MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 28, 2015 | Washington, D.C.

TABLE OF CONTENTS

ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting in Washington, D.C. on May 28, 2015. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber (by teleconference)
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter

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

Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

The Honorable Sally Yates, Deputy Attorney General, represented the Department of Justice, along with Deputy Director for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., and Thomas Byron, Esq.

Other meeting attendees included: Professor R. Joseph Kimble, the Committee's style consultant; Judge Jeremy D. Fogel, Director of the Federal Judicial Center; Judge Michael A. Chagares, member of the Appellate Rules Advisory Committee and prior Chair of the CM/ECF Subcommittee; Judge John D. Bates, incoming Chair of the Advisory Committee on Civil Rules; Professor Troy A. McKenzie, former Associate Reporter for the Advisory Committee on Bankruptcy Rules.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney, Rules Committee Support Staff
Scott Myers	Attorney, Rules Committee Support Staff
Bridget Healy	Attorney, Rules Committee Support Staff
Frances Skillman	Paralegal Specialist, Rules Committee Support Staff
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order, reviewed the agenda, and thanked those involved in providing logistical support.

Judge Sutton welcomed Deputy Attorney General Sally Yates to her first Standing Committee meeting and thanked Elizabeth Shapiro for arranging a meeting for Judge Sutton, Dan Coquillette and Rebecca Womeldorf with DAG Yates at the Department of Justice on May 27, 2015. DAG Yates spoke on the importance of the good working relationship between DOJ and the Rules Committees and her plans to participate in the rules process along with her colleagues.

Judge Sutton introduced Judge John Bates, immediate past-Director of the Administrative Office, and incoming Chair of the Civil Rules Advisory Committee, and shared the sad news of Dan Meltzer's passing. Members shared remembrances and observed a moment of silence.

Judge Sutton reported on the March 2015 Judicial Conference Session and on the proposed amendments adopted by the Supreme Court and transmitted to Congress on April 29, 2015. These amendments will become effective on December 1, 2015, absent contrary congressional action. The proposed amendments include: Bankruptcy Rule 1007; Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55; and abrogation of Rule 84 and the Appendix of Forms.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Committee approved its January 8-9, 2015 meeting minutes, with minor technical amendments as well as insertion of an additional paragraph on page 12 concerning the discussion of Multi-District Litigation cases.**

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented three action items. The first two items have been under consideration by the Advisory Committee since 2012, and were previously authorized for publication: Rule 4, which deals with service of criminal process, and Rule 41, which deals with the judicial district where search warrants can be sought. After consideration of public comments, the Advisory Committee now seeks final approval of Rules 4 and 41.

Amendments for Final Approval

FOREIGN SERVICE: FED. R. CRIM. P. 4 – Judge Raggi reported that the proposed rule contains two prongs regarding how foreign service may be accomplished:

(i) under 4(c)(3)(D)(i), by effecting service in a manner authorized by the foreign jurisdiction's law, or

(ii) under 4(c)(3)(D)(ii), by any other means that give notice, including one stipulated to by the parties, letters rogatory or a similar request submitted under an international agreement, or as otherwise permitted under an applicable international agreement.

Judge Raggi reported that comments received were generally favorable, and discussed one adverse comment filed by a U.S.-based law firm. Judge Raggi noted that the Advisory Committee considered, but declined to require, prior judicial approval before service of a criminal summons could be made in a foreign country by "other means" pursuant to 4(c)(3)(D)(ii). Judge Raggi offered the unanimous recommendation of the Advisory Committee to approve the proposed amendment as published.

The Committee discussed the proposal. One member commented on the strong need for the proposed amendment, citing the experience of having foreign corporations sending counsel to monitor proceedings in the United States who were not authorized to accept service.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 4 as published for submission to the Judicial Conference for final approval.**

VENUE: FED. R. CRIM. P. 41 – Judge Raggi next reported on the proposed amendment to Rule 41's territorial venue provisions. Rule 41's territorial venue provisions – which generally limit searches to locations within a district – create difficulties for the government when it investigates crimes where the location of the victim computer is known, but the source of the offending conduct is not known. Judge Raggi acknowledged the expectation that the government will investigate such crimes, and the Advisory Committee believed it better to give the government a venue to seek a warrant, rather than leaving the government to rely on allegations of exigent circumstances or harmless error after-the-fact.

Based on comments received, the Advisory Committee tailored its proposed amendment to address the two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The first scenario occurs when the

government seeks to search a particular computer with an unknown location, a situation increasingly common due to sophisticated anonymizing technologies that hide a perpetrator's true IP address, thus preventing agents from identifying the physical location and judicial district of the originating computer. Second, the government increasingly faces criminal schemes involving multiple computers located in multiple districts, such as the surreptitious infection of multiple computers with malicious software creating a "botnet" of compromised computers that operate under the remote control of an individual or group. Rather than going to every affected district, if the harm extends to five or more districts, the proposal would permit the government to apply for a warrant in any affected district.

