Rule's flexible approach.

Professor Cooper added that the privilege-log problem stems from Rule 26(b)(5)(A)'s text, which requires the withholding party to "describe the nature of" the items withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." That is a beautiful statement of the rule's purpose but it gives no guidance on how to comply. The Civil Rules Committee's Discovery Subcommittee acknowledged the complex policy concerns at play and it consulted widely and at length. The picture that emerged is one in which the producing parties can face significant compliance costs, while the receiving parties are concerned about overdesignation and that the descriptions they receive do not enable them to make informed choices about whether to challenge an assertion of privilege. In addition, problems may surface belatedly because the privilege log is provided late in the discovery process. The subcommittee realized that there would be no easy prescription for every case, and it concluded that parties are in the best position to solve the problem by working together in good faith. The proposed amendment adds only a few words, but it is intended to start a very important process.

Professor Marcus noted that the Advisory Committee has heard from many commenters. The amendment had evolved quite a bit and was now ready for public comment.

Judge Bates observed that, although the changes to the rules' text are modest, the proposed amendments are accompanied by three or four pages of committee notes. Some of that note discussion is historical, and some is explanatory, but some looks like best-practices guidance. He wondered whether this was unusual or a matter of concern.

Professor Marcus acknowledged the importance of that concern. He noted that this is a concise change to a rule that has a large body of contention surrounding it. Because the proposed amendment asks parties to discuss something that is not defined in the rule with great precision, it seems helpful for the committee note to provide some prompts for that discussion. Public comment

often focuses on the committee notes, and such comment might prompt the Advisory Committee to revise the note language after publication. But it seems more desirable to put some guidance into the proposed note rather than to provide a Delphic rule with no guidance.

Professor Cooper added that this issue was considered at the Advisory Committee meeting. The practice on committee notes has varied over time. For example, the 1970 committee notes to the discovery-rule amendments would put a treatise to modest shame, and served a good purpose at the time. And courts of appeals have said that committee notes can provide useful guidance for interpreting the rules. The note is subject to polishing, and public reaction may stimulate and help focus that polishing. It is challenging at best to improve on the present text of Rule 26(b)(5)(A)—how does one express in rule text that what may work in one case may not work in another? The note grew to these proportions in order to capture how the parties might try to alleviate problems that have emerged in practice but that are too varied and complex to incorporate into the rule's text.

Judge Bates expressed concern that, even if the note spurs more comments, because this is a contentious issue, the comments would reflect competing views of what the note should contain. Would the Advisory Committee then intend to resolve those competing views in deciding what goes in the committee note in terms of what is or isn't the best practice? Publication could make this process more complex, especially with so many bits of best-practice advice offered on a subject that is important to many litigants and counsel.

A practitioner member thought that the rule text was elegant and salutary and also noted appreciation of the existing rule's cross-reference to Evidence Rule 502. The long committee note would create the attention that the Advisory Committee wants, would focus practitioners on how to make the process work, and would address the existing problem of privilege logs coming late in the discovery process.

A judge member agreed with Judge Bates and stated that his initial reaction had been that the Standing Committee was being asked to approve a committee note, not a rule change. But then, the member said, he perceived a linkage between the rule text and the committee note. Because the rule was intended to be flexible, not one-size-fits-all, that is why it should be on the agenda early in the case. But the committee note could be greatly reduced to something like: "This was not intended to be an inflexible, one-size-fits-all rule. *See* the 1993 committee notes. This issue should be discussed early on in litigation, hence the proposed change." That might more appropriately focus the public comments.

Another practitioner member thought that the proposed amendment to the rule's text was an excellent addition that would treat both plaintiffs and defendants fairly. The committee note serves a purpose and is evenhandedly written. The note would help parties in privilege-log negotiations to push back against a view that all communications must be logged. A short note runs the risk of accomplishing little. This longer note would allow for good discussion between parties in order to alleviate costs and burdens.

A third practitioner member liked the rule change itself but agreed that the committee note was on the long side. The note is evenhanded but reads like something that would be better found in a treatise, not a committee note. There would be some benefit to stripping some examples out

of the note and allowing litigants and courts to develop the practice. Over time, a treatise would capture the best practices.

Professor Coquillette congratulated the Advisory Committee on an excellent rule, but agreed that the notes were too long and contained too much practical advice. The point is often made that lawyers look to treatises for practical advice. But those sources are behind paywalls, and some lawyers do not even read committee notes. So substantive changes should be in the rule text. Professor Coquillette observed that the committee notes could be revised after public comment.

A judge member suggested striking language in the draft committee note to the amendment to Rule 16(b)(3). Specifically, the clause "these amendments permit the court to provide constructive involvement early in the case" (agenda book page 211, lines 265–66) is inaccurate because a court does not need the rule's permission to be involved in discussions about complying with the privilege-log requirement. Professor Marcus asked the member whether the word "enable" would be better than "permit." The member thought that "enable" might still carry the implication that the court does not otherwise have the authority to manage the case by talking to counsel about what should be in a privilege log. Another judge member suggested replacing "permit" with "acknowledge the ability of."