The proposed rule generated many responses during the public comment period, including forty-four written comments from individuals and organizations, and the testimony of eight witnesses at the Advisory Committee's hearing in November 2014. Those opposing the amendment feared that the proposed rule relaxed the protections for personal privacy guaranteed by the Fourth Amendment. Multiple comments questioned whether remote searches could meet the Fourth Amendment's particularity requirement. Although the Advisory Committee believed that the proposed venue provision does not impact the duty to state with particularity the subject of a search, to address concerns the Advisory Committee added language to the Committee Note to emphasize that the amendment does not alter the government's Fourth Amendment obligations. The Advisory Committee also made plans to work with the Federal Judicial Center on judicial education. Judge Raggi explained that the revision to the caption of Rule 41, replacing "Authority to Issue a Warrant" with the new caption of "Venue for a Warrant Application" was intended to emphasize that the rule change was directed to venue only and did not substantively enlarge the "authority" to obtain a warrant, a misreading the old caption invited.

Judge Raggi explained that the amendment aims to mimic notice physical search requirements. The proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Advisory Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises, but reasonable efforts must nonetheless be made to provide notice to the person whose information was seized or whose property was searched.

After publication, the Advisory Committee added language to the Committee Note to explain the changes to the notice provisions and to respond to comments that criticized the proposed notice provisions as insufficiently protective. The addition draws attention to the other provisions of Rule 41 that preclude notice except when authorized by statute and provides a citation to the relevant statute.

The Advisory Committee voted to recommend the revisions to Rule 41 to the Committee, with one dissent. The dissenting member viewed the amendment as having important substantive effects, allowing judges to make ex parte determinations about core privacy concerns.

Discussion followed. One member pointed out that these searches are already being done. Although the amendment looks substantive, it simply articulates venue. The member commended Judge Raggi for taking a broad proposal from the government and narrowing it substantially to address the concerns

and comments raised. Another member spoke in support of the proposal, stating that the choice for the Committee was whether to establish a process rule or to leave the situation to Congress or to magistrates all over the country.

Another member spoke in favor of the amendment, but questioned the potential for forum shopping under the proposed rule. The Committee discussed the potential for forum shopping under any rule. DAG Yates talked about the availability of venue in more than one district under the current rules, and the benefit of the proposed amendment in allowing prosecution in the same district issuing the warrant.

Another member questioned the source of the proposal to allow a warrant to be sought in any affected district if five or more districts were impacted; why five? Judge Raggi acknowledged that the number was a compromise, and after the rule goes into effect experience with it may suggest that a different threshold would work better.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 41 as amended after publication, for submission to the Judicial Conference for final approval.**

Information Items

Electronic Filing – Judge Raggi noted that the Advisory Committee continues its work trying to make sure criminal rules for electronic filing parallel civil rules to the extent appropriate, while accounting for significant differences in criminal practice. A proposed amendment to the Civil Rules would mandate electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The proposed Civil amendment was of particular concern to the Advisory Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. The Reporters for the various committees continue to examine these issues and coordinate on behalf of all the rules committees in search of common language that would work in various contexts. The Advisory Committee will benefit from the opportunity to study the provisions now under consideration by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committees), so that it can determine how best to revise the Criminal Rules.

Rule 35 – Judge Raggi briefed the Committee on a request to amend Rule 35 to bar appeal waivers before sentencing. The Advisory Committee declined to proceed with the proposal.

Judge Sutton acknowledged this meeting as the last for Judge Raggi as Chair of the Advisory Committee. Judge Sutton noted Judge Raggi's many years of excellent service on the rules committees, and particularly her work with the Rule 12 amendments, which spanned seven years, and which she guided to a consensus vote. Judge Sutton also praised Judge Raggi's sense of care about the important line of when to amend a rule, and when not to. Members voiced appreciation for Judge Raggi's service.

REPORT ON MULTI-COMMITTEE PROPOSAL TO AMEND "3-DAY RULE"

Amendments for Final Approval

COMPUTING AND EXTENDING TIME: FED. R. APP. P. 26(C), BANKRUPTCY RULE 9006(F), FED. R. CIV. P. 6(D), FED. R. CRIM. P. 45(C) – Judge Chagares provided background for the conclusion by the CM/ECF Subcommittee that the original basis for the "3-Day Rule" across various rules no longer applies in the computer age. The proposed parallel amendments to the civil, criminal, bankruptcy and appellate rules published for comment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. Eliminating the extra three days would simplify time computation.

Professor Beale discussed Criminal Rule 45(c), and concerns specific to criminal practice about shortening the time for service. Members were concerned that the three added days were particularly important for criminal practitioners because speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. Post publication, working from language proposed by DOJ, the Criminal Rules Advisory Committee endorsed an addition to the Committee Note that addresses the potential need to grant an extension of the time allowed for responding after electronic service. That new language has been added to the published Committee Note in each Committee's parallel proposal, as confirmed by Professor Cooper. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

The Advisory Committee also agreed to amend the caption of Rule 45(c) published for comment to eliminate the additional words "Time for Motion Papers," and to revise Rule 45 as published so that the text is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*."

The Chair noted that although the Advisory Committees other than the Criminal Rules Advisory Committee initially voted against the added Committee Note language, the concerns specific to the criminal context, as well as the desire for uniformity, outweighed the general preference against adding such language to committee notes.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, as amended, for transmission to the Judicial Conference.**

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Sessions referenced the Advisory Committee's report, set out in the memorandum dated May 7, 2015, with attachments. Judge Sessions relayed the unanimous request of the Advisory Committee to

publish two proposed rules for comment, both of which received a positive reception at the last Committee meeting.

Amendments for Publication

ANCIENT DOCUMENTS: FED. R. EVIDENCE 803(16) – Rule 803(16)'s hearsay exception for "ancient documents" provides that a document 20 or more years old that appears authentic is admissible for the truth of its contents. Judge Sessions explained that the rule has always confused authentication and reliability, and has been used infrequently. The Advisory Committee considered whether Rule 803(16) should be abrogated or amended in light of the development of electronically stored information. Because electronically stored information can be retained for more than 20 years, we could very well see a flood of unreliable documents coming in under this rule.

The Advisory Committee considered four proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. The Advisory Committee unanimously concluded that Rule 803(16) should be abrogated, because it allows for the introduction of unreliable evidence. Evidence in ancient documents that is reliable can be admitted under other hearsay exceptions.

One member noted that the amendment might seem to some to be a substantial change, but it is not. While the rule at common law may have had a legitimate basis, no need for the exception now exists and authentication of documents traditionally thought of as ancient is still available under the rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed abrogation of Rule 803(16), together with the Committee Note to explain the abrogation.**

AUTHENTICATION REQUIREMENTS: FED. R. EVIDENCE 902 – Judge Sessions next reviewed the proposed amendment to Rule 902 regarding authentication of electronic evidence. The Advisory Committee's ongoing study of the admissibility of electronic evidence has produced proposals to improve efficiency, including allowing certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial. The Advisory Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901, but only by calling a witness to testify to authenticity. The Advisory Committee concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness,

incurring expense and inconvenience – and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The proposed change should bring cost savings to the process.

Professor Capra noted that the proposals should be viewed under the low level of proof required to show authenticity. The proposals reduce costs associated with requiring a live witness. One member noted that many proposals reflect an ongoing effort to grapple with electronic evidence. More than one member asked for clarification of the "process that produces an accurate result" language in the proposed amendment. One member noted the distinction between a declaration that says "this is what it purports to be" versus "this is an accurate result."

Professor Capra noted that the proposed language reflects language already in the rules. The proposal does not change the standard or the method of authentication under the rules; it simply allows the proponent to make the necessary showing by declaration as opposed to live testimony. One member suggested that examples in the Committee Note would help to avoid confusion.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 902 to add subsections 902(13) and 902(14).**

At a later point in the meeting, Judge Sessions and Professor Capra offered an additional paragraph of language for the Committee Note accompanying the proposed amendment to Rule 902. The proposed paragraph provides two examples of what the rule covers, and what it does not. As Professor Capra explained, the examples to be added to the Committee Notes illustrate and emphasize the limited reach of the proposal; the certificate can be used only to show that the proffered item is authentic. Questions of reliability, hearsay, and probative value remain for the court and the factfinder. Subject to further comment from the Advisory Committee, Judge Sessions asked the Committee to approve the Committee Note as revised for publication. Several members voiced support for the revised Committee Note and stated the explanation would be helpful during the comment period.

Upon motion that the new language will be included in the Committee Note absent any further contrary input from the Advisory Committee, with a second, and on voice vote: **The Committee unanimously approved for publication for public comment the proposed revised Committee Note to accompany the proposed amendments to Rule 902.**

Information Items

Symposium on the Hearsay Rule and Its Exceptions – Judge Sessions reported that in conjunction with its Fall meeting on October 9, 2015, the Advisory Committee will hold a symposium on the hearsay rule at the John Marshall School of Law. The symposium will explore recent broad proposals to loosen the strictures of the federal rule against hearsay. Judge Posner has proposed to substitute most of the hearsay exceptions with an expanded version of Rule 807 (the residual exception) which render the admissibility of a hearsay statement dependent on a judicial finding of reliability under the particular circumstances presented. The symposium will include presentation of information and ideas by invited judges, lawyers and professors, and may provide a foundation for future recommendations regarding the hearsay rule and its exceptions.

Notice Provisions in the Federal Rules of Evidence – Judge Sessions noted that the Advisory Committee is thinking about addressing inconsistencies in the notice provisions of the Federal Rules of Evidence. Some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Two such provisions may be problematic, independently of any interest in uniformity. First, Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. The Advisory Committee is inclined to abrogate that unnecessary requirement that serves as a trap for the unwary, particularly given that most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. Second, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not.

Best Practices Manual on Authentication of Electronic Evidence – To provide assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, the Advisory Committee has begun work with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported on six sets of proposed amendments offered by the Advisory Committee on Appellate Rules for consideration by the Standing Committee for final approval.