A practitioner member offered suggestions for shortening the committee note to the Rule 26(f) amendment. The initial paragraphs were background. The paragraph starting on page 209 at line 200 recounted privilege-log practice. The next paragraph listed some examples that were probably worth having in the note. The paragraph discussing technology was useful to have in the note. Then there were the paragraphs about timing of privilege logs. The current draft's ten to twelve paragraphs, this member suggested, could probably be reduced to about four.

Judge Bates asked the representatives of the Advisory Committee whether they wanted to proceed with seeking the Standing Committee's approval for publication or to return to the Advisory Committee with the Standing Committee's feedback first. After conferring, Judge Rosenberg announced that she and the reporters would return to the Advisory Committee and the appropriate subcommittee with the Standing Committee's comments. The Advisory Committee would bring the proposed amendment back to the Standing Committee, with any warranted changes, at its June meeting. **No further action was taken on this item at this time.**

Appeals in Consolidated Cases. Judge Rosenberg reported on this item. This suggestion arose from *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018), in which the Supreme Court observed that if its holding regarding finality of judgments in actions consolidated under Rule 42(a) "were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." After extensive discussion and a thorough FJC study by Dr. Emery Lee, a joint subcommittee of the Appellate and Civil Rules Committees found that there was not a sufficient problem to warrant a rule amendment—that is, litigants were not missing the deadline by which to appeal a final judgment in a consolidated action. The item was therefore removed from the joint subcommittee's and the Civil Rules Committee's agenda.

Judge Rosenberg recommended that the joint subcommittee be dissolved. The Appellate Rules Committee's representatives concurred. Judge Bates noted that he was unsure whether the

joint subcommittee had been formed by a vote of the Standing Committee. Hearing no questions or comments about this item from the Standing Committee, Judge Bates asked whether anyone objected to removing the *Hall v. Hall* issue from ongoing review by the joint subcommittee and the Advisory Committees and dissolving the joint subcommittee. **Without objection, the joint subcommittee was dissolved.**

Presumptive Deadline for Electronic Filing. Judge Rosenberg briefly addressed this item, noting that the Advisory Committee had recommended that the proposal be removed from its agenda. But, based on Judge Bates's comments from earlier in the meeting, the joint subcommittee would reconsider the suggestion. **No further action was taken on this item at this time.**

Information Items

Multidistrict Litigation ("MDL"). Judge Rosenberg introduced this item by remarking that the MDL Subcommittee had first been formed in 2018 in response to comments about how important MDLs had become. No decision has yet been made on whether to recommend a rule change addressing MDLs. The subcommittee has instead focused on the question: if there *were* a rule change, what would the best possible rule be? Every MDL is different, and that has been the guiding principle throughout the iteration of different proposals. The subcommittee has been mindful of the importance of flexibility and of the many factors that bear on MDLs. The subcommittee explored putting MDL provisions into Rules 16 and 26 before ultimately developing the idea for a new Rule 16.1.

There are two versions of the draft rule, currently called Alternatives 1 and 2. The Advisory Committee has not yet considered and discussed the feedback of participants at the transferee judges' conference. Alternative 1 was well-received at the transferee judges' conference by many of the same judges who did not support an MDL-specific rule change four years ago.

MDLs make up anywhere from one-third to one-half of the federal docket. There are many new transferee judges who need to be educated about these cases. These judges also appoint new attorneys to leadership in MDLs, and these attorneys need to have proper direction and expertise. The *Manual for Complex Litigation* is being updated, but even if it were already up-to-date, people always begin by looking at the rules. So there needs to be something about MDLs in the rules.

The draft rule is designed to maintain flexibility. It has a series of guiding principles or prompts. Some prompts will apply in a specific MDL, but others may not. A judge need not go through every point listed in the draft rule. The goal is to put these points on the radar of the judges and counsel so that they start active case management early on.

Professor Marcus remarked that input from the Standing Committee would be extremely valuable to the subcommittee, especially as to the list of topics set out in Alternative 1 on page 219 of the agenda book. Judge Rosenberg agreed that the subcommittee would welcome comments on both Alternative 1 and Alternative 2. The goal is to have a more refined version to take to the full Advisory Committee meeting in March and potentially to the Standing Committee for approval for publication in June.

Judge Bates opened the floor for comments and questions.

An academic member noted that the Standing Committee had previously debated whether guidance on MDLs should go in a rule or in some other resource. This member queried whether it might make sense to wait to see the update of the *Manual for Complex Litigation*. The member suggested that Alternative 1's long list looked more like something that would go in the *Manual* than like rule text. Alternative 2 looked more rule-like, but this member would be more comfortable adopting Alternative 2's more spare approach if more detailed guidance could be found elsewhere, such as in the *Manual*. The academic member also noted others' suggestions that the rulemakers address the question of authority for some of the things that judges have done in managing MDLs, and the member questioned whether either alternative draft tackled that issue.

Judge Bates remarked that the next edition of the *Manual* would be a substantial update and would take a long time to complete. Judge Cooke estimated that it would take two to three years, probably closer to three years. Judge Bates noted that, given the three-year timeline for rule changes, it would take about six years for anything like draft Rule 16.1 to come into effect if the committees awaited the new *Manual*.