Amendments for Final Approval

INMATE FILINGS: RULES 4(C)(1) AND 25(A)(2)(C), FORMS 1 AND 5, AND NEW FORM 7 – Judge Colloton first introduced the proposed amendments designed to clarify and improve the inmate-filing rules. After studying the matter since 2007, the Advisory Committee believes the rules should be clarified in light of concerns expressed about conflicts in case law and ambiguity in the current text. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence – a declaration, notarized statement, or other evidence such as a postmark and date stamp – showing that the document was deposited on or before the due date and that the postage was prepaid. New Form 7 suggests a form of declaration that would satisfy Rules 4(c)(1) and 25(a)(2)(C). Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, the court of appeals retains discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

Judge Colloton called the Committee's attention to several changes after publication. After publication, the Advisory Committee decided to abandon its prior proposal to delete the legal mail system requirement from Rules 4(c)(1) and 25(a)(2)(C). Research by Professor Struve and comments received convinced the Advisory Committee that retaining the requirement to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped, thus avoiding unnecessary litigation over the timing of deposits. In addition, the Advisory Committee

revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to reflect comments received in an effort to make all three forms more user-friendly and to make the new form more accurate.

One member suggested clarifying Forms 1 and 5 by referring to "this" notice of appeal rather than "the" notice of appeal in the new notes to inmate filers; Judge Colloton accepted the suggestion as a friendly amendment. Another member questioned the procedure of relying upon convicted felons to swear under penalty of perjury as to the truth of their declarations as to timeliness. The Chair noted the tremendous variation among jurisdictions as to requirements. Judge Colloton observed that the Advisory Committee did not consider whether to require more by way of verification than the current federal rule, but that a litigant could challenge a suspicious verification.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to the inmate filing rules and related forms – Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7 – for submission to the Judicial Conference for final approval.**

TOLLING MOTIONS: RULE 4(a)(4) – Judge Colloton next reviewed the proposed amendment to Appellate Rule 4(a)(4) concerning tolling motions filed in the district court. Appellate Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The question is whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a district court mistakenly ordered an "extension" of the deadline for filing the motion, or if the opposing party did not object to the untimely filing. A majority of the circuits that have considered this question have ruled that such a motion is not "timely" for purposes of Rule 4(a)(4). The minority view holding otherwise stands in some tension with the Supreme Court's decision in *Bowles v. Russell*, which held that courts have no authority to create equitable exceptions to jurisdictional requirements.

The Advisory Committee feels that it is important to clarify the meaning of "timely" in Rule 4(a)(4) and that uniformity in this area is important. The proposed amendment adopts the majority view – *i.e.*, that post-judgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law.

After publication, one commenter argued that the proposed amended Rule, like the current version, sets a trap for unwary litigants, a concern discussed at length by the Advisory Committee in its deliberations. The Advisory Committee ultimately adhered to its judgment that the Rule should be amended to adopt the majority view. The Advisory Committee observed that the Committee Note includes examples to promote understanding of the Rule.

One member asked about the range of other options considered given the high percentage of cases litigated by pro se litigants and the reality that in a rare case a litigant's appeal could be dismissed as untimely even though the district court had allowed additional time for a motion. Judge Colloton discussed the policy choices faced by the Advisory Committee. Discussion followed concerning the factual scenario underlying the Supreme Court's decision in *Bowles*, where a district court told a litigant that the litigant had more time to appeal than the rule and statute actually permitted, and the

Supreme Court upheld the judgment of the Sixth Circuit finding the litigant's appeal untimely. The Advisory Committee's proposed rule would not change that result, and simply defines "timely." Discussion followed concerning possible ways to change the result in a *Bowles* scenario by rule.

Members discussed whether this is the rare instance where congressional amendment to the jurisdictional statute might be properly sought. One member noted in support of that possibility the growing number of pro se litigants and the change away from a system where most parties have lawyers. In light of the discussion, and at the request of a member of the Standing Committee, Judge Colloton agreed to put on the Advisory Committee's agenda further consideration of exceptions to appeal deadlines, whether by rulemaking or proposed legislation.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 4(a)(4) for submission to the Judicial Conference for final approval.**

LENGTH LIMITS: RULES 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6 – Judge Colloton next reviewed the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – approved unanimously by the Advisory Committee after post-publication changes – that would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page.

The genesis of this project was the suggestion that length limits set in terms of pages are subject to undesirable manipulation and in any event have been superseded by advances in technology. Given that briefs are already subject to type-volume limits, and that the Supreme Court employs type-volume limits, the Advisory Committee determined the suggestion was a sensible one, and embarked on selecting a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit – that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee considered information that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules in fact contained fewer than 280 words per page.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page – that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule. The published proposals add a new Rule 32(f) setting forth a list of items to be excluded when computing length.

Many appellate lawyers and certain judges opposed a reduction in the length limits for briefs, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on

the Advisory Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In reviewing the suggestion of commentators to withdraw the proposal, therefore, the Advisory Committee considered whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

As noted, the Advisory Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the current proposal now before the Standing Committee. The amendments would reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

The Standing Committee Liaison to the Appellate Rules Advisory Committee spoke in support of the compromise position, which was the result of a thorough, deliberative process, robust debate, and careful review of a considerable number of comments received. The process resulted in a compromise informed by voluminous comments received and many differing viewpoints.

One member expressed concern that the proposed changes attempt to solve a "non-problem" given the case-specific nature of whether a brief is too long, and this member also expressed reservations that the proposal builds lack of uniformity into the rules and invites motions for leave to file over-length briefs. This member agreed that the process was well-done and for that reason that member would not vote against the compromise but would likely abstain. Another member seconded concerns about uniformity and the difficulty of discouraging lengthy briefs by rule, but expressed support for the proposal because of strong belief that most briefs are too long.

Another member supported the proposal even though the member's circuit may opt out to avoid anticipated motions to file over-length briefs. As to concerns about lack of uniformity, lawyers can (and do) manage differences now. Circuits should not have to continue accepting briefs of a length that they think they do not need.

One member asked about the reaction of the appellate bar to the compromise proposal. Another member questioned how many circuits might opt out, and expressed concern about approving a rule when circuits might opt out. Judge Colloton declined to predict the reaction of the bar or what circuits would do. He noted that the proposal would go to the Judicial Conference, and the Chief Judges would be there and could react and express their views. Judge Colloton commented that the concerns voiced by members were considered carefully by the Advisory Committee, as they mirrored many comments received. On the uniformity point, Judge Colloton noted the absence of uniform length limits in the district courts.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments related to length limits – Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – for submission to the Judicial Conference for final approval, with one abstention.**

One member of the Advisory Committee commended Judge Colloton for his handling of a difficult issue and brokering of compromise. Judge Sutton echoed praise for Judge Colloton and Professor Struve and for the process that produced the compromise. Professor Kimble noted his appreciation of the chart collecting length limits and encouraged similar efforts where appropriate. Judge Sutton endorsed the effort as one that improves access to justice, particularly for unrepresented litigants.

AMICUS FILINGS IN CONNECTION WITH REHEARING: RULE 29 – Judge Colloton next introduced the proposed amendment to Rule 29. The problem identified for the Advisory Committee was the absence of a national rule on timing and length of amicus briefs in support of a petition for rehearing. While some local rules do exist, given the uncertainty for practitioners, the Advisory Committee proposes amendments to establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. The amendments would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case. Either way, the new default federal rule would ensure that some rule governs the filings in every circuit. The published proposal would have set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). Amicus opposing the petition would have the same due date as that set by the court for the response.

In response to the public comments, the Advisory Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Advisory Committee also deleted the alternative line limit from the length limit as unnecessary.

One member spoke in favor of the proposal, noting his view that the selection of a particular length limit or filing deadline was not as important as providing practitioners definitive guidance. This member was one of the original proponents of addressing the issue through rulemaking.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 29 for submission to the Judicial Conference for final approval.**

RULE 26(C) – AMENDING THE "THREE-DAY RULE": RULE 26(C) – The Chair noted the approval of the proposed amendment to Rule 26(c) as part of the Committee's prior vote on the three-day rule package.

UPDATING A CROSS-REFERENCE IN RULE 26(a)(4)(C) – Judge Colloton next explained the proposal to amend Rule 26(a)(4)(C) to correct an outdated cross-reference. In 2013, Rule 13 – governing appeals as of right from the Tax Court – was revised and became Rule 13(a). A new Rule 13(b) – providing that Rule 5 governs permissive appeals from the Tax Court – was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to

"filing by mail under Rule 13(a)(2)." The Advisory Committee asks to amend Rule 26(a)(4)(C) to update this cross-reference with the understanding that the change is a technical amendment that can proceed to the Judicial Conference without publication upon approval from the Standing Committee.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 26(a)(4)(C) for submission to the Judicial Conference for final approval.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell addressed the intention to undertake an educational campaign concerning the Duke Rules Package approved by the Supreme Court, assuming that Congress allows the amendments to become effective December 1, 2015. These rules impact case management, discovery, and electronically-stored information, and they encourage greater cooperation. The lesson of rulemaking is that rule changes alone do not change behavior. Judge Paul Grimm, Discovery Subcommittee Chair, will lead the effort, which will include articles to be read by bench and bar, presentations at judicial conferences, preparation of materials for presentation at other conferences, videos, and more. The FJC will help to educate judges and publicize the benefits that can come with aggressive case management consistent with the anticipated rule changes. Judge Fogel explained that the FJC's primary focus will be on three areas: training of new judges, national conferences scheduled for district judges next year, and video educational opportunities. Judge Campbell solicited input, during the meeting and after, on these efforts and noted that the plans for the educational effort will be formed over the next six months or so, and that educational efforts will continue into 2016.

The Chair reported that DAG Yates offered DOJ as a resource for educational efforts. Members discussed options for undertaking educational efforts, including using the local and federal bar associations and taking advantage of trainings for new lawyers for admission to the federal bar.

Judge Campbell next turned to two minor rule changes as to which the Advisory Committee seeks final approval.

Amendments for Final Approval

RULE 4(m) – Judge Campbell introduced the proposed revision to Rule 4(m) referenced in the meeting materials. The Committee approved the August 2014 publication of a proposed amendment of Rule 4(m), adding service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. The amendment corrects a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time period specified in Rule 4(m). This problem is recognized by the two clear exceptions: for service on an individual in a foreign country under Rule 4(f), and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit exception for service on a foreign corporation, partnership, or other unincorporated association, which the proposed amendment makes explicit.