Judge Rosenberg observed that the *Manual* is not a quick read, and not every judge has or needs to have a desk copy. But as to whether this is a best-practices or a rules issue, she agreed with former chair Judge Dow's emphasis on making sure to put things in the rules—not every lawyer or judge reads the *Manual* or other resources, but everyone looks at the rules.

A judge member stated that a rule along the lines of Rule 16.1 would be helpful to judges and expressed a preference for Alternative 1 because it provides the information a court would need without having to read through a whole manual. It gives the court a lot of ideas and factors to consider in managing the case. Alternative 2 is too broad and vague to be helpful for a first-time MDL judge. Addressing the bracketed items in Alternative 1, such as the reference to a common benefit fund, the member expressed support for including those items in order to spark thought about what needs to be discussed.

Regarding Alternative 1, another judge member asked how the report called for by the rule would address items 6 through 14 if items 1 through 5 had not yet been resolved. If it is unknown who is leadership counsel or what leadership counsel's authority is, who engages in the discussion of items 6 through 14? Judge Rosenberg responded that draft Rule 16.1(b) discusses the designation of coordinating counsel for the preconference meet-and-confer. Coordinating counsel will not necessarily become permanent leadership counsel. Interim coordinating counsel and the judge can identify issues on which the judge needs feedback. These decisions can be changed, perhaps when leadership counsel is appointed or there is a major development in the MDL. This is not uncommon, that decisions made by leadership counsel need to be changed along the way. The rule contemplates that court-appointed coordinating counsel will help with the meet-and-confer and reporting to the court at the first conference on the first 14 issues or any additional issues the court deems necessary. The judge member asked what happens if there is dissension on the plaintiff side. Can coordinating counsel commit to anything in items 6 through 14? What if plaintiffs' counsel is split 50/50 on those issues?

To answer this question, Judge Rosenberg asked a practitioner member to talk about that member's experience with the issue. The member commented that there have been several large MDLs in which the court has appointed interim coordinating counsel to get the lawyers talking to

each other and resolve or narrow the issues. In situations where there is not unanimity on one side on some procedural priority, coordinating counsel presents the differing views to the court in an organized fashion at the initial conference. That doesn't give coordinating counsel absolute authority to make decisions unless there is a consensus. The emphasis is on the organizational and coordinating functions—to let the court see the range of views and make decisions in an orderly way.

Professor Marcus commented that the rule lets the judge direct counsel to report about the topics listed on page 219 of the agenda book. That would help orient the judge to the case and focus the lawyers on things that matter, even if they do not agree. That is better than a free-for-all. And requiring the lawyers to address relevant issues early on could help to avoid situations where the judge makes decisions based on incomplete information and later comes to question them, as Judge Chhabria described concerning his experience with the *Roundup* case. It may also be sensible to soften the language in proposed Rule 16.1(d) on page 220 to make clear that the management order after the initial conference is subject to revision. Overall, the point is to give the judge guidance in overseeing the case.

A judge member expressed continuing skepticism. There is some merit to the question about the court's authority. But the member asked how often transferee courts are reversed for acting without authority. If there is not a problem, perhaps not so much work needs to be done on a solution. This judge noted that the choice between the two alternative drafts only arises if one is first persuaded that a rule is needed at all.

Judge Bates observed that there might have been an authority question in *In re Nat'l Prescription Opiate Litigation*, 976 F.3d 664 (6th Cir. 2020).

A practitioner member stated that he has a bias because his firm litigates many MDLs on the defense side. The member's sense is that the plaintiffs' bar thinks that the MDL system basically works okay, while the defense bar does not think it is working, at least not in the big pharmaceutical MDLs. Rather, the system leads to settlements of meritless cases for billions of dollars. It is difficult for the rulemakers to work in an environment like that, where some people are relatively happy with the system and some are not. Both alternatives, especially the longer Alternative 1, are really about the plaintiffs' side. They may be potentially helpful, but they do not speak to defense concerns. The primary defense concern is that large MDLs are not vehicles for consolidating existing cases so much as encouraging more cases to be filed. The language coming closest to speaking to defense-side concerns is on page 219 of the agenda book, lines 568–69, about creating an avenue for vetting. But the proposed language ("*[w]hether the parties should be directed to* exchange information about their claims and defenses at an early point in the proceedings") was too agnostic. The member suggested considering deleting "whether the parties should be directed to" and starting with "exchange of information about". At least from an efficiency standpoint and from the defense bar's perspective, vetting is important.

The member also commented that, in previous versions, there had been debate about whether the exchange should be of "information" or "information and evidence." The member agreed that "evidence" seems awkward. But "information" is amorphous and may not be enough to determine whether cases in an MDL are meritorious. One suggestion is "exchange information

about the factual bases of their claims and defenses." That gets at the "evidence" concept without using the word "evidence."

Another practitioner member endorsed the idea of separating items 1 through 5 from items 6 through 13 in Alternative 1. This member expressed concern about the application of Alternative 1 before lead counsel is appointed, because then it would become an opportunity for would-be lead counsel to pontificate about the issues in items 6 through 13—that puts the cart before the horse. One of the most important things in an MDL is the appointment of lead counsel. The rules do not limit a judge's considerations in making that appointment. Does the judge consider the size of the claim? Counsel's experience level? The member has a bias toward the Private Securities Litigation Reform Act because it sets a process and criteria for appointing lead counsel. The member thought that transferee judges like that they can pick whom they want for lead counsel. The member predicted that this would become a controversy one day in a big MDL because there are no standards for that appointment. Perhaps a future Advisory Committee will add meat to that bone, but many of the topics listed in the current draft rule are obvious things that any competent MDL judge or defense counsel would want to consider.