RULE 6(d) – Judge Campbell noted the Advisory Committee's proposal regarding Rule 6(d) had been approved by the Committee.

RULE 82 – Judge Campbell referenced the Advisory Committee's last action item dealing with an amendment to Rule 82 to reflect the reality that one referenced statute no longer exists, and the venue statutes governing admiralty actions have been amended.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to Rules 4(m), 6(d), and 82 for submission to the Judicial Conference for final approval.**

Information Items

e-Rules – The Advisory Committee has been working toward publication of proposed rules on electronic filing, electronic service, and electronic certificates of service. There are dozens of provisions in the rules that would be affected, but there is a strong feeling that change is needed. Because continuing expansion of electronic communication binds these issues together, these drafts are presented as one package. There are issues that overlap the jurisdiction of other Advisory Committees, including whether and how to mandate electronic filing and service and how to treat pro se litigants. Detailed information on these topics is included in the meeting materials.

The discussion that followed surfaced the need for more detailed understanding of local court rules and standing orders regarding pro se electronic filing, both of which may vary substantially by jurisdiction. Other areas for exploration include the specifics of PACER use by pro se litigants, and potential issues of allowing access to those who are not officers of the court.

Rule 68 – The Advisory Committee continues to look at possible changes to Rule 68 – whether it should be revised to become more effective, left alone, or studied for abrogation. The Advisory Committee is examining state practices to see whether actual experience shows good results achieved under a different approach to offers of judgment.

Rule 23 Subcommittee – Judge Campbell reported that the Rule 23 Subcommittee chaired by Judge Dow has been very active and has made significant strides in identifying issues on which to focus and in exploring ideas about how rule changes might address those issues. The Subcommittee has participated in 15 events over the past six months and more are scheduled. The Advisory Committee hopes to suggest concrete proposals for publication at the Spring 2016 Standing Committee meeting.

Judge Campbell briefly reviewed the issues under consideration by the Subcommittee and invited suggestions about additional topics. Issues under consideration include: (1) settlement approval criteria; (2) settlement class certification and the wisdom of a new Rule 23(b)(4) permitting certification for purposes of settlement; (3) very challenging issue surrounding *cy pres* in class action settlements; (4) the role available to objectors in the class action settlement process, and the tricky task of writing a rule that facilitates "good" objectors while deterring "bad" objectors; (5) Rule 68 offers of judgment used to moot proposed class actions; (6) how issue classes should be managed; (7) a range of

notice issues, including possible substitution of e-notice for first-class mail, whether some form of notice should be required in (b)(1) or (b)(2) class actions, and other possible steps to make notice more effective and perhaps less expensive; (8) the concept of "frontloading," meaning the procedure to follow when the parties propose settlement before a class has been certified, so that the court has full information about the litigation and the proposed settlement to support a decision whether to give notice to the class of the proposed settlement and certification; and (9) the question of ascertainability.

The Chair noted the importance of identifying circuit splits that exist on the application and interpretation of Rule 23 and considering the potential for rulemaking in those areas, even if the Subcommittee declines to recommend pursuing certain issues through rulemaking.

The Subcommittee will host a Mini-conference on September 11, 2015 in Dallas, Texas, to explore potential amendments to Rule 23. The Subcommittee will invite 25 participants from diverse perspectives.

Requester Pays – As reflected in the Advisory Committee report, the Discovery Subcommittee continues to consider possible implementation of a "requester pays" system. Members of Congress asked the rules committees to continue to study this question. Information is being gathered to aid the Discovery Subcommittee chaired by Judge Grimm. The recent amendment package is important to the committee's consideration because like a "requester pays" regime, the proposed rule amendments aim to reduce the costs of civil litigation.

Manufactured Finality – These two projects of the Appellate-Civil Subcommittee began in the Appellate Rules Committee. In the end, the Civil Rules Committee voted, with one dissent, to advise the Appellate Rules Committee that the Civil Rules Committee does not believe that an effort should be made to draft rules to govern the many phenomena that can be characterized as "manufactured finality." The Advisory Committee concluded there is no need for national uniformity in this area, and each circuit is satisfied with its own rules.

Judge Colloton, speaking for the Appellate Rules Committee, said that although a member expressed concern about uniformity, the Committee had elected to table the matter for the time being, believing that any Rule amendment should originate in the Civil Rules Committee. Judge Sutton noted that having listened to discussion in both Advisory Committee meetings, there was not a consensus on a substantive direction to take if the rules committees were resolved to address the issue. If uniformity is a driver, perhaps the Supreme Court will resolve the issue.

Stays Pending Appeal – Subcommittee consideration of these questions is in mid-stream. One simple starting point in exploring Rule 62 was to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay – 14 days – and the time allowed to make the motions that support a stay under Rule 62(b) – which is 28 days. Lawyers are not reporting a problem; lawyers apparently are working this out among themselves. One question is what problems would result from extending the automatic stay to 28 or 30 days, and whether those problems would be alleviated if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay. The central point made in Advisory Committee discussion was that neither the judges nor the lawyers have encountered difficulties with stays of money

judgments pending appeal. Ordinarily the parties work out a reasonable solution. Judge Campbell solicited views from the Committee. One member questioned whether stating more explicitly the availability of a work around to obtaining a supersedeas bond would have the effect of discouraging use of those bonds.

Pilot Projects – The discussion of pilot projects at the January meeting of the Standing Committee stimulated further discussion of the opportunities to foster projects that will advance the base of empirical information that can be used in crafting improved rules of procedure. Judge Sutton addressed the desire to coordinate pilot project discussions with the CACM Committee and its current Chair Judge Hodges, and noted Judge St. Eve would be a great resource in a liaison role between the Rules Committees and CACM given her history of service on both.

Judge Sutton acknowledged the last meeting of Judge Campbell as Chair of the Civil Rules Advisory Committee and praised his decade of service to the rules committees, and his last four years as Chair of the Civil Rules Advisory Committee. He noted that Judge Campbell dealt effectively with all of the various cross currents of the Civil Rules Package, and, quite impressively, achieved unanimous consensus. The entire Civil Rules Package effort dignified the Rules Enabling Act process. Judge Campbell noted that the Civil Rules Package was a team effort.

LEGISLATIVE REPORT

Rebecca Womeldorf reported on legislation that may intersect with the work of the Committee, particularly the Advisory Committee on Civil Rules. Covered legislation included: patent legislation, the Lawsuit Abuse Reduction Act of 2015 ("LARA"), and the Fairness in Class Action Act of 2015. Discussion followed, particularly as to one aspect of potential patent legislation that would require designation of core versus non-core discovery, a topic that intersects with mandatory early disclosures and some of the issues discussed in connection with pilot projects under consideration. The ability of the rules committees to react in the case of legislative mandates was also discussed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta recognized the tremendous service of Troy McKenzie as Associate Reporter to the Advisory Committee and wished him well in his new position with the Office of Legal Counsel at the Department of Justice.

Judge Ikuta summarized the action items from the Advisory Committee as seeking the Committee's final approval of one proposed new rule, four rule amendments, and the last major group of forms that were revised as part of the Forms Modernization Project ("FMP"). The Advisory Committee also seeks approval of one proposal for publication. Judge Ikuta noted that none of the committee's action items was controversial, and referred to the Advisory Committee report and appendices for additional detail on the proposals and the forms.

Amendments for Final Approval

RULES 1010, 1011, AND 2002, AND PROPOSED NEW RULE 1012 (GOVERNING RESPONSES TO, AND NOTICES OF HEARINGS ON, CHAPTER 15 PETITIONS FOR RECOGNITION, ALONG WITH NEW OFFICIAL FORM 401) – The Advisory Committee asks for final approval as published of these amendments and additions to the Bankruptcy Rules, which are part of a project to improve procedures for international bankruptcy cases and to give those rules their own "home" in the Bankruptcy Rules. The Bankruptcy Rules were amended in response to the 2005 amendments to the Bankruptcy Code to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15 related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in international bankruptcy cases. The proposed Official Form 401 is a new petition form for commencing chapter 15 international cases. None of these changes generated any opposition.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rules 1010, 1011, and 2002, and proposed new Rule 1012, along with new official Form 401, for submission to the Judicial Conference for final approval.**

RULE 3002.1 (ALONG WITH OFFICIAL FORM 410A) – The Advisory Committee proposes a change to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) to ensure that debtors who attempt to maintain their home mortgage payments while they are in bankruptcy will have the information they need to do so. Rule 3002.1, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's home to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. The proposed change clarifies how the rule applies in various scenarios on which courts have disagreed. An accompanying change to Form 410A requires a creditor to provide loan payment history information to the debtor in a format that is both more beneficial to the debtor and easier for the creditor to prepare.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 3002.1, along with official Form 410A, for submission to the Judicial Conference for final approval.**

RULE 9006(f) (ELIMINATING THE 3-DAY RULE FOR ELECTRONIC FILING) – Judge Ikuta noted prior approval by the Committee, along with similar amendments to other rules.

FORMS MODERNIZATION PROJECT – Judge Ikuta announced the final set of forms from the Advisory Committee's Forms Modernization Project (FMP) was ready for consideration, along with minor revisions to modernized forms previously approved by the Committee.

Judge Ikuta explained one issue regarding the effective date of the modernized forms. When the FMP effort began, it was anticipated that the new forms would go into effect at approximately the same time

as bankruptcy courts began using the redesigned case management system, known as the Next Generation of CM/ECF (NextGen). A goal of NextGen is to capture and store all material individual pieces of data used to complete bankruptcy forms so that users such as the court and clerk's office can prepare customized reports, putting the data in any order the user wants.

Although the FMP developed the modernized forms in a manner that would facilitate data collection by the NextGen case management system, the roll-out of NextGen is proceeding more slowly than expected. Under the current schedule, by the end of 2015 no more than a handful of bankruptcy courts will be on the NextGen case management system. The AO estimates that by December 2016, NextGen will have the capacity to capture and store all of the data elements from forms filed by individual debtors using the modernized forms (about 70 percent of bankruptcy cases). By December 2017, the AO estimates that the NextGen case management system will be able to capture and store all of the data elements by all debtors using the modernized forms.