A judge member thought that Alternative 1 is a particularly good framework to organize an MDL and indeed any complex case. The member suggested two big-picture additions. First, direct the parties in preparing their report and discussing the case to adhere to the principles of Civil Rule 1—just, speedy, and inexpensive dispositions. Counsel are not always aware of that rule. Second, there should be an emphasis on early determination of core factual issues—this might be early vetting—and core legal issues. Not necessarily dispositive legal issues, but core issues like a *Daubert* motion, an early motion in limine, or an early motion for summary judgment that will shape the law applicable to the case. Civil Rule 16(c)(2) concludes its long list of matters for consideration at a pretrial conference with "facilitating . . . the just, speedy, and inexpensive disposition of the action," thus referencing Rule 1. But because that is so important in a complex case, the reference to Rule 1 should be at the outset of the new rule, followed by a direction to focus on core issues of fact and law.

Judge Bates asked what the Advisory Committee thinks about the issue of settlement. There are questions concerning the court's role and authority, and settlement is a big issue in MDLs. Transferee judges historically have had different levels of involvement. Some think they have no authority to get involved. That is unlike class actions, where Rule 23 sets forth the judge's very involved oversight role. For normal civil cases, Rule 16(c)(2) tells the judge to focus on settlement and to use special procedures to assist in settlements. The question is what the proposed rule says about settlements in MDLs. In Alternative 1 on page 219, at lines 557–58, there is a reference to addressing a possible resolution. In Alternative 2 on page 220, line 598, there is also a reference to possible resolution. What is the message being sent to the bar and bench if that is where settlement winds up in the rule, especially compared to the more fulsome requirement in Rule 23? It is important to write these rules for the less-experienced judges and practitioners.

A practitioner member thought that another provision could be added to deal specifically with settlement—assessing whether there is a method for a prompt resolution of the claims. Over the years, more would probably be added to the rule, but something specifically dealing with considerations of early resolution, and settlement generally, would certainly be worth listing. But the problem of attorney jousting before the appointment of leadership counsel will still arise.

Another practitioner member thought that different language could solve the sequencing issue. The language would state that not all the considerations should be considered or decided at one initial conference; rather, they should be addressed in a series of conferences. Experienced MDL judges know that case management is an ongoing, iterative process; a single pretrial order is not enough. This language could avoid some confusion about how many of the considerations in the rule need to be addressed at one time. It would tell the court that this is a menu of items and let the court determine which are the priority items for the first conference and which to address in an ongoing fashion.

The previous practitioner member reiterated that, unless leadership counsel is appointed early, it makes no sense to deal with the other topics. It would be helpful, especially to inexperienced judges, to make clear in the rule that the appointment of leadership counsel should be dealt with up front.

Judge Rosenberg remarked that the subcommittee spent a lot of time on the settlement issue. Transferee judges thought that—unlike class actions, which have unrepresented parties—judges did not and should not manage, oversee, or approve settlements in MDLs. Some lawyers who looked at the draft rule may have had similar reactions. The subcommittee ultimately decided to take out that language. Still, it is important for the MDL process to have integrity and transparency, and so the subcommittee considered how a judge could ensure the process has those qualities without having the authority to approve a settlement. The solution was to give the judge a more proactive role in all aspects of case management, including appointing leadership counsel, determining leadership counsel's responsibilities, and having a regular reappointment process. Ensuring that the process is fair can promote trust in the outcome.

Judge Bates acknowledged the distinction between managing the process and reviewing the outcome, but suggested that the draft rule did not contain much guidance about what the judge should consider in appointing leadership counsel or about what other parties and counsel should be doing to create a process that will lead to a fair and just resolution of the claims.

Professor Marcus added that, with respect to settling individual claims asserted by claimants represented by other lawyers, appointment of leadership counsel is dicey. The subcommittee has given that scenario a lot of thought and discussion, including whether there could be a process by which a judge could "approve" the negotiation process for any settlements that come about. That is also dicey. On page 219 of the agenda book, in item 13, in brackets, another possibility is mentioned, which is to use a master to assist with possible resolution. Another question is: what happens if leadership counsel's own cases are settled—must different leadership counsel be appointed? MDLs involve different situations from Rule 23(e), and there is a "third-rail" aspect to this subject, so it is very valuable to have the Standing Committee's feedback while addressing it.

Judge Bates asked whether special masters have been widely used in managing and reaching settlements in MDLs. A practitioner member said yes, absolutely. In some of the biggest cases, special masters run the whole settlement process. Judge Bates asked if such a master reports to the court. A practitioner member gave an affirmative answer to this question, but remarked that these masters are not typically Rule 53 special masters. They are called "settlement masters" or "court-appointed mediators." It is an ad hoc appointment in terms of the roles and duties, but those

duties do typically include reporting to the court. The extent to which the master can report to the court on the substance of the negotiations is usually worked out among the parties. In the *Opiate* MDL, there were Rule 53 appointments of special masters who ultimately became involved in mediation and settlement. In the *Volkswagen* MDL, Judge Breyer invented a position called "settlement master," which was not based on Rule 53 but had many but not all of the same responsibilities and roles. Judge Breyer made the appointments after requesting input from the parties on whether to appoint a master and, if so, whom. The court need not follow the parties' recommendations, but in the member's experience, this topic is discussed with the parties and the court's determinations do not come as a surprise.

Judge Bates thought that judges who appoint masters would communicate with them. Should the master's reporting duty to the judge be one of the considerations under the rule?

Judge Rosenberg mentioned that the subcommittee had received feedback from some groups that did not like having the words "special master" in the draft rule. It might create a presumption that there should be a special master, even if not everyone wants one. This led to some discussion, and some thought it might be better to have the words "special master" in the rule so that the parties will talk about it, even if they disagree.

Judge Bates asked whether the rulemakers should be careful about referring to the appointment of a "special master." Might the reference be viewed as authorizing something outside of Rule 53? He intended no criticism of what any judge has done in the MDL process, but he asked whether the rulemakers want to give, through a casual reference in item 13 of a laundry list, an imprimatur to the idea that a judge can say, "I want a settlement master. Rule 53 doesn't fit, so I'm just going to create this role on my own."

Judge Rosenberg responded that the subcommittee has discussed this topic but has not yet brought it to the full Advisory Committee. The subcommittee is working on tweaking the language in response to feedback on that issue and others. As another example, in line 570 of the report in the agenda book, there is a reference to a "master complaint." The rules do not provide for a master complaint, but the Supreme Court has referred to master complaints, and so has the subcommittee. One piece of feedback was that the term should not be used. Does using it somehow give credibility to a form of complaint that the rules otherwise do not mention?

Judge Bates commented that one could go pretty far back in this line of thought. The rules do not authorize the appointment of leadership counsel, for example. There are a lot of things that may not have a specific basis in the existing rules.

A judge member noted that the draft rule does not make any reference to the transferor court. It rarely happens that the case is sent back, but the MDL framework does contemplate that the work of the transferee court ends at some point. An item could be added to suggest that the transferee court and lawyers should consider when a case should be sent back to the transferor court.

Professor Cooper commented that a suggestion had arisen that the rule should address remand. But it was unclear whether the suggestion meant addressing motions to remand to state court, in cases plaintiffs thought improperly removed, or remand to transferor courts.

The judge member thought that it sounds like there is a never-ending list of items that could be considered or called into question. At what point do we return to the concept of "first do no harm"? Is there a need for this rule? What is its usefulness?

Professor Marcus commented that there has been a decades-long debate about whether the transferor court, if a case goes back, can simply start from scratch and throw out what the transferee judge did with the case. Putting a time limit on transferee activities might produce some behaviors that should not be encouraged. Also, as Professor Cooper said, remand means two different things here. Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") has authority to remand to the transferor court, but the JPML usually awaits a suggestion from the transferee judge that this would be desirable. The transferee judge cannot do this unilaterally.

Judge Bates commented that there are some things, not listed in the draft rules, that might occur later on before the transferee judge, particularly bellwether trials. If the draft rule is viewed as a continuing conference obligation, should it address other items, such as how to manage and sequence any bellwether proceedings?

Judge Rosenberg responded that bellwether management was not included because it is far along in the MDL process and might be outside the realistic scope of what can and should be discussed in the early conferences.

Professor Marcus added that there are also various views about whether bellwethers are useful. It is probably unwise to urge the judge to map out possible use of bellwethers at the start of an MDL. He predicted that any rule will say that, except for extremely simple and small MDLs, one conference is not enough, and the management plan must be revisited as things move forward. So the rule's focus will probably be on the initial exercise, and the expectation will be that judges continue to oversee other events as they become timely. Bellwethers might be in that latter category.

Judge Rosenberg thanked the Standing Committee for its feedback.

Rule 41(a) (Dismissal of Actions). Judge Rosenberg reported on this item. The Advisory Committee formed a subcommittee to address a conflict about the scope of Rule 41(a)(1)(A), which allows a plaintiff to voluntarily dismiss without prejudice an "action" without obtaining a court order or the defendants' consent. The subcommittee's research showed that courts approach Rule 41 dismissals in different ways. The primary disagreement is whether Rule 41(a)(1)(A) requires dismissal of an entire action against all parties or whether it may be used to dismiss only certain claims or only claims against certain parties. The subcommittee has not reached a consensus on whether to pursue an amendment or what amendment to propose. An additional wrinkle is Rule 15, through which a plaintiff can amend a complaint to remove certain claims or defendants. The subcommittee is considering whether Rule 15 should be the vehicle by which a party should dismiss something short of the entire action.

Judge Bates remarked that this is a complex issue, and he solicited comments or feedback from the Standing Committee. Hearing none, Judge Rosenberg turned to the remainder of the report, and invited Professor Cooper to present the next item.

Rule 7.1 (Disclosure Statement). Professor Cooper addressed two suggestions made to the Advisory Committee about recusal disclosures. One suggestion, about "grandparent corporations," contemplates a company that owns a stake in a second company, which in turn has a stake in a third company. If, say, Orange Julius is a party to an action, then the current rule requires it to disclose that Dairy Queen is its owner. But the rule does not require Orange Julius to disclose that Berkshire Hathaway owns Dairy Queen. So if the judge in the action owns shares of Berkshire Hathaway, that judge may not have notice of a potential financial interest in the case's outcome. Should something be done to address this in the rule?

The other suggestion proposed a rule directing all parties and their counsel to consult the assigned judge's publicly available financial disclosures. The parties would either flag any interests that may raise a recusal issue or certify that they have checked and do not know of any. The Advisory Committee has not really dived into this. Rule 7.1 covers only nongovernmental corporate parties. There are all sorts of business organizations with complicated ownership structures that may involve interests a judge is not aware of. Should the Advisory Committee just say it is too complicated to try to go further than corporations?

In response to a question posed by Professor Cooper, Judge Bates suggested that, unless the Appellate or Bankruptcy Rules Committees feel otherwise, it makes sense for the Civil Rules Committee to take the lead in considering proposed amendments to Rule 7.1.

Other Items Considered. At this point, Judge Bates opened the floor for any remaining issues raised in the Civil Rules Committee's report. He asked a question about service awards for class-action representatives. Does the Advisory Committee view this issue as a matter of procedure or of substantive law? Judge Rosenberg responded that the issue was not a subject of much discussion at the last Advisory Committee meeting. Professor Marcus thought that there was no need to worry about the issue yet. There was a pending certiorari petition on the issue, so there might be more to learn by waiting.

Professor Marcus turned to Rule 45, about which a question had arisen: what does it mean to "deliver" a subpoena? By hand? By email? It may be that, in civil litigation, counsel can work this out. Is it worth trying to devise specifics on a method of delivery?

A judge member drew attention to the information item on standards and procedures for deciding in forma pauperis ("IFP") status, and suggested that that item warranted action. The member remarked that a *Yale Law Journal* article had described disparate practices on IFP status, which raised important issues of access to justice. The Appellate Rules Committee is looking at a standardized form for IFP status on appeal. The member suggested that someone should review this—if not the rulemakers, then a different committee of the Judicial Conference.

Judge Bates commented that the current view of the Advisory Committee was that it was not going to take any specific action on standards for IFP status. If the Rules Committees are not going to look further at this, should they encourage another Judicial Conference committee to do so? The only other logical Judicial Conference committee is CACM. Judge Rosenberg remarked that there is an Administrative Office pro se working group that may also be appropriate. Judge Bates suggested that perhaps the rulemakers could communicate to these entities that the Advisory Committee is not going to do anything with the topic for now but views it as an important question.

Another judge member informally asked the Advisory Committee to consider whether there is a need to address the Supreme Court decision in *Kemp v. United States*, 142 S. Ct. 1856 (2022), which held that a judge's error of law is a "mistake" under Rule 60(b).

Items Removed from Agenda. Judge Rosenberg concluded by noting items removed from the Advisory Committee's agenda. These included proposed amendments to Rule 63 (Successor Judge), Rule 17(a) (Real Party in Interest) and Rule 17(c) (Minor or Incompetent Person). There were no questions or comments from the Standing Committee on these items.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met in Phoenix, Arizona, on October 27, 2022. The Advisory Committee presented two 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 297.

Information Items

Rule 49.1 (Privacy Protection for Filings Made with the Court). Judge Dever reported on this item. He explained that the Advisory Committee had considered and decided to remove from its agenda a proposal by Judge Furman regarding Rule 49.1. The rule's committee note refers to 2004 guidance from CACM that certain documents should remain confidential and not be made part of the public record. In *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), Judge Furman held that the common law and the First Amendment required appropriate disclosure of a defendant's CJA Form 23 and accompanying affidavit. Judge Furman suggested amending Rule 49.1(d) and removing the committee note's reference to the CACM guidance. The Advisory Committee concluded that the original committee note did not produce confusion about the constitutional or common-law rights of access, and it also hesitated to venture into potentially substantive issues through rule amendments.

Rule 17 (Subpoena). Judge Dever reported on this item as well. The Advisory Committee is analyzing a proposal by the New York City Bar to amend Rule 17 to allow defendants to more easily subpoena third parties for documents. As part of this process, the Advisory Committee has appointed a subcommittee, chaired by Judge Nguyen, to gather information about how federal courts apply the rule and how states handle these kinds of subpoenas. The goal is to determine whether there is a problem that warrants a rule change. There have been two Supreme Court cases interpreting the rule, both fairly atypical. The subcommittee has heard from a wide variety of experienced practitioners from the defense bar and the Department of Justice. The process is still in its early stages, and the Advisory Committee will continue to study these issues.

Judge Bates commented that the miniconference on the Rule 17 issue at the most recent Advisory Committee meeting had been very informative and had elicited several different perspectives that should be useful in the committee's ongoing study.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Evidence Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met in Phoenix, Arizona, on October 28, 2022. The Advisory Committee presented two 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 365.

Information Items

Rule 611 (Juror Questions for Witnesses). Judge Schiltz reported on this item. This proposal would add a new subsection (e) to Rule 611 to create safeguards if jurors are permitted to ask questions at trial. The proposed amendment was presented to the Standing Committee at the June 2022 meeting. Most comments then had been about whether jury questioning is a good thing at all; some members thought that it was not and that putting safeguards in the rule would only encourage judges to allow jurors to ask questions. The proposed amendment was returned to the Advisory Committee for further study on the pros and cons of juror questioning.

The Advisory Committee held a miniconference on the issue at its fall 2022 meeting in Phoenix, Arizona, which was coincidental but fortunate in that Arizona is a pioneer among the states in allowing juror questioning. The panel included federal and state judges and civil and criminal practitioners, all with a great deal of experience with juror questioning. All of them expressed the view that juror questioning was a positive thing with many benefits and few risks. They all supported the proposed rule. It was difficult to find opponents—one whom Professor Capra did find could not attend the miniconference. Afterward, the Advisory Committee thoroughly discussed the proposal. It will continue to discuss the proposal at its spring 2023 meeting and decide whether to pursue it.

Judge Bates thought the miniconference was a helpful exercise. Although it was one-sided—as it necessarily would be in Arizona—it gave the committee many issues to consider.

Professor Capra reiterated that it was difficult to find someone in Arizona who had anything critical to say about the practice. There were a couple of comments—one from a judge at the miniconference who said that juror questioning sometimes took too much time, and another from a prosecutor who said that sometimes there is a risk that questioning can get out of hand because the lawyers cannot control the witness. But there was a swarm of positive factors indicating that juror questioning is not the problem that some think it would be. Most juror questions are only for clarification, not attempts to take over the case or to pick or fill holes in one party's case.

Judge Bates raised a concern about juror questions in criminal cases. The criminal process is not a pure search for the truth—the prosecutor has the burden to prove guilt. He suggested that a juror question may unfairly help the prosecution by revealing a problem in the case that the prosecutor can then address or cure.

A judge member asked whether there was anecdotal information from actual jurors, such as information from a questionnaire asking whether they liked being able to ask questions. Professor Capra said that the judges reported that they generally discuss the process with jurors

and that reviews had been positive. One juror told a judge that he was glad he could ask questions so that he did not have to look up answers on the internet. Another juror said that it was nice to be able to ask questions; even if the juror did not do so, the juror still became more involved in the process. Judge Schiltz also commented that there have been studies showing that jurors give overwhelmingly positive feedback about the ability to ask questions.

A practitioner member asked whether a 50-state (and multidistrict) survey had been done to learn about the prevalence of the practice. Professor Capra responded that there are some data on that question. The state of Washington has a juror-questioning practice. About 15% to 20% of trials in federal courts allow juror questioning. The member commented that it would be a good idea to identify federal district judges who allow the practice and to get their feedback. Judge Bates observed that it is a judge-by-judge question, not a court-by-court question. The practitioner member reiterated that the Advisory Committee should try to determine the frequency of the practice outside of Arizona and to talk with federal judges who have done juror questioning and find out its pros and cons. Judge Schiltz noted that the Advisory Committee had the same questions and had asked Professor Capra to gather more data on them. Professor King commented that the National Center for State Courts has collected and published data about juror questioning in the states.

Judge Bates asked whether the Advisory Committee had considered whether there is a difference between the civil and criminal contexts and whether a rule might address one but not the other. Professor Capra responded that any safeguard that applies in the civil context would have to apply to the criminal context as well. Perhaps criminal cases could have additional safeguards, but no safeguards would apply only to the civil context.

Judge Schiltz commented that there had been a study in the Ninth Circuit that recommended permitting juror questioning in civil cases but not criminal cases. Judge Bates suggested, however, that there was more recent work in the Ninth Circuit that was more positive about juror questions. And Professor Capra noted that the Ninth Circuit pattern criminal instructions now address juror questions.

Rule 611 (Illustrative Aids). Judge Schiltz reported on this item as well. The Advisory Committee held a second miniconference in Phoenix on illustrative aids. Despite the fact that illustrative aids are used in virtually every trial, there is confusion over the difference between demonstrative evidence, which is admitted into evidence, and illustrative aids, which are not admitted into evidence and are used only to help the jury understand evidence that has been admitted. There are variations among judges' practices about notice requirements to opposing counsel, whether illustrative aids can go to the jury room, and whether the aids become part of the record.

This amendment would add a new subsection (d) to govern the use of illustrative aids. It would clarify the distinction between illustrative aids and demonstrative evidence, require notice, prohibit illustrative aids from going to the jury room absent a court ruling and proper instruction, and require they be made part of the record so that they would be available to the appellate court.

The miniconference featured a large panel of judges, professors, and practitioners, most of whom opposed the proposed rule. Since then, the Advisory Committee has also received about 40

comments on the rule. Most opposition is to the notice requirement. Practitioners adamantly opposed having to show their illustrative aids to their opponents, especially aids they wanted to use at closing. There were also practical concerns. The category of illustrative aids spans a wide variety. For example, if an attorney writes something on a chart as a witness is testifying, how does the attorney give prior notice to opposing counsel of that contemporaneously created illustrative aid? The Advisory Committee did receive a comment in support of the rule—including the notice requirement—from the Federal Magistrate Judges Association. At its spring 2023 meeting, the Advisory Committee will review the comments and decide whether to move forward, perhaps after excising the notice requirement.

Judge Bates, noting that this miniconference had also been very helpful to the Advisory Committee, opened the floor for comment.

A practitioner member raised concerns about the notice requirement from the member's colleagues in trial practice. Attorneys persuade juries in two ways: by words and by visuals. When both are aligned, people retain far more information than when only one method is used. An attorney would never show the outline of an opening statement or witness exam to an opponent—it puts the attorney at a strategic disadvantage because opponents can change what they will say in response. Sharing an illustrative aid is similar. And the effect of taking the notice requirement out would be that there is a transcript, an objection, and a discussion—the rule would treat illustrative aids the same as attorneys' oral statements. Requiring notice would put more disclosure obligation on the visual than the oral. Professor Capra responded that he thinks the Advisory Committee was comfortable with deleting the notice requirement, and it is likely that that is what will happen.

The member also commented that, as illustrative aids are defined—helping the factfinder understand admitted evidence—a strict reading would mean that a PowerPoint presentation could not be used in an opening because no evidence will have been admitted yet. Professor Capra responded that the Advisory Committee needs to decide whether the rule applies to openings and closings. If the rule were to apply to openings and closings, one could revise proposed Rule 611(d)(1)'s "understand admitted evidence" to read "understand admitted evidence or argument."

A judge member mentioned that, as a trial judge, the member would customarily make illustrative aids a part of the record. Now, after 20 years on the court of appeals, the member has had very little occasion to see an illustrative aid that is part of the trial record. The member continues to think that putting aids in the record is the better practice. The appellate courts are so far removed from the trial process that anything that gives them a better feel of what has been before the trier of fact is of great assistance.

A second practitioner member expressed support for rulemaking on this topic and commented on the centrality of slides in modern trials. The member is often concerned that the other side will do something crazy with illustrative aids in openings and closings. The member can sometimes work out an arrangement with the other side to mutually disclose trial materials. But sometimes things like closing slides are made the night before the closing argument—when is it practical to give notice for these aids? Putting aids in the record is an easy decision, as is making it clear that they do not go to jury deliberations. Notice might bother the member less than it does other lawyers because the member has seen people do crazy things at trial, and the damage is done even if the judge says something after the fact. The standard in proposed Rule 611(d)(1)(A)

("[substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time") gives a judge enormous power over what can be done—that might be good or bad. The member does not know what the standard should be; maybe it should be the same as applies to oral advocacy in a closing argument.

A third practitioner member largely agreed with the previous member's comments. The solution is probably not one-size-fits-all, so the member is not sure what to do about a notice requirement. The second practitioner member suggested that you do not want to show aids to opposing counsel so far in advance that they can change what they will do in response, but you do want to make sure that there are not any slides that are so outrageous that the judge should know about them in advance.

Professor Capra asked whether the solution might be to take out the notice requirement from the text but to put in language that summarizes the two previous members' comments—there is no one-size-fits-all notice requirement, but notice is preferred because it allows judges to decide in advance rather than after the fact. But the rule would leave the determination for the judge to make.

The second practitioner member agreed with Professor Capra's suggestion. The "Wild West" view of trials is dangerous, so having some notice is a good idea. But it should not be so much notice that each side can redo its slides in response to the other's.

The third practitioner member noted that it is much harder to unsee than unhear something. That is a qualitative difference between what is said and shown. Judge Bates observed that it would be valuable for the Advisory Committee to consider preserving judges' discretion to deal with the notice issue.

The first practitioner member reiterated opposition to a notice requirement. Leaving the notice requirement out of the rule does not strip a federal judge of inherent authority. Also, some slides' power comes from not disclosing them in advance. If this rule applies to openings and closings, notice disincentivizes parties from using powerful slides during those key parts of trial.

Professor Capra responded that many judges already use Rule 611(a) to control visual demonstrations in openings and closings. It did not make sense to him to exclude openings and closings from a rule specific to illustrative aids because there would then be two rules covering essentially the same thing, one during trial and one during openings and closings.

Updates on Other Rules Published for Public Comment.

Judge Schiltz briefly mentioned that there are several other proposed rules that are published for comment. The Advisory Committee has received almost no comments on those rules.

Judge Bates called for any further comments from the Standing Committee. Hearing none, Judge Bates thanked the Advisory Committees, their members, reporters, and chairs for their hard work.

OTHER COMMITTEE BUSINESS

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to give its recommendations to the Judicial Conference's Executive Committee about the contents of the strategic plan and what should receive priority attention over the next two years. The recommendations were due within a week after the meeting. Judge Bates requested comment on the priorities in the strategic-planning memorandum beginning on page 402 of the agenda book. No comments were offered.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff to give comments to the Executive Committee, on behalf of the Rules Committees, about the strategies and goals for the next two years. This procedure had been followed in the past, but he wanted to be sure that no one had any problem with it. **Without objection, the Standing Committee gave Judge Bates that authorization.**

New Business

Judge Bates then opened the floor to new business. No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their valuable contributions and insights. The committee will next convene on June 6, 2023, in Washington, D.C.