Notwithstanding the delays in the implementation of NextGen, the Advisory Committee at its spring meeting voted unanimously to seek a December 1, 2015 effective date for the modernized and renumbered forms. Several considerations support that decision. First, the FMP has produced a set of vastly improved, user-friendly forms that will be a benefit to the bankruptcy community (including *pro se* filers) even without the extra capability with the NextGen system. Second, if the modernized forms take effect on December 1, 2015, the AO will be able to build a backend database that will store the information from the modernized forms, rather than the old forms. This approach will not prevent the AO from capturing the 80 data points required by the 2005 bankruptcy legislation.

Judge Ikuta noted one wrinkle to implementing the modernized forms in 2015, and sought the guidance of the Committee. The United States Bankruptcy Court for the District of New Jersey developed a program that lets *pro se* filers use what is essentially a Turbo Tax-like system to complete and file a chapter 7 bankruptcy case electronically. This concept, which was further developed by the court and the AO, is named the electronic self-representation (eSR) pathfinder program. The courts that have implemented this eSR program emphasize its importance as an access-to-justice project. The eSR program is linked to the current chapter 7 case opening forms. The eSR data-entry screens and database will not work with modernized forms. The AO estimates that by 2017 eSR will work with the new forms.

Because the Advisory Committee concluded that the modernized forms should go into effect generally on December 1, 2015, but without disrupting the already established eSR pilot projects, it asked the Standing Committee to seek approval of the following from the Judicial Conference:

a. To make the forms effective December 1, 2015.
b. To allow the Advisory Committee to continue to make minor typo-type changes to these forms even after Committee approval.
c. To recommend to the Judicial Conference that it allow specified chapter 7 case-opening forms to continue to be official forms for the eSR program in the Central District of California, New Jersey, and New Mexico bankruptcy courts until 2017.

One member observed this proposal was consistent with the implementation of NextGen and was the right recommendation under the circumstances.

One member noted the fortuity of having the clerk of the New Jersey bankruptcy court on the committee, and thanked the clerk for his valuable input.

Another member questioned the wisdom of specifying an effective date as opposed to leaving the provision open ended; after discussion, the member who raised the question moved the proposal as written to keep the hard target date.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the Advisory Committee's request to ask the Judicial Conference: to authorize the modernized forms as effective December 1, 2015; to allow the Advisory Committee to make minor, non-substantive revisions to the official forms before submitting them to the Judicial Conference; and to allow specified case-opening forms in effect on November 30, 2015 to remain official forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by pro se debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation system.**

Amendment for Publication

RULE 1006(6)(1) – The provision provides for the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee is proposing an amendment to Rule 1006(b)(1). The amendment is intended to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006(b)(1).**

Information Items

Stern Amendments in Light of *Wellness v. Sharif* – Judge Ikuta reported on the Supreme Court's decision in *Wellness v. Sharif*, which held that if parties consent, bankruptcy judges can resolve claims otherwise reserved to Article III judges. The Court held that implied consent may satisfy the consent requirement, but that an express-consent approach may be easier to implement. Judge Ikuta reported that the Advisory Committee would reconsider at its Fall 2015 meeting its pending *Stern* amendments – which required express consent and had been held in abeyance pending the Court's decision in *Wellness.* Discussion followed concerning the timing of submissions to the Court.

Chapter 13 Plan Form – Judge Ikuta next reported on the status of the committee's multi-year project to create an official chapter 13 plan form. The proposal was initially published in August 2013, and re-

published in August 2014 after revision in response to substantial comments received. Again, the Advisory Committee received many comments, most in opposition, and with one opposition signed by 40% of the bankruptcy bench. After reviewing the comments on the proposed chapter 13 plan form, the Committee determined that there is still significant opposition to this new form, and it voted not to seek final approval of the form and related rule amendments at this time. Instead, the Advisory Committee intends to give further consideration to a compromise proposal, suggested by a group of commenters, that would allow a district to opt out of the mandatory national form if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements.

Discussion followed concerning the decision to develop a compromise proposal to allow a district to opt out of using a national chapter 13 plan form if the district adopted a single local plan form that met certain criteria, which will be considered at the Advisory Committee's October 2015 meeting. The Advisory Committee is considering whether such a revised approach would require republication, given that variations on the proposed form had gone through two rounds of publication already. While the Advisory Committee has discussed this issue, it decided to defer making the decision about republication until the October 2015 meeting pending more feedback from the bankruptcy community.

Discussion of the merits of republication followed, including the implications of republication on the Rules Enabling Act process.

CONCLUDING REMARKS

Judge Sutton expressed gratitude and farewell to outgoing members Dean Colson and Judge Levi. Judge Sutton also recognized the 30th anniversary of service to the Committee by Professor Coquillette.

Judge Sutton concluded the meeting and announced that the Committee will next convene on January 7-8, 2016 in Phoenix, Arizona.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary