ADVISORY COMMITTEE ON APPELLATE RULES

October 19, 2023

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of October 19, 2023

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TAB 1

TAB 1A

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure (Standing Committee)

Chair

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

Reporter

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

Secretary to the Standing Committee

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

Advisory Committee on Appellate Rules

Chair

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

Reporter

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

Advisory Committee on Bankruptcy Rules

Chair

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

Reporter

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

Associate Reporter

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

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Civil Rules

Chair

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United States District Court
West Palm Beach, FL

Reporter

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

Associate Reporter

Professor Andrew Bradt
University of California, Berkeley
Berkeley, CA

Advisory Committee on Criminal Rules

Chair

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United States District Court
Raleigh, NC

Reporter

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

Associate Reporter

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

Advisory Committee on Evidence Rules

Chair

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

Reporter

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

ADVISORY COMMITTEE ON APPELLATE RULES

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

Members

Linda Coberly, Esq. Winston & Strawn LLP Chicago, IL	George W. Hicks, Jr., Esq. Kirkland & Ellis LLP Washington, DC
Professor Bert Huang Columbia Law School New York, NY	Honorable Leondra R. Kruger Supreme Court of California San Francisco, CA
Honorable Carl J. Nichols United States District Court Washington, DC	Honorable Elizabeth B. Prelogar Solicitor General (ex officio) United States Department of Justice Washington, DC
Honorable Sidney R. Thomas United States Court of Appeals Billings, MT	Honorable Richard C. Wesley United States Court of Appeals Geneseo, NY
Lisa B. Wright, Esq. Office of the Federal Public Defender Washington, DC	

Liaisons

Honorable Daniel A. Bress (*Bankruptcy*) United States Court of Appeals San Francisco, CA	Andrew J. Pincus, Esq. (*Standing*) Mayer Brown LLP Washington, DC

Clerk of Court Representative

Molly Dwyer, Esq.
Clerk
United States Court of Appeals
San Francisco, CA

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date		End Date
Jay S. Bybee Chair	C	Ninth Circuit	Member: Chair:	2017 2020	---- 2024
Linda Coberly	ESQ	Chicago, IL		2023	2026
George W. Hicks, Jr.	ESQ	Washington, DC		2022	2025
Bert Huang	ACAD	New York		2022	2025
Leondra R. Kruger	JUST	California		2021	2024
Carl J. Nichols	D	District of Columbia		2021	2024
Elizabeth Prelogar*	DOJ	Washington, DC		----	Open
Sidney R. Thomas	C	Ninth Circuit		2023	2025
Richard C. Wesley	C	Second Circuit		2020	2026
Lisa B. Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)		2019	2025
Edward Hartnett Reporter	ACAD	New Jersey		2018	2025

Principal Staff: Bridget Healy, 202-502-1820

* Ex-officio - Solicitor General

ADVISORY COMMITTEE ON APPELLATE RULES
SUBCOMMITTEES
(2023–2024)

<table>
<tr><td><u>Amicus Disclosures Subcommittee</u>
Prof. Bert Huang
Lisa Wright, Esq.</td><td><u>Bankruptcy Appeals Subcommittee</u>
Judge Leondra Kruger
Prof. Bert Huang</td></tr>
<tr><td><u>Costs on Appeal Subcommittee</u>
Judge Carl Nichols
Judge Richard Wesley
Mark Freeman, Esq.</td><td><u>E-Filing Deadline Joint Subcommittee</u>
Judge Jay Bybee, Chair
Judge Catherine McEwen
Judge Cathy Bissoon
Judge Carl Nichols
Catherine Recker, Esq.
Jeremy Retherford, Esq.
Joshua Gardner, Esq.</td></tr>
<tr><td><u>IFP Form 4 Subcommittee</u>
Lisa Wright, Esq.</td><td><u>Intervention on Appeal Subcommittee</u>
Judge Leondra Kruger
Prof. Bert Huang
Mark Freeman, Esq.</td></tr>
</table>

RULES COMMITTEE LIAISON MEMBERS

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

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(Criminal)

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

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1B

	FRAP Item	Proposal	Source	Current Status
	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Effective 12/21
	17-AP-G	Rule 42(b)–discretionary “may” dismissal of appeal on consent of all parties	Christopher Landau	Effective 12/22
	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Effective 12/22
7	None assigned	Rules for Future Emergencies Rules 2 and 4	Congress (CARES Act)	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Draft approved for publication by Standing Committee 6/21 Discussed at 10/21 meeting Final approval for submission to Standing Committee 3/22 Approved by Standing Committee 6/22 Approved by Judicial Conference 9/22 Submitted to Supreme Court 10/22 Approved by Supreme Court 4/23
7	None assigned	Add Juneteenth to Rule 26	Congress	Initial consideration 3/22 Final approval for submission to Standing Committee 3/22 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/22 Submitted to Supreme Court 10/22 Approved by Supreme Court 4/23

	FRAP Item	Proposal	Source	Current Status
6	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting Discussed at 4/19 meeting Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Remanded by Standing Committee 6/21 Draft approved for resubmission to Standing Committee 10/21 Draft approved for publication by Standing Committee 1/22 Correction approved for submission to Standing Committee 3/22 Correction approved for publication by Standing Committee 6/21 Discussed at 10/22 meeting Final approval for submission to Standing Committee 3/23 Approved by Standing Committee 6/23 Approved by Judicial Conference 9/23
3	21-AP-D	Costs on Appeal	Alan Morrison	Initial consideration of suggestion and subcommittee formed 10/21 Discussed at 3/22 meeting Discussed at 10/22 meeting Discussed at 3/23 meeting Draft approved for submission to Standing Committee 3/23 Draft approved for publication by Standing Committee 6/23
3	None assigned	Rule 39; Direct Appeals; Rules 4 & 6; Resetting Time to Appeal in Bankruptcy Cases	Bankruptcy Committee	Discussed at 10/22 meeting and subcommittee formed Discussed at 3/23 meeting Draft approved for submission to Standing Committee 3/23 Draft approved for publication by Standing Committee 6/23
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting

	FRAP Item	Proposal	Source	Current Status
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19 Discussed at 4/20 meeting and subcommittee formed Discussed at 10/20 meeting Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting and held
1	20-AP-D	IFP Forms	Sai	Initial consideration 10/20 and referred to IFP subcommittee Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting and held
1	21-AP-B	IFP Forms	Sai	Initial consideration and referred to IFP subcommittee 4/21 Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting and held
1	21-AP-C	Amicus Disclosures	Senator Whitehouse & Representative Johnson	Issue noted and subcommittee formed 10/19 Initial consideration of suggestion 4/21 Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting Discussed at 3/23 meeting
1	21-AP-E	Electronic Filing by Pro Se Litigants	Sai	Initial consideration of suggestion and referred to reporters 10/21 Discussed at 3/22 meeting Discussed at 10/22 meeting Discussed at 3/23 meeting
1	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration 10/20 and tabled pending consideration by Civil Rules Committee Referred to reporters 10/21 See 21-AP-E
1	21-AP-G	Comment on 21-AP-C	Chamber of Commerce	Initial consideration 3/22 See 21-AP-C
1	21-AP-H	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration 3/22 See 21-AP-C

	FRAP Item	Proposal	Source	Current Status
1	22-AP-A	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration 3/22 See 21-AP-C
1	22-AP-E	Social Security Numbers in Court Filings	Senator Widen	Initial consideration 3/23 Discussed at 3/23 meeting
1	22-AP-G	Intervention on Appeal	Stephen Sachs	Initial consideration and subcommittee formed 3/23
1	23-AP-A	Rule 29; Amicus Briefs	DRI Center	Initial consideration and referred to amicus subcommittee 3/23
1	23-AP-B	Rule 29; Amicus Briefs	Atlantic Legal Foundation	Initial consideration and referred to amicus subcommittee 3/23
1	23-AP-C	Intervention on Appeal	Judith Resnik	Initial consideration and subcommittee formed 3/23 See 22-AP-G
1	23-AP-D	New rule regarding contempt	Joshua Carback	Initial consideration 10/23
1	23-AP-E	Comment on 21-AP-C	People United for Privacy	Initial consideration 10/23
1	23-AP-F	Nationwide filing deadline	Howard Bashman	Initial consideration 10/23
1	23-AP-G	Civil Rule 11	Andrew Straw	Initial consideration 10/23
1	23-AP-H	Rule 17	Thomas Dougherty	Initial consideration 10/23
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21 Discussed at 4/21 meeting and postponed until 4/24
0	22-AP-C	Third-Party Litigation Funding Disclosure	Lawyers for Civil Justice	Initial consideration 10/22 Discussed and held pending Civil Committee 3/23
0	22-AP-D	Comment on 22-AP-C	International Legal Finance Association	Initial consideration 3/23 See 22-AP-C
0	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19 and subcommittee formed Discussed at 4/20 meeting and to be considered in 4/23 Discussed at 3/23 meeting and removed from agenda

	FRAP Item	Proposal	Source	Current Status
0	22-AP-F	Rule 46; Admission to the Bar	Erwin Rosenberg	Initial consideration 3/23 and removed from the agenda

0 recently moved from agenda or deferred to future meeting
1 pending before Advisory Committee prior to public comment
2 approved by Advisory Committee and submitted to Standing Committee for publication
3 out for public comment
4 pending before Advisory Committee after public comment
5 final approval by Advisory Committee and submitted to Standing Committee
6 approved by Standing Committee
7 approved by SCOTUS

TAB 1C

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2023

Current Step in REA Process:
- Transmitted to Congress (Apr 2023)

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

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." The amendments would put the burden on the claim holder to identify the elements of its claim.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:
- Transmitted to Congress (Apr 2023)

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

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within … 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2023

Current Step in REA Process:
- Transmitted to Congress (Apr 2023)

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

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:
- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Revised September 11, 2023

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

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

REA History:

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

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

Revised September 11, 2023

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2025

Current Step in REA Process:
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

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

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

TAB 1D

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
National Defense Authorization Act for Fiscal Year 2024	**H.R. 2670** *Sponsor:* Rogers (R-AL) *Cosponsor:* Smith (D-WA) **S. 2226** *Sponsor:* Reed (D-RI)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670eas.pdf https://www.congress.gov/118/bills/s2226/BILLS-118s2226es.pdf **Summary:** Section 9011(a)(2)(B) of H.R. 2670, as amended and passed by the Senate but disagreed to by the House, and of S. 2226, as passed by the Senate, would deem that a "request for disclosure of unidentified anomalous phenomena, technologies of unknown origin, and non-human intelligence materials . . . constitute[s] a showing of particularized need under rule 6 of the Federal Rules of Criminal Procedure."	• 09/20/2023: House appointed conferees and requested a conference to resolve differences • 09/19/2023: House disagreed to the Senate amendment to H.R. 2670 • 07/27/2023: Senate passed S. 2226 with an amendment (86–11); Senate amended H.R. 2670 by striking all after the Enacting Clause and substituting the language of S. 2226, as amended; Senate passed H.R. 2670, as amended, by unanimous consent • 07/26/2023: H.R. 2670 received in Senate • 07/14/2023: H.R. 2670 passed House (219–210) • 07/11/2023: S. 2226 introduced in Senate • 06/21/2023: H.R. 2670 ordered to be reported as amended (58–1). • 04/18/2023: H.R. 2670 introduced in House; referred to Armed Services Committee
Protecting Our Courts from Foreign Manipulation Act of 2023	**H.R. 5488** *Sponsor:* Johnson (R-LA) **S. 2805** *Sponsor:* Kennedy (R-LA) *Cosponsor:* Manchin (D-WV)	CV 26(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5488/BILLS-118hr5488ih.pdf https://www.congress.gov/118/bills/s2805/BILLS-118s2805is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party "foreign person, foreign state, or sovereign wealth fund . . . that has a right to receive any	• 09/14/2023: H.R. 5488 introduced in House; referred to Judiciary Committee • S. 2805 introduced in Senate; referred to Judiciary Committee

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			payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise. . . .” Would further require disclosure of the source of funding and, by default, a copy of any agreement creating the contingent right. Would prohibit third-party ligation funding by foreign states and sovereign wealth funds	
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 90 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 34 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices’ nomination, confirmation, or appointment. Would require expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge	• 09/05/2023: Placed on Senate Legislative Calendar under General Orders. Calendar No. 199. • 07/20/2023: S. 359 ordered to be reported favorably, with an amendment • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would require promulgation of Rules to put any criminal surveillance order, including search warrants, on the public docket and/or create a case number and caption. There would be exceptions to address personal information and where the surveillance applicant asks the court to seal the order Would amend Criminal Rule 41(f)(1)(B) by adding that an inventory shall disclose information about any electronic information	• 09/01/2023: H.R. 5331 introduced in House; Referred to Judiciary Committee
Protect Reporters from Exploitative	**H.R. 4250** *Sponsor:* Kiley (R-CA)	CV 26–37, 45; BK 7026–37, 9016;	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4250/BILLS-118hr4250ih.pdf	• 07/19/2023: H.R. 4250 ordered reported (23–0) • 06/21/2023: H.R. 4250 introduced in House;

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State Spying (PRESS) Act	*Cosponsors:* 19 bipartisan cosponsors **S. 2074** *Sponsor:* Wyden (D-OR) *Cosponsors:* Lee (R-UT) Durbin (D-IL) Graham (R-SC)	CR 16, 17	https://www.congress.gov/118/bills/s2074/BILLS-118s2074is.pdf **Summary:** Would require federal entities to obtain court authorization to compel testimony or certain documents from covered journalists or covered providers; court must find by preponderance of evidence that "there is a reasonable threat of imminent violence unless the testimony or document is provided"	referred to Judiciary Committee • S. 2074 introduced in Senate; referred to Judiciary Committee
Bring Our Heroes Home Act	**H.R. 3110** *Sponsor:* Pappas (D-NH) *Cosponsors:* Fulcher (R-ID) Houlahan (D-PA) Simpson (R-ID) **S. 2315** *Sponsor:* Crapo (D-ID) *Cosponsors:* 9 bipartisan cosponsors	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3110/BILLS-118hr3110ih.pdf https://www.congress.gov/118/bills/s2315/BILLS-118s2315is.pdf **Summary:** Would deem that a "request for disclosure of [H.R. 3110: Missing Armed Forces Personnel; S. 2315: missing Armed Forces and civilian personnel] materials . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure"	• 07/13/2023: S. 2315 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 05/05/2023: H.R. 3110 introduced in House; referred to Oversight & Accountability Committee
LGBTQ+ Panic Defense Prohibition Act of 2023	**H.R. 4432** *Sponsor:* Pappas (D-NH) *Cosponsor:* Davids (D-KS) **S. 2279** *Sponsor:* Markey (D-MA) *Cosponsors:* 17 Democratic or Democratic-caucusing cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4432/BILLS-118hr4432ih.pdf https://www.congress.gov/118/bills/s2279/BILLS-118s2279is.pdf **Summary:** Would preclude the use of evidence of a "nonviolent sexual advance or perception of belief, even if inaccurate, of the gender, gender identity, or sexual orientation of an individual . . . to excuse or justify the conduct of an individual or mitigate the severity of an offense," except that a court may admit evidence "of prior trauma to the defendant for the purpose of excusing or justifying the conduct of the defendant or mitigating the severity of an offense"	• 07/12/2023: S. 2279 introduced in Senate; referred to Judiciary Committee • 06/30/2023: H.R. 4432 introduced in House; referred to Judiciary Committee
Judicial Ethics and Anti-Corruption Act of 2023	**H.R. 3973** *Sponsor:* Jayapal (D-WA)	CV 26(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3973/BILLS-118hr3973ih.pdf	• 06/09/2023: H.R. 3973 introduced in House; referred to Judiciary, Oversight &

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	Cosponsors: 40 Democratic cosponsors **S. 1908** *Sponsor:* Warren (D-MA) *Cosponsors:* 8 Democratic or Democratic-caucusing cosponsors		https://www.congress.gov/118/bills/s1908/BILLS-118s1908is.pdf **Summary:** Would prohibit a court from entering an order otherwise authorized under Civil Rule 26(c) to restrict disclosure of information obtained through discovery unless the court makes certain findings regarding the protection of public health and safety and the tailoring of the order; would also prevent order from continuing in effect after entry of final judgment unless court makes similar findings	Accountability, Rules, Financial Services, Agriculture, and House Administration Committees • 06/08/2023: S. 1908 introduced in Senate; referred to Judiciary Committee
National Guard and Reservists Debt Relief Extension Act of 2023	**H.R. 3315** *Sponsor:* Cohen (D-TN) *Cosponsors:* Cline (R-VA) Dean (D-PA) Burchett (R-TN)	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3315/BILLS-118hr3315ih.pdf **Summary:** Would extend the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023	• 05/15/2023: Introduced in House; referred to Judiciary Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 14 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would establish Diwali (a/k/a Deepavali) as a federal holiday	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
Strengthening Transparency and Obligations to Protect Children Suffering from Abuse and Mistreatment (STOP CSAM) Act of 2023	**S. 1199** *Sponsor:* Durbin (D-IL) *Cosponsors:* Hawley (R-MO) Cruz (R-TX) Grassley (R-IA) Klobuchar (D-MN)	CR 32(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1199/BILLS-118s1199rs.pdf **Summary:** Would require probation officer, in preparing PSR, to request information from multidisciplinary child-abuse team or other appropriate sources "to determine the impact of the offense on a child victim and any other children who may have been affected by the offense"	• 05/15/2023: Reported favorably with an amendment; placed on Senate Legislative Calendar under General Orders • 04/19/2023: Introduced in Senate; referred to Judiciary Committee
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 18 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee

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	H.R. 3079 *Sponsor:* Bacon (R-NE) *Cosponsors:* 19 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors		**Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j)	• 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 5 Democratic cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Federal Extreme Risk Protection Order Act of 2023	**H.R. 3018** *Sponsor:* McBath (D-GA) *Cosponsor:* 95 Democratic cosponsors	CV? CR?	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3018/BILLS-118hr3018ih.pdf **Summary:** Would authorize a new kind of ex parte and permanent injunctive relief, albeit one sounding in criminal law, not civil law. The injunctive relief could also result in property forfeiture. May need new rulemaking to account for this kind of hybrid procedure	• 04/28/2023: Introduced in House; referred to Judiciary Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
Women in Criminal Justice Reform Act	**H.R. 2954** *Sponsor:* Kamlager-Dove (D-CA)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2954/BILLS-118hr2954ih.pdf **Summary:**	• 04/27/2023: Introduced in House; referred to Judiciary, Ways & Means, and Energy & Commerce Committees

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	Cosponsors: 8 Democratic & 1 Republican cosponsors		Would create a pretrial diversion program for federal criminal cases; may need new rulemaking for criminal procedure (e.g., to allow for withdrawal of guilty plea under diversion program)	
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 22 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would create new Fed. Rule of Evidence to exclude "evidence of a defendant's creative or artistic expression, whether original or derivative" as evidence against that defendant (not restricted to criminal cases); would permit it on certain showings by the government by clear and convincing evidence (but not clear what would happen in a civil case if the government is not a party)	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 2782** *Sponsor:* Porter (D-CA) *Cosponsor:* Nadler (D-NY) Cicilline (D-RI) Jayapal (D-WA)	CV 8, 12	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2782/BILLS-118hr2782ih.pdf **Summary:** Would abrogate *Twombly*'s pleading standard, at least in antitrust cases	• 04/20/2023: Introduced in House; referred to Judiciary Committee
First Step Implementation Act of 2023	**S. 1251** *Sponsor:* Durbin (D-IL) *Cosponsors:* 10 bipartisan cosponsors	AP 4(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1251/BILLS-118s1251is.pdf **Summary:** Would provide that Appellate Rule 4(a) governs the time limit for an appeal of a final order on a motion to modify a term of imprisonment imposed for crimes committed before age 18	• 04/20/2023: Introduced in Senate; referred to Judiciary Committee
Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2023	**H.R. 1059** *Sponsor:* Kelly (R-ND) *Cosponsors:* 30 bipartisan cosponsors **S. 1212** *Sponsor:* Cramer (R-ND) *Cosponsor:* 9 bipartisan cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1059/BILLS-118hr1059rfs.pdf https://www.congress.gov/118/bills/s1212/BILLS-118s1212is.pdf **Summary:** Would establish national standards for remote electronic notarization; would make signature and title of notary prima facie or conclusive evidence in determining genuineness or authority to perform notarization	• 04/19/2023: S. 1212 introduced in Senate; referred to Judiciary Committee • 02/28/2023: H.R. 1059 received in Senate; referred to Judiciary Committee • 02/27/2023: H.R. 1059 passed House by voice vote • 02/17/2023: H.R. 1059 introduced in House;

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				referred to Judiciary Committee
Online Privacy Act of 2023	**H.R. 2701** *Sponsor:* Eshoo (D-CA) *Cosponsor:* Lofgren (D-CA)	CV 4, CV 23	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2701/BILLS-118hr2701ih.pdf **Summary:** Would permit service of "petition for enforcement" for civil investigative demand under § 401 to be served by mail, and proof of service would be permitted by "verified return" including, if applicable, any "return post office receipt of delivery" Would require a class action to be prosecuted by a nonprofit organization, not an individual, and mandates equal division of total damages among entire class	• 04/19/2023: Introduced in House; referred to Energy & Commerce, House Administration, Judiciary, and Science, Space & Technology Committees
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Would terminate the national emergency declared March 13, 2020, by President Trump. Ends authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference	• 04/10/2023: Signed into law • 03/29/2023: Passed Senate (68–23) • 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit, after JCUS promulgates guidelines, district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law (e.g., CR 53)	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee
Everyone can Notice-and-Takedown Distribution of Child Sexual	**S. 823** *Sponsor:* Hawley (R-MO)	CV 4(i)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s823/BILLS-118s823is.pdf **Summary:**	• 03/15/2023: Introduced in Senate; referred to Judiciary Committee

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Abuse Material (END CSAM) Act			Would allow a private person to bring a qui tam civil action against a social-media company that does not disable access to or remove an offending visual depiction within 10 days of notice; complaint must be served on the government under Civil Rule 4(i)	
Justice for Kennedy (JFK) Act of 2023	**H.R. 637** *Sponsor:* Schweikert (R-AZ)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr637/BILLS-118hr637ih.pdf **Summary:** Would deem that a "request for disclosure of assassination records . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure"	• 03/07/2023: Introduced in House; referred to Judiciary, Oversight & Accountability, Ways & Means, Foreign Affairs, Armed Services, and Intelligence Committees
Facial Recognition and Biometric Technology Moratorium Act of 2023	**H.R. 1404** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 10 Democratic cosponsors **S. 681** *Sponsor:* Markey (D-MA) *Cosponsors:* Merkley (D-OR) Warrant (D-MA) Sanders (I-VT) Wyden (D-OR)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1404/BILLS-118hr1404ih.pdf https://www.congress.gov/118/bills/s681/BILLS-118s681is.pdf **Summary:** Would bar admission by federal government of information obtained in violation of bill in criminal, civil, administrative, or other investigations or proceedings (except in those alleging a violation of the bill itself)	• 03/07/2023: H.R. 1404 introduced in House; referred to Judiciary and Oversight & Accountability Committees • 03/07/2023: S. 681 introduced in Senate; referred to Judiciary Committee
Asylum and Border Protection Act of 2023	**H.R. 1183** *Sponsor:* Johnson (R-LA)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1183/BILLS-118hr1183ih.pdf **Summary:** Would require "an audio or audio visual recording of interviews of aliens subject to expedited removal" and would require the recording's consideration "as evidence in any further proceedings involving the alien"	• 02/24/2023: Introduced in House; referred to Judiciary Committee
Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* Buck (R-CO)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Would require rulemaking under 28 U.S.C. § 2075 "to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene without charge, and without meeting any requirement under any local	• 02/14/2023: Introduced in House; referred to Judiciary Committee

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			court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel"	
Write the Laws Act	**S. 329** *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Fourth Amendment Restoration Act	**H.R. 237** *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen	• 02/07/2023: Referred to subcommittee • 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees
Federal Police Camera and Accountability Act	**H.R. 843** *Sponsor:* Norton (D-DC) *Cosponsors:* Beyer (D-VA) Torres (D-NY)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf **Summary:** Among other things, would bar use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; would create evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if	• 02/06/2023: Introduced in House; referred to Judiciary Committee

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			recording or retention requirements not followed; and would bar use of federal body-cam footage from use as evidence if taken in violation of act or other law	
Save Americans from the Fentanyl Emergency (SAFE) Act	H.R. 568 *Sponsor:* Pappas (D-NH) *Cosponsors:* 18 bipartisan cosponsors	CR 43	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr568/BILLS-118hr568ih.pdf **Summary:** Would permit reduction or vacatur of sentence for certain crimes involving controlled substances that are "removed from designation as a fentanyl-related substance"; would not require defendant to be present at any hearing on whether to vacate or reduce a sentence	• 02/03/2023: Referred to Health Subcommittee • 01/26/2023: Introduced in House; referred to Energy & Commerce and Judiciary Committees
Limiting Emergency Powers Act of 2023	H.R. 121 *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference	• 02/01/2023: Referred to subcommittee • 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees
Restoring Judicial Separation of Powers Act	H.R. 642 *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal agency is a party" and cases "concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure	• 01/31/2023: Introduced in House; referred to Judiciary Committee
No Vaccine Passports Act	S. 181 *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s181/BILLS-118s181is.pdf	• 01/31/2023: Introduced in Senate; referred to Health, Education, Labor & Pensions Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			Summary: Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	
No Vaccine Mandates Act of 2023	**S. 167** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s167/BILLS-118s167is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Judiciary Committee
See Something, Say Something Online Act of 2023	**S. 147** *Sponsor:* Manchin (D-WV) *Cosponsor:* Cornyn (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s147/BILLS-118s147is.pdf **Summary:** Would prohibit disclosure by providers of interactive computer services of certain orders related to reporting of suspicious transmission activity; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings	• 01/30/2023: Introduced in Senate; referred to Commerce, Science & Transportation Committee
Protecting Individuals with Down Syndrome Act	**H.R. 461** *Sponsor:* Estes (R-KS) *Cosponsors:* 19 Republican cosponsors **S. 18** *Sponsor:* Daines (R-MT) *Cosponsors:* 24 Republican cosponsors	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr461/BILLS-118hr461ih.pdf https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed	• 01/24/2023: H.R. 461 introduced in House; referred to Judiciary Committee • 01/23/2023: S. 18 introduced in Senate; referred to Judiciary Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 57 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 31 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act	**H.R. 241** *Sponsor:* Calvert (R-CA) *Cosponsors:* Waltz (R-FL) Grothman (R-WI)	CV 16	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr241/BILLS-118hr241ih.pdf **Summary:** Would require JCUS to "under rule 16 of the Federal Rules of Civil Procedure or any other applicable law, in consultation with property owners and representatives of the disability rights community, develop a model program to promote the use of alternative dispute resolution mechanisms, including a stay of discovery during mediation, to resolve claims of architectural barriers to access for public accommodations."	• 01/10/2023: Introduced in House; referred to Judiciary Committee
Kalief's Law	**H.R. 44** *Sponsor:* Jackson Lee (D-TX)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr44/BILLS-118hr44ih.pdf **Summary:** Would impose strict requirements on the admission of statements by youth during custodial interrogations into evidence in criminal or juvenile-delinquency proceedings against the youth	• 01/09/2023: Introduced in House; referred to Judiciary Committee

TAB 2

TAB 2A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 6, 2023

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

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

The following attended on behalf of the Advisory Committees:

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

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. 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
Professor Liesa L. Richter, Consultant

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

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

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OPENING BUSINESS

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

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

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

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

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

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

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

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

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

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

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

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

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

Electronic-Filing Deadline

Judge Bates reported on this item.

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

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

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

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

District-Court Bar Admission Rules

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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He suggested that the proposed committee note's reference to "clarifying changes" encompassed this feature of the proposed amendments.

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

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

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

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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- In the fourth paragraph, second line, the word "information" was changed to "evidence."

- In the seventh paragraph (which commences "Many courts require"), the sentence "That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used," was changed to "That said, there is a wide variety of illustrative aids and a wide variety of circumstances under which they might be used."

- In the seventh paragraph, the sentence beginning "Ample advance notice" was struck and replaced with the sentence: "In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Item

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (CONTINUED)

Information Items (Continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OTHER COMMITTEE BUSINESS

Information Item

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

Action Item

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

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

New Business

No member raised new business.

CONCLUDING REMARKS

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

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TAB 2B

Agenda E-19 (Summary)
Rules
September 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 2-3

2. a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law

   b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

   c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date .... pp. 5-9

3. Approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 12-13

4. Approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 17-19

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

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

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

Agenda E-19
Rules
September 2023

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 6, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee (9th Cir.), chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III (E.D.N.C.), chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz (D. Minn.), chair, Professor Daniel J. Capra, Reporter, and Professor Liesa Richter, consultant, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Christopher Ian Pryby, Law Clerk to the Standing Committee;

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. An additional update concerned the start of coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees to evaluate a proposal to adopt a unified standard for admission to the bar of federal district and bankruptcy courts. Finally, the Standing Committee approved a brief report regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

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

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

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

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

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

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

Rule 6 (Appeal in a Bankruptcy Case)

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

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

Rule 39 (Costs)

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

Information Items

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

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 7001 (Scope of Rules of Part VII)

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

Rule 8023.1 (Substitution of Parties)

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

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

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

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

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

Recommendation: That the Judicial Conference:

a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

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

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

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

in 2021. The proposed amendments—intended to encourage a greater degree of compliance with the rule's provisions—included a new midcase assessment of the mortgage claim's status in order to give the debtor time to cure any postpetition defaults that may have occurred, new provisions concerning the effective date of late payment-change notices, and requirements concerning notice of payment changes for a home equity line of credit ("HELOC"). Additionally, the proposed amendments would have changed the assessment of the status of the mortgage at the end of a chapter 13 case from a notice to a motion procedure that would result in a binding order.

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

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

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

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

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

Official Forms Related to Proposed Amendments to Rule 3002.1

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

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

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

Information Items

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

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

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

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

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

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

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

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

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

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

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

New Rule 16.1 (Multidistrict Litigation)

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

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

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

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

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

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

Information Items

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

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

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

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

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

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

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

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

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

New Rule 107 (Illustrative Aids)

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

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

Rule 613 (Witness's Prior Statement)

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

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

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

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

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

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

Rule 1006 (Summaries to Prove Content)

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

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

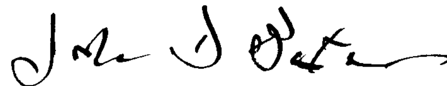
The Advisory Committee on Evidence Rules met on April 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed possible amendments to add a new subdivision to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) to address permitting jurors to submit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

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

JUDICIARY STRATEGIC PLANNING

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

Respectfully submitted,



John D. Bates, Chair

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

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TAB 3

Minutes of the Spring Meeting of the

Advisory Committee on the Appellate Rules

March 29, 2023

West Palm Beach, Florida

DRAFT

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, March 29, 2023, at 9:00 a.m. EDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: George Hicks, Judge Carl J. Nichols, Judge Richard C. Wesley, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Professor Bert Huang, Justice Leondra R. Kruger, Danielle Spinelli, and Judge Paul Watford, attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Daniel Bress, Member Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Marie Leary, Federal Judicial Center; Chris Pryby, Rules Law Clerk, RCS; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; and Tim Reagan, Federal Judicial Center, attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone, particularly the new member of the Committee, George Hicks, and the new liaison from the Bankruptcy Rules Committee, Judge Daniel Bress.

II. Approval of the Minutes

The Reporter noted that Tom Byron had submitted some typographical corrections to the draft minutes of the October 13, 2022, Advisory Committee meeting. (Agenda book page 74). With those corrections, the minutes were approved.

III. Discussion of Matter Published for Public Comment

Judge Bybee presented the subcommittee report about the proposed amendments to Rule 35 and 40 that have been published for public comment. (Agenda book page 95). These amendments transfer the material from Rule 35 to Rule 40 and eliminate redundancies. We have received few comments. The subcommittee considered those comments, and for the reasons explained in the subcommittee memo, made no changes in the amendments as published. The matter is now before the Committee for final approval.

Judge Bybee invited discussion and comment. The Committee had nothing to add, and it voted unanimously to give its final approval to these amendments and recommend that the Standing Committee give final approval to them as well.

IV. Discussion of Matters Before Subcommittees

A. Costs on Appeal—Rule 39 (21-AP-D)

Judge Nichols presented the report of the amicus subcommittee. (Agenda book page 133). He noted that there is an updated draft after input from the style consultants. (Agenda book page 236). He explained that this project was a response to the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs and observed that the Rule could be clearer.

The subcommittee dealt with three concerns. First, it sought to make clearer the distinction between the allocation of costs among the parties and the taxation of costs. Allocation is done by the court of appeals, while taxation is done in whatever court is closest to where the costs were incurred. Second, it sought to not hold up the mandate while the allocation of costs is being revisited. The mandate issues, but the court of appeals retains jurisdiction to decide the question of allocation. Third, it looked for ways to make sure that the judgment winner in the district court knows the cost of a supersedeas bond—which can be quite substantial—early enough to ask the court of appeals to reallocate the costs. It did not find a good way to deal with this concern in the Appellate Rules. (Agenda book page 135). The Reporter for this Committee has spoken to the Reporter for the Civil Rules Committee about the possibility of that Committee considering an amendment to the Civil Rules to call for such disclosure in the district court when the bond is procured.

DRAFT

Along the way, the subcommittee discovered other issues, such as a weird lack of parallelism that it sought to clean up. And the style consultants provided their comments.

Judge Nichols then worked through the draft proposal.

Subdivision (a) provides the default rules for allocating costs: who pays and in what percentage. It uses the word "allocated" rather than "taxed," saving "taxed" for deciding the amount. It leaves the parties free to decide otherwise. It also preserves the power of the court of appeals to order otherwise and depart from these default rules.

Subdivision (b) is new. It is not intended to be a substantive change, but to clarify how a party can ask the court of appeals to reconsider the allocation of costs. It makes clear that the mandate is not delayed, and that the court of appeals retains jurisdiction to decide a motion to reconsider the allocation of costs.

Subdivision (c) is also new. It makes clear that the allocation of costs by the court of appeals applies both to costs taxed in the court of appeals and costs taxed in the district court.

In subdivision (d), the word "assessed" is changed to "allocated" in keeping with the distinction between allocation and taxation.

The first part of subdivision (e) is new, fixing a lack of parallelism in the current rule between the costs taxable in the court of appeals, which are not listed in the current rule, and the costs taxable in the district courts, which are listed in the current rule. The rest of subdivision (e) is unchanged, except for clarifying and conforming amendments.

Subdivision (f) is unchanged, other than being relettered (f).

At the last meeting of this Committee, there was discussion of whether this project is worth it. Given the directive from the Supreme Court that the Rule could be clearer, the subcommittee took one more shot. The subcommittee has addressed as many issues as it thinks we can. A big caveat is that the proposal does not include a requirement for the timely disclosure of the cost of a supersedeas bond. Instead, that issue is left for further discussions with the Civil Rules Committee.

Judge Nichols noted that the subcommittee thinks it landed in the right place, that the proposed amendment is ready for publication, and invited discussion. Judge Bates noted that there is an extra "that" in the Committee Note. (Agenda book page 238). A liaison member suggested a more descriptive title for subdivision (c), and the Committee settled on "Costs Governed by Allocation Determination." Mr. Freeman suggested that the Committee Note be expanded to clarify the distinction between

the docketing fee taxable in the court of appeals under 39(e)(1) and the filing fee for the notice of appeal taxable in the district court under 39(f)(4). The Reporter agreed. A judge member noted that 39(f) does not specify a procedure for taxing costs in the district court. The Reporter noted that the rule would leave that to the district court, and Judge Nichols added that litigants would look elsewhere than the Federal Rules of Appellate Procedure for any such rule. The judge member was satisfied with this explanation, and observed that the proposed amendment provides clarity.

The Committee unanimously approved the text of the proposed amendment for publication, with the Reporter to come back later in the meeting with a revised Committee Note.

At the end of the meeting, the Reporter presented the revised Committee Note and it was approved without dissent.

B. Direct Appeals in Bankruptcy—Rule 39

Danielle Spinelli presented the report of the subcommittee on direct appeals in bankruptcy. (Agenda book page 141). She explained that Appellate Rule 6(c) governs direct appeals to the court of appeals in bankruptcy cases. Typically, a bankruptcy court decision is appealable to the district court or bankruptcy appellate panel before it can be appealed to the court of appeals. This two-step takes time, and sometimes bankruptcy appeals need speed. In 2005, Congress added 28 U.S.C. § 158(d)(2), which allows direct appeals from a bankruptcy court to the court of appeals.

There are three steps in this process. First, the bankruptcy court, the district court, the bankruptcy appellate panel, or all of the parties can certify that the statutory criteria for a direct appeal are present. These criteria are similar to those set forth in 28 U.S.C. § 1292(b), but looser, joined by "or" rather than "and." Second, the appellant must file a notice of appeal. Once these two steps are taken, any party may request the court of appeals to authorize a direct appeal.

Appellate Rule 5 was originally designed to deal with permission to appeal under 28 U.S.C. § 1292(b). In 2014, Appellate Rule 6 was amended so that Rule 5 would largely cover direct appeals in bankruptcy as well. It's become clear, however, that Rule 5 doesn't work that well. Rule 5 was written for the situation where there is no appeal at all without authorization by the court of appeals. But in the context of direct appeals in bankruptcy, there is an appeal; the question is which court will hear that appeal.

The subcommittee decided to make Rule 6(c) largely self-contained rather than broadly incorporate Rule 5. It does, however, refer to Rule 5 where necessary.

Judge Bybee observed that a lot of work went into this proposal and that the Committee is fortunate to have Ms. Spinelli. Professor Struve added that she has

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watched the progress of this project with admiration; it's a beautiful job, fantastic work. She did have one concern: proposed Rule 6(c)(2)(J) refers only to "sending the record." Back in 2014, this Committee deliberately decided to use the phrase "making the record available"; Rule 6(b)(2)(C) has "make the record available" all over it. She suggested that there was no need for an additional sentence calling for particular action once the court of appeals authorizes a direct appeal.

Ms. Spinelli observed that there could be situations where the district court or BAP has ordered paper records and then the court of appeals authorizes a direct appeal after the record has been sent to the district court or BAP. Professor Struve responded that Bankruptcy Rule 8010 puts the burden on the appellant. Ms. Spinelli asked if we could count on the court to make the record available to the court of appeals. The Reporter stated that a reviewing court of appeals does not necessarily have access to an electronic record unless someone makes it available. Professor Struve noted that this part of the Rule could be short because it is written for the clerks. Mr. Byron stated that "make available" is broader because it encompasses both paper records and various electronic ways.

After some detailed wordsmithing on a shared screen, the Committee reached a tentative consensus on using the title ("Making the Record Available") and the first sentence ("Bankruptcy Rule 8010 governs completing the record and making it available.") from the existing Rule and changing the second sentence in (J) to "When the court of appeals enters the order authorizing the direct appeal, the bankruptcy clerk must make the record available to the circuit clerk." This creates some redundancy with Bankruptcy Rule 8010, but the redundancy doesn't hurt, and it is much simpler than what appears in the agenda book.

The Reporter stated that we had started this discussion by jumping right into the weeds of proposed Rule 6(c)(2)(J) and suggested that we step back and get everyone up to speed. He thought it might make sense for Ms. Spinelli to walk through the rest of the proposal.

She began with Rule 6(b)(1)(C), which inadvertently lacks the word "bankruptcy" before "appellate panel."

Turning to Rule 6(c), the title is changed to match section 158(d)(2).

In subdivision, 6(c)(1), the key change is to make Rule 5 inapplicable except as provided in Rule 6 itself. This reduces the confusion of having to figure out how Rule 5 and Rule 6 go together. It also makes it possible to eliminate the confusing provision in current 6(c)(1)(C).

Subdivision 6(c)(2) provides the additional rules applicable to direct appeals. Subdivision 6(c)(2)(A) provides for the petition authorizing a direct appeal. The petition is also provided for in Bankruptcy Rule 8006, but it is useful to have it in the

Appellate Rules as well. Subdivision 6(c)(2)(B) describes the contents of the petition, requiring the material required by Rule 5(b)(1), the certification, and the notice of appeal. Subdivisions 6(c)(2)(C) and (D) refer to Rule 5. Subdivision 6(c)(2)(E) clarifies what is implicit in the existing rule, that no new notice of appeal is required. Subdivision 6(c)(2)(F) takes some material from Rule 5, but modified for the circumstances of a direct appeal. In particular, it makes clear how to handle filing fees if a fee has already been paid for the appeal to a district court or BAP.

Judge Bybee wondered if the fee for an appeal to a district court or BAP might ever be higher than the fee for an appeal to a court of appeals. No one seemed to think that was a likely possibility.

Mr. Freeman suggested that there was no need for subdivision 6(c)(2)(G), dealing with bonds for costs on appeal. He noted that subdivision 6(c)(1) makes Rule 7 applicable and provides that references in Rule 7 include a bankruptcy court or BAP. Ms. Spinelli agreed that it should be taken out; unlike Rule 5, there is no deadline set.

Subdivision 6(c)(2)(H) provides that Bankruptcy Rule 8007 governs any stay pending appeal. Professor Struve suggested that it would be better if this said that Bankruptcy Rule 8007 "applies to" stays pending appeal, language chosen in the past so as not to suggest that it governs exclusively. Ms. Spinelli noted how helpful Professor Struve's institutional memory is.

Mr. Freeman noted that there sometimes can be a bit of a jurisdictional hole where a party seeks a stay of a bankruptcy order in the district court and the district court either denies it or doesn't act on it. There's no obvious way under the Federal Rules to seek a stay directly in the court of appeals when there is no appeal pending in the court of appeals. Ms. Spinelli agreed that this is a nightmare that she's been through.

Mr. Freeman noted that the Supreme Court can grant a stay directed to a court of appeals before a cert petition has been filed, relying on 28 U.S.C. § 2101(f). But there's no analogous provision for the courts of appeals; the All Writs Act requires jurisdiction before issuing a stay. The only solution they have come up with is to file a mandamus petition to create jurisdiction in the court of appeals and then seek a stay to preserve the status quo so the court of appeals can hear an eventual appeal. Maybe this is sufficiently obscure that we don't need to deal with it. Or maybe this isn't something that the rules can deal with anyway.

Ms. Spinelli responded that the issue is broader than direct appeals. It may not be something that can be fixed by the rules, but it is worth thinking about in the future.

Subdivision 6(c)(2)(I) deals with the record on appeal. The proposed amendment adds a sentence providing that if a party has already filed a document or completed a step required to assemble the record, it need not repeat that step.

We have already discussed subdivision 6(c)(2)(J). Subdivision 6(c)(2)(K) is already in the Rule, as is subdivision 6(c)(2)(L), but it is expanded to require each party to file a representation statement. Mr. Byron noted the word "after" was deleted and asked if that was intentional. Ms. Spinelli responded that it should not be deleted.

After a short break, Judge Bybee asked if the subcommittee is confident enough of this that they are prepared to ask the Committee to refer this to the Standing Committee for publication. Ms. Spinelli said that she believed so. Judge Bybee then opened the floor for discussion on that question.

Mr. Freeman asked how a representation statement differs from an appearance in the court of appeals. Ms. Spinelli said that she didn't know, but that since Rule 12 calls for a representation statement in appeals generally, the subcommittee did not want to delete it here without knowing exactly what the courts of appeals use them for. The Reporter added that this was one of two areas (the other, dealing with the record, has already been discussed) where the bankruptcy reporters, who were otherwise very happy with this proposal, had concerns. In particular, they asked why switch from the current rule, which requires the attorney who sought permission to appeal to file the representation statement, to requiring the attorney for each party to do so.

The Reporter stated that he looked at various local circuit rules, and almost every one requires each counsel to submit a notice of appearance. Some specifically reference Rule 12 and say don't worry about Rule 12; the notice of appearance covers the Rule 12 requirement. Others don't say that, but maybe as a matter of practice it does. It appears that in the Ninth Circuit, they use the representation statement to require the appellant to provide all of the information. The reason to require both sides to file the representation statement is the unique status of direct appeals. We don't know which party is going to be asking for a direct appeal. The idea that any party might seek direct review is what's driving this whole project.

What's the big deal with asking both sides to file a representation statement? They are already filing notices of appearance. Why not simply delete the requirement of a representation statement? That would require revisiting Rule 12, and why do we want to open that up?

Judge Bybee asked if there were any other questions or comments. The Reporter stated that Bridget Healy had alerted him to a style issue in Rule 6(b)(2)(D).

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The style consultants suggested modest changes to proposed Rule 6(c)(2)(L), and there is virtually identical language in Rule 6(b)(2)(D). It would seem to make sense to make the same style changes there. Ms. Spinelli agreed.

An academic member returned to the issue of whether there might be a situation where the filing fee for an appeal to a district court or bankruptcy appellate panel might be higher than the fee for an appeal to the court of appeals, and suggested using the word "excess" rather than the word "difference" in Rule 6(c)(2)(F)(ii)(II). Ms. Spinelli responded that such a change would grammatically require other changes. In addition, you've filed the appeal and need to pay the fee for the appeal to the bankruptcy appellate panel, so that there wouldn't be any circumstances in which you'd get a refund. It's simpler to just say "difference."

Professor Struve returned to the issue of representation statements. She was intrigued by them, and looked back at the Committee Note from 1993 that explained that they were adopted as a useful accompaniment to the amendment to Rule 3(c). The idea is to shed more light on who exactly is taking the appeal. For that reason, it might be worth keeping it limited to the party taking the appeal.

Ms. Spinelli was initially attracted to the idea, noting that the appellant is the appellant, regardless of who seeks leave for the direct appeal. The Reporter asked what's the harm in asking everybody to do it, since almost everybody is going to be filing a notice of appearance anyway. Professor Struve thought that there might be cases where there are a lot of parties but few appellants and that this would impose a paperwork requirement, perhaps even on people who haven't retained counsel; she added that perhaps that's not realistic. Ms. Spinelli noted that she initially thought about just deleting this requirement because she has never done it and doesn't understand the point. But given that it's a rule in all appeals, this doesn't seem to be the place to start deleting it; it's fine to limit it to the appellant.

A judge member stated that he has no idea what utility this might have to the clerk, making him loath to change something and running unintended consequences. Ms. Spinelli agreed, noting that in every other situation, it is just the appellant who has to file, so let's keep it limited to the appellant.

In attempting to revise the proposal in this way, however, the Committee struggled. One possibility was to say the attorney who filed the notice of appeal, but there is no notice of appeal filed in the court of appeals. Another was to say the attorney who filed the petition, but that could be the appellee. Another was to say the attorney who filed the notice of appeal in the bankruptcy court, but there may be multiple notices of appeal and sometimes it's necessary to work out who's across the "v." from whom; it may scramble some things and may be more ambiguous as to who's responsible for filing.

Judge Bybee suggested leaving it as drafted even though it is a little over inclusive. Ms. Spinelli agreed that that made sense, noting that there is no way to really make it align with Rule 12. Professor Struve concluded that this approach makes sense and thanked the Committee for considering the issue.

Judge Bybee invited any further comments. The Reporter noted that we had accommodated virtually everything suggested by the style consultants. Professor Struve said that she admires the work done on this rule. Judge Bybee thanked the subcommittee, particularly Ms. Spinelli for taking the laboring oar.

The Committee agreed, without opposition, to approve the proposed rule as amended at this meeting, with the Committee Note revised to conform to those changes.

C. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Judge Bybee presented the report of the amicus disclosure subcommittee. (Agenda book page 163). He noted that we have been working on this for several years, and received very good feedback from the Standing Committee at its January 2023 meeting. The subcommittee met to consider that feedback.

There are three issues to discuss.

The first is a new issue. The Supreme Court has recently changed its rules to no longer require consent before filing an amicus brief. The subcommittee thinks it makes sense for the appellate rules to conform in this regard to the Supreme Court rules.

The second issue involves disclosure of the relationship between a party and an amicus. Working draft Rule 29(b) has four requirements, two of which are in the existing rule. The working draft adds a requirement to disclose whether a party, counsel, or any combination of parties and counsel has contributed 25% or more of the gross annual revenue of an amicus curiae during the 12-month period before the brief was filed. The Standing Committee discussed other approaches, such as banding, but found the 25% level to be reasonable. It expressed some concern about the administrative feasibility of a 12-month lookback period, but the subcommittee is concerned that a prior calendar year approach would open too big a loophole.

The third issue involves disclosure of the relationship between a nonparty and an amicus. The current rule calls for the disclosure of earmarked contributions by any person other than the amicus, its members, or its counsel. The Standing Committee expressed great doubt about expanding disclosure of the relationship between a nonparty and an amicus. The subcommittee offers two alternatives for discussion. Alternative beta is the same as the existing rule, with some modest

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tightening. Alternative alpha does two things: it removes the exemption for member contributions, and it requires disclosure only of earmarked contributions that exceed $1000. This alternative closes the member loophole, but by creating a de minimis exception, enables crowd sourcing.

A judge member stated that we have been round and round on this, and this is a reasonable alternative. It will draw attention and fire. Where it ends up is another matter.

A liaison member noted that the phrasing of 26(b)—"party, counsel, or any combination of parties and counsel"—leaves open the possibility that this may include people on opposite sides of the case. This may not be a big issue, but it may be a glitch worth thinking about. There isn't an obvious solution. In response to a question by Judge Bybee, the liaison member stated that pro bono briefs are treated as a contribution by counsel and therefore don't have to be disclosed.

Judge Bates asked if the issue would be solved by referring to a "party, its counsel, or any combination of parties and their counsel"? The liaison member said no because there might be a trade association that has five significant members, one of which is on one side and one on the other in a case. The Reporter wondered whether that's a problem that needs to be worried about; presumably such a disclosure would enhance the credibility of the amicus. The liaison member responded maybe not, but the current perception is that disclosure is bad and people don't like to do it. Maybe it's not an overwhelming obstacle, but a speed bump.

A lawyer member asked for a fifteen-second summary of what the problem is. Judge Bybee called on the Reporter who provided some background on the proposed Amicus Act and the referral by the Supreme Court. Judge Bybee noted that the concern has not so much been on recusal issues, but on what may be useful for judges to know about who is behind a brief, particularly a party. A judge member added that there is a concern about the inequity of effectively letting a party generate four briefs while his adversary has one. A liaison member emphasized the difference between parties and nonparties; where a party has substantial control, that's worth flagging either because of extra pages or manufactured support. It makes sense to have some standard there; the question is coming up with the right standard. That's very different than where we are dealing with nonparties.

A different lawyer member said that the examples of problems pointed to by the drafters of the Amicus Act mostly involved nonparties, leading this member to favor more nonparty disclosure. A judge member added that while there does not seem to be much evidence of a problem involving parties, disclosures about party relationships are a lot less problematic. Questions about nonparty relationships open up lots of other concerns.

Judge Bybee stated that the Committee had spent quite a bit of time trying to craft a rule about nonparties. The general, but not universal, sense has been that it was not as productive. And we certainly got the view from the Standing Committee that the rule should not go that far.

Mr. Freeman noted that the working draft eliminates the exemption that the government has from these disclosures and suggested that it be restored. A liaison member noted that it could be added to 29(e). The Reporter noted that the subcommittee had considered this and didn't expect it to be a problem for the national government or state governments, but if there was a problem in some offbeat little town, we'd want to know about it. Mr. Freeman noted that the existing rule did not exempt little towns. An academic member added that there might also be various kinds of private-public partnerships. The Reporter asked if the Committee is completely confident that no state AG would ever allow a party to draft a brief in whole or in part.

In response to a question by Judge Bybee, Mr. Freeman stated that while there are borderline questions about what counts as an agency of the United States, there is a lot of substantive content on the question with regard to state action. A lawyer member noted that disclosure by the government is not a burden and this deals with the rare case.

Judge Bates asked if the subcommittee decided not to exempt the state government. Some but not all members of the subcommittee recalled that it had, on the theory that it can't hurt because there is no burden and on the off chance something weird happens, you sure would want to know about it.

A liaison member predicted that the states would see this as a sort of sovereignty question and view it as quite provocative. Mr. Freeman agreed. While he is most interested in the United States and can file a template footnote if needed, it seems unnecessary and likely to provoke. The liaison member predicted that all the states would be pretty upset.

The Committee settled on restoring the exemption by adding it to the beginning of 29(e). (Agenda book page 170, line 45).

Judge Bates asked about the use of the adjective "considerable" in working draft Rule 29(a)(2). Are we asking anyone to make that assessment? Is it wise to ask anyone to make the assessment that a brief is of considerable help. The Reporter stated that he believed that this was taken from the Supreme Court rule.

A liaison member suggested that "when warranted" or "when justified" would be a better header than "when helpful."

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Mr. Freeman worried whether the phrase "relevant matter not already brought to its attention by the parties" might invite amici to submit arguments that had been forfeited or waived by the parties. This is more of an issue in the courts of appeals than in the Supreme Court, from which this provision was drawn. Judge Bybee responded that as far as he was concerned, a waived argument would not be relevant.

A lawyer member observed that if all these disclosures are required, the footnote will become very long. Perhaps the rule could state that if no disclosures are required, that is all that needs to be said. A judge member suggested adding "if applicable" to 29(e). Ms. Spinelli responded that there is value in having to actually say, "No party wrote this brief." She wouldn't want to add "if applicable." The lawyer member agreed because the result might be that there is no footnote and people will wonder whether the requirement was overlooked. The judge member agreed that made sense.

The Rules law clerk asked whether the requirement in 29(c) for a party or counsel who knows that an amicus has failed to make a required disclosure to do so applies to disclosures about adverse parties. Judge Bybee noted that it would be in the interest of an adverse party to do so. The Rules law clerk asked about exempting the United States from this requirement, noting that the exemption as currently framed extends to this provision as well. Mr. Freeman suggested changing the government's exemption so that it would be exempt from 29(b) and (d), but not from (c). Mr. Byron noted that there may not be a problem here because the United States could voluntarily disclose.

Judge Bybee raised a concern about what counts as government knowledge: The IRS might know something that the DOJ does not. Mr. Freeman stated that he is troubled by the knowledge point. Mr. Byron suggested that if the government is going to be exempt from (b) and (d) but not (c), it might make sense to switch (c) and (d).

Ms. Spinelli stated that she is a bit concerned about making a general requirement that applies to all parties and counsel. The purpose was to put an obligation on the specific person who needs to be disclosed to do so if the amicus does not. She would narrow the provision to make clear that we are talking about the party or counsel whose relationship to the amicus is required to be disclosed.

To make this clear, the phrase "a party or counsel" in line 98 could be changed to "the party or counsel." With this change, there is no need to swap (c) and (d).

Judge Bates asked whether the phrase "except as provided in 29(e)(2) and (3)" made sense given the extensive deletions in the rest of 29(e). The Reporter responded that he had the same question last night even though he had typed this up, but it's just the way the redline works. It's hard to see, but there is still a small surviving part of (e)(2) so that the exception still makes sense.

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The Committee took a lunch break from 12:15 until approximately 12:45.

The Committee then turned to alternative drafts dealing with the relationship between an amicus and a nonparty. (Agenda book page 171). The alpha version is a little more aggressive than the existing provision; the beta version is very similar to the current rule with some tweaks.

A liaison member asked the committee to consider two situations. In the first, a group is putting together its 2024 budget and plans to file two or three amicus briefs supporting patent protection. So it puts $150,000 in the budget and, based on the number of members, adds $5000 to everybody's dues. In the second, a group is mostly a lobbying or communication organization that doesn't plan to file amicus briefs. But all of a sudden, the Supreme Court grants cert in a critical patent case that is very important to its members. So it has to pass the hat. One group has to disclose, and one doesn't. That's the problem, especially since the perception is that disclosure is not positive.

Mr. Freeman asked if it was clear that disclosure wouldn't be required in the first situation. The liaison member had understood the rule to refer to a particular brief in a case rather than some hypothetical brief that was contemplated. Otherwise, all members would be disclosed all the time, which would be a lengthy footnote for many organizations. Others agreed with the narrower reading.

A lawyer member asked how much a fancy brief costs and how much has to be put in the hat. The liaison member stated that there's a wide range. Law firms sometimes do them at low cost as a business development opportunity; a medium may be in the $35,000 to $75,000 range. How much gets put in the hat really depends on the organization.

The Reporter asked if the concern would be met by a higher dollar threshold. The liaison member said no. A person can become a member the day after. It's like campaign finance: it's really, really hard to draft ironclad rules.

The Rules law clerk asked about contributions in kind. Judge Bybee said that neither version seems to be directed to services in kind.

A liaison member said that this will affect behavior because people will decline to contribute to avoid disclosure. Ms. Spinellli noted that the current rule requires disclosure by nonmembers, even of $1, so it already has that potential effect on behavior. The difference is that the alpha version extends disclosure to members as well, while raising the threshold to $1000.

Mr. Freeman stated that it will deter briefs in the pass the hat category. A liaison member stated that a consortium of contributors usually consists of two or three in his experience, maybe five or six, and that he was not aware of crowd-sourced

briefs. A lawyer member added that the Supreme Court bounced a crowd-sourced brief where people had given $50 anonymously.

A judge member stated that he favored the alpha version but suggested that the $1000 threshold is too low. That doesn't give the judge much information. But a much more substantial contribution, $10,000 or $25,000 perhaps, would be more material to weighing the brief. Judge Bybee added that one challenge for any amount would be that it wouldn't be indexed.

Ms. Spinelli joked that the result of such a rule would be that firms would be writing briefs for just under $25,000. A lawyer member suggested that it's about how many people have to get together to pay for the brief; if the number is small enough, it brings into question whether it is really the view of the amicus. This distinguishes the budgeted situation. Judge Bybee added that this is also the problem with amici that are formed with indistinct names and purposes.

A liaison member suggested treating the crowd sourcing issue separately. An academic member raised the possibility of a percentage threshold rather than a dollar threshold. The Reporter suggested borrowing the same 25% from the earlier provision. Ms. Spinelli noted that one problem with a percentage is that you may not know the cost of a brief until after it is filed. She suggested disaggregating the threshold question from the member exemption question.

Mr. Freeman suggested that there are different purposes in play. If the purpose is to make sure that a brief is really on behalf of the organization rather than one or two members, then some test for concentration is appropriate. If we are just trying to inform the public who paid for the brief, then everybody above $1000 is in.

Judge Bybee suggested that a high enough dollar threshold gets at both: who is in control and represented, and who may be pushing this brief. Mr. Freeman asked if 50 members each contributed $1000 would we be comfortable with knowing that it is a bona fide brief on behalf of the organization and not need to know the names of the 50 people. Ms. Spinelli suggested that, based on her experience, you would want the number to be closer to $10,000 to be helpful. Firms sometimes do briefs for pretty nominal fees.

Judge Bybee stated that the discussion has been helpful, but it probably makes sense to send it back to the subcommittee for further thinking and discussion.

The Committee then turned to (b)(4) and the issues of the 25% and 12 month look back. A judge member said that a time period set by the date a brief is due is good because it is not within the filer's control. Another judge member agreed that this is the best look back period. It's not that hard to administer because there aren't many contributors at the 25% level. A liaison member agreed as well.

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A lawyer member noted that we are supposed to be tightening the rules and we are considering going from zero to $10,000. Judge Bybee noted that we would pick up members. Perhaps there should be a different threshold for members and nonmembers. A liaison member noted a presumption that those in the organization are affiliated with the organization and are different from strangers. A lawyer member responded that this was true unless they just joined for that purpose. A different lawyer member asked whether the value of such disclosure depends on people knowing who a particular funder is. And if this is designed for known funders, they are more sophisticated about evading the rules. So is the game worth the candle? A different lawyer member suggested that it would deter briefs that aren't what they appear to be.

A liaison member said that amicus briefs in the courts of appeals almost always come from organizations that are well known.

Mr. Freeman added one issue for the subcommittee to consider: the possibility of a rule that addresses amicus briefs at other stages of the case, particularly on stay applications.

Judge Bybee concluded that we had a very productive discussion to take back to the subcommittee.

V. Discussion of Pending or Deferred Matters

A. Third-Party Litigation Funding (22-AP-C; 22-AP-D)

Judge Bybee introduced the topic of third-party litigation funding. (Agenda book page 175). He does not think that there is anything for this Committee to do at this point. He noted that the Civil Rules Committee is looking at this issue and we are tagging along for now. As he sees it, this is sort of an information item. He invited others to speak on the issue, but no one did.

B. Decisions on Unbriefed Grounds (19-AP-B)

Judge Bybee introduced the topic of decisions on unbriefed grounds. (Agenda book page 190). There is a suggestion that we should prescribe rules governing when courts decide cases on unbriefed grounds. The question is whether we need a subcommittee to consider this.

The Reporter added some background. When this matter was before the Committee before, the consensus was that this was not appropriate for rulemaking, but that it was appropriate for the then-chair of the Committee to send a letter to the chief judges of the circuits alerting them to the issue. But the Committee also decided to revisit the issue at this time. That's why it is back. Current members of the Committee might think it inappropriate for rulemaking, or might think that we

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should have a subcommittee look into whether it is appropriate for rule making. In response to a question by Mr. Freeman, the Reporter stated that he did not think that the suggestion was prompted by the Supreme Court decision about the importance of party presentation, but instead was prompted by the views of the members of the American Academy of Appellate Lawyers. Judge Chagares attended one of their meetings and saw everyone raise a hand in response to the question whether a decision on an unbriefed ground had ever happened to them.

Judge Bybee said that he thinks it is very hard to write a rule about this. When a panel perceives an issue that hasn't been briefed, it usually calls for additional briefing, unless the issue is obvious like the parties not being diverse. He is sure that if you asked district judges if the court of appeals ever addressed issues that had not been before the district court they would say yes, because he has watched arguments in the Supreme Court and wondered, "When did that become an issue? It wasn't in the case when I wrote the opinion in the court of appeals." He invited discussion.

A judge member said that he would not continue discussion on this issue. If parties miss something, jurisdictional or otherwise, that a court feels duty bound to consider, the parties may get annoyed, but it's their fault. That's not always what's going on, but it's not an insubstantial part.

A lawyer member stated that he can't think of a time it happened, although there are shades of grey. Sure, if you take an informal poll at the AAAL meeting you will get lots of people to say yes. But if you followed up to get more detail, you would find a whole lot less. And what would be the authority or enforcement mechanism?

Judge Bybee said that it feels like a best practices suggestion. Mr. Freeman added that panel rehearing is available and that, at least in the outer ranges, there is binding legal authority. *United States v. Sineneng-Smith* [2020] is the most recent significant case. Judge Bybee noted that, in the middle range that calls for a judgment call whether something is an elaboration or fuller exploration of something that was presented, it is very difficult to reduce it to a rule. It was tabled three years ago.

A judge member, stating that three years is long enough, moved to remove the item from the agenda. The motion carried without opposition.

VI. Discussion of Recent Suggestions

A. Social Security Numbers in Court Filings (22-AP-E)

The Reporter presented a suggestion by Senator Ron Wyden that the judiciary should be doing more to protect Social Security numbers from appearing in court filings. (Agenda book page 197). This is primarily a matter for the Bankruptcy Rules Committee and that Committee is giving the matter close attention. The Appellate Rules piggyback on other rules governing privacy protections. Appellate Rule 25(a)(5)

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was just amended to extend to Railroad Retirement Act cases the privacy protections provided in Social Security cases. Seeing nothing for this Committee to do here, the Reporter, with some discomfort, recommended removing the item from the agenda.

Mr. Byron suggested instead that the matter be tabled until the Bankruptcy Rules Committee considers the question. If they act, that might prompt rulemaking by other committees. Judge Bybee decided, without objection, to simply keep the item on the agenda.

B. Bar Admission (22-AP-F)

The Reporter presented a suggestion that Rule 46 be amended to permit all persons to practice law, absent a compelling reason for restriction. (Agenda book page 201). The Reporter suggested removing the item from the agenda. A motion to remove the item from the agenda was approved unanimously.

C. Intervention on Appeal (22-AP-G, 23-AP-C)

The Reporter presented two suggestions that the Committee consider adding a rule governing intervention on appeal. (Agenda book page 205). About a dozen years ago, the Committee explored the issue and decided not to take any action. In the spring of 2022, Professor Stephen Sachs noted that the Supreme Court had recently pointed out that there is no appellate rule on this question, and he suggested we should look into it. Professor Judith Resnik has also informed us of an amicus brief that she submitted in a pending Supreme Court case urging the Court not to use the case as a vehicle for creating rules governing intervention on appeal but to leave that to the rule making process. That case was listed and then removed from the argument calendar, but the Solicitor General's motion for divided argument has been granted. The case may become moot. If the Court decides the case, its decision will be relevant to anything this Committee does; if the case is dismissed as moot, the issue doesn't go away. The Committee may think that there is value in exploring the issue to see whether what was found inappropriate a dozen years ago is appropriate now. Judge Bybee invited discussion.

A liaison member noted that the issue arises a lot, particularly with changes in administration in the states and the federal government. Some guidance could be really useful. Mr. Freeman agreed.

Judge Bybee appointed a subcommittee consisting of Mr. Freeman, Professor Huang, and Justice Kruger.

D. Consent to Amicus Briefs (23-AP-A, 23-AP-B)

The Reporter presented two suggestions that the Committee follow the Supreme Court's lead in permitting the filing of amicus briefs without requiring the

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consent of the parties or the permission of the Court. The amicus disclosure subcommittee has already incorporated this idea into the working draft. The formal action is probably to refer these to the same subcommittee. Judge Bybee did so.

E. Resetting Time to Appeal in Bankruptcy Cases

The Reporter presented a suggestion from the Bankruptcy Rules Committee to amend Appellate Rule 6 to deal with resetting the time to appeal. (Agenda book page 217). The question involves the interaction of the Appellate Rules, the Civil Rules, and the Bankruptcy Rules. Under Appellate Rule 4, certain post judgment motions reset the time to appeal. The time to make such motions under the Civil Rules is 28 days. But the time to make similar motions under the Bankruptcy Rules is 14 days. Appellate Rule 6(a) tells us that when there is an appeal from a district court exercising original jurisdiction in a bankruptcy case, just use the Civil Rules. But applied literally, this would mean that the relevant time frame is 28 days, rather than the 14 days called for by the Bankruptcy Rules.

The Bankruptcy Rules Committee looked into all kinds of ways to amend the Bankruptcy Rules to fix the problem and didn't see a good way to do so. It considered asking this Committee to amend Appellate Rule 4(a)(4)(A), but that rule is already so complicated that making it even more complicated, particularly to add something that applies only to bankruptcy cases, didn't make a lot of sense. So they are suggesting amending Appellate Rule 6(a)—which deals with appeals from district courts exercising original jurisdiction in a bankruptcy case—to direct that the reference in Appellate Rule 4(a)(4)(A) to the time allowed by the Civil Rules be read as a reference to the time as shortened for some types of motions, by the Bankruptcy Rules.

The Reporter noted that if the Committee had not approved the other amendments to Rule 6, this proposal could simply be referred to the bankruptcy appeals subcommittee. But since those amendments were approved earlier in this meeting, if the Committee is sufficiently comfortable with this amendment, it could simply be folded into the other amendments to Rule 6 approved earlier.

Ms. Spinelli stated that she was comfortable with folding it in, but wondered why it referred to the time allowed by the Civil Rules as shortened by the Bankruptcy Rules rather than simply the time allowed by the Bankruptcy Rules. Professor Struve responded that not all of them are shortened. Both Ms. Spinelli and the Reporter thought that a direct reference to the Bankruptcy Rules would work, but worried that if Professor Struve is putting in language and they aren't seeing why, then there is a good reason that they are not seeing. Professor Struve, in turn, expressed concern with not having the Bankruptcy Rules reporters on the line. Ms. Spinelli does not want to wrongly suggest that the Civil Rules govern; she has seen people make that mistake.

A liaison member suggested simply listing the particular motions in the rule. Is that too cumbersome? A lawyer member suggested that the relationship among the three sets of rules is a great vexing problem and suggested being more explicit. A judge member said that adding something to the language in the agenda book seems right, but he was not in a position to vote on the right language sitting here today.

Ms. Spinelli suggested that this part go back to the bankruptcy appeals subcommittee to come up with something.

Judge Bates observed that the changes approved earlier in the meeting are going to be before the Standing Committee in June, but that these additional changes would lag behind and we try to avoid doing that. A vote by email is appropriate if the issue is simple enough and narrow enough that the committee feels that it gets a full airing.

The matter was referred to the subcommittee with the hope that it can unanimously come up with a fix that could be approved by the full Committee by email and folded into the rest of the proposal in time to go to the Standing Committee this June.

VII. Joint Committee Business—Self-Represented Litigants

Professor Struve provided an update on the project about e-filing by self-represented litigants. (Agenda book page 224). Tim Reagan led the research underlying the memo in the agenda book.

One main question under investigation is whether there continues to be any reason to require that someone who files on paper must serve other parties via traditional means—as opposed to relying on service by CM/ECF once the papers are scanned into the system. Based on the information gathered so far, documents always get entered into CM/ECF and are therefore available. A question arose about sealed filings, and the answer is that access is the same whether the filing is done by a lawyer or a self-represented party. The remaining loose end is what happens if there is more than one self-represented party not on CM/ECF: how do you know whether someone else needs traditional service? The people we spoke to in six different districts were nonplussed. It's just quite rare for there to be two pro se litigants in the same case who aren't co-parties who are closely coordinating. But the working group might explore ways to draft for this problem.

Those who allow CM/ECF access are fans, praising its benefits. It's a net gain for clerk's offices because they save on processing paper filings and serving court orders in paper form. Some districts offer an alternative, such as submission by email or upload apart from CM/ECF. Most did not see any particular implementation problems, but one was more equivocal. Courts that have adopted electronic noticing

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love it because it saves them from mailing court orders and the debates about whether litigants received them.

Professor Struve invited Committee members to submit suggestions for any questions that should be asked of the folks in the districts.

VIII. Review of Impact and Effectiveness of Recent Rule Changes

Judge Bybee directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 135). He called for any comments or concerns about these recent amendments. The Committee did not raise any particular concerns.

IX. New Business

Judge Bybee asked if anyone had anything else to raise for the Committee. No one did.

X. Adjournment

Judge Bybee announced that the next meeting will be held on October 19, 2023, in Washington, DC.

He thanked everyone, noting that a lot of people with a lot of important things to do have put in a lot of time. Courts can impose enormous transaction costs on people. The work of this Committee is to try to reduce those transaction costs. If we have reduced transaction costs and saved litigants and courts from misunderstanding, our time has been very, very well spent.

The Committee adjourned at approximately 3:15 p.m.

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TAB 4

TAB 4A

MEMORANDUM

DATE: September 18, 2023

TO: Advisory Committees on Appellate, Civil, and Criminal Rules[1]

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

As you know, a working group that was convened to consider filing methods open to self-represented litigants has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive a notice of electronic filing (NEF) through CM/ECF or a court-based electronic-noticing program.

In spring 2023, Tim Reagan and I conducted additional interviews of court personnel on these topics, and I enclose a report that summarizes findings from those interviews. This memo provides a very brief update concerning the working group's summer 2023 discussions on both the filing and the service topics.

The service topic concerns whether to repeal the current rules' apparent requirement that non-CM/ECF users serve CM/ECF users separately from the NEF generated after a filing is scanned and uploaded into CM/ECF. The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their post-case-initiation filings[2] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even those that are CM/ECF users. In the advisory committees' discussions of this topic during the past year, participants were receptive to the possibility of amending the service rules to eliminate the requirement of paper service on those receiving

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1 The Bankruptcy Rules Committee, of course, is also a part of the project discussed in this memo, but as of this writing that Committee has already met. It received an oral report along the same lines expressed in this memo.

2 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). As noted, the discussion here focuses on filings subsequent to the initiation of a case.

NEFs. At the working group's most recent (September 2023) meeting, participants expressed support for that idea, but also suggested a number of possible drafting changes to the then-extant sketch of a possible amendment. That redrafting is yet to be done, so I am not including here a sketch of a possible amendment. We intend to develop that proposal in the coming months.

On the filing topic, last year's round of advisory-committee discussions disclosed both some support for adopting a rule that would broaden self-represented litigants' access to CM/ECF and also a fair amount of opposition to adopting a rule that would require broad access for self-represented litigants to CM/ECF. In the light of those discussions, at its September 2023 meeting the working group considered the possibility of proposing a rule that would merely disallow districts from adopting blanket bans entirely denying all CM/ECF access to all self-represented litigants. Such a rule might say that even if a district generally disallows CM/ECF access for self-represented litigants it must make reasonable exceptions to that policy. That idea, like the service idea, has not yet taken shape in draft form. At the fall advisory committee meetings, I welcome the opportunity to gather input on whether such a rule could be drafted in such a way as to address the concerns expressed by participants in the process who are most wary of a broad right of CM/ECF access.

Encl.

MEMORANDUM

DATE: September 18, 2023

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Update concerning spring 2023 district-court interviews

During March 2023, Tim Reagan and I interviewed 17 district-court employees[1] who hale from nine districts.[2] This memo summarizes some of the themes that emerge from the interviews.

We are indebted to the 17 interviewees, who took time from their extremely busy schedules to share their courts' experiences with us. And I am also indebted to Tim, who guided my research and provided me with the entrée that enabled us to talk with the court staff with whom we spoke – many of whom he or his colleagues had interviewed in the course of last year's research. His and his colleagues' study provided the foundation for this further research, and Tim's expert presence on our video meetings and phone calls was invaluable. Tim also generously allowed me to choose the focus of this round of follow-up interviews.

I chose to focus this round specifically on personnel in districts where – we believed – the district has adopted the approach of exempting litigants from separate service on CM/ECF participants. But once we had the opportunity to talk with court personnel from a given district, of course we took the opportunity to ask them about the other two topics (CM/ECF access, and alternative modes of electronic access) as well. And in some instances, we also had the opportunity to inquire about special programs that the district had adopted concerning incarcerated litigants.[3] To make the inquiry manageable, I restricted our scope to district courts

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1 In some instances, more than one person joined the interview: we spoke with two people in the District of Arizona, two in the District of Columbia, five in the District of Kansas, two in the Western District of Pennsylvania, and two in the District of South Carolina.

2 The districts in question were: D. Ariz.; D.D.C.; N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; W.D.Pa.; D.S.C.; and D. Utah.

We also interviewed a Pro Se Law Clerk from another district, but that interview turned out to be brief because she explained that her district does not actually engage in any of the service or filing practices on which we wanted to focus.

3 Those inquiries are omitted from this memo, in part because we did not have time to pursue them in all interviews.

(not bankruptcy or appellate courts) and focused our questions on the practice in civil cases (not criminal cases). This memo first sketches some findings concerning the service issue, and then turns to CM/ECF and alternative electronic access.

I. Exempting litigants from separate service on CM/ECF participants

We confirmed through our interviews that the following districts have exempted paper filers from traditionally serving papers[4] on litigants who are on CM/ECF:

- The District of Arizona
- The Northern District of Illinois
- The Western District of Missouri
- The Southern District of New York
- The Western District of Pennsylvania
- The District of South Carolina
- The District of Utah

For short, I'll refer to these districts as the "service-exemption" districts. Notably, these districts vary in how explicitly their published materials tell self-represented litigants about the exemption; only one of these districts is very explicit and consistent on this point.[5]

Once we confirmed that a district was indeed a service-exemption district, we asked the personnel from that district the questions noted in Part I.B of my March 3, 2023 memo.

Those personnel reported no problems with the implementation of the service-exemption policy. We specifically asked about burdens on the clerk's office, and no one could think of any.[6] One interviewee stated that the lawyers representing other parties in the case don't want paper copies of filings anyway.[7]

As to the question, how do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still

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4 As discussed previously, we are focusing here on Civil Rule 5 service (that is, for papers subsequent to the complaint), not on Civil Rule 4 service.
5 The Southern District of New York is explicit: "Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service." S.D.N.Y. ECF Rules & Instructions 9.2; see also id. Rules 9.1, 19.1, & 19.2; Role of the Pro Se Intake Unit, https://www.nysd.uscourts.gov/prose/role-of-the-prose-intake-unit.
6 Interviewees who responded to the burdens question and said no included: D. Ariz.; N.D. Ill. (no effect on the clerk's office because "We don't monitor how service is done."); W.D. Mo. (might even save clerk's office "a little smidge" of work because they need not deal with later filing of a certificate of service); W.D. Pa.; S.D.N.Y.; D.S.C.
7 D. Ariz.

required), responses varied. It was noted that this particular question would only arise in a case where multiple parties are not on CM/ECF – which some of our interviewees noted would be unusual.[8] Also, even in such a case, the question would arise only if the person making the paper filing was not enrolled in an electronic-noticing program (because such a program would generate a NEF when the paper filing was entered in CM/ECF, and the NEF would state if any other party to the case required traditional service).[9] One interviewee said they thought that this information might be included in a notice that the court sends to self-represented parties early in the case.[10] A number of interviewees observed that a useful way to discern who needs traditional service is to look at the docket; if it shows no email address for a self-represented litigant, that is a tip-off that the person is not receiving electronic noticing.[11] Interviewees from another district stated that the issue might be addressed in a court order early in the case.[12] Interviewees from two districts said that the issue simply had not arisen.[13]

In at least three of the relevant five or six districts,[14] the service exemption encompassed both service on CM/ECF participants and service on participants in a court-run electronic-noticing program,[15] but one interviewee surmised that the program in their district encompassed only service on CM/ECF participants and not service on participants in the court-run electronic-noticing program[16] and, upon reviewing my notes, I am not sure that I posed this question to the interviewee from one other district.[17]

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8 N.D. Ill. (interviewee stated this would be very rare, but might arise in a lawsuit involving spouses, or a lawsuit in which two individuals are jointly suing the police); W.D. Mo. (interviewee could not think of a case involving more than one self-represented party); D.S.C. (interviewee stated that “theoretically that could happen, but as a practical matter it hasn’t been a concern”).

9 S.D.N.Y.

10 D. Ariz.

11 D. Ariz.

12 W.D. Mo.; D.S.C.

13 W.D. Pa. (clerk’s office assumes that litigants comply with their service requirements); D. Utah.

14 If my memory serves, the District of South Carolina does not offer electronic noticing.

In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish. If a self-represented litigant signs up to use CM/ECF but is making paper filings, that litigant need not be traditionally served.

15 D. Ariz.; S.D.N.Y. ECF Rules & Instructions 9.1 (the service exemption encompasses service on “all Filing and Receiving Users who are listed as recipients of notice by electronic mail”); id. 2.2(b) (“A pro se party who is not incarcerated may consent to be a Receiving User (one who receives notices of court filings by e-mail instead of by regular mail, but who cannot file electronically).”); D. Utah.

16 N.D. Ill.

17 W.D. Mo.

Our interviewees confirmed that when a litigant makes a filing in paper, that filing will always be scanned by the clerk's office and placed into CM/ECF.[18] (Interviewees noted a few exceptions, such as documents submitted by a person who is under a filing restriction,[19] documents submitted by a litigant whose case had been closed for several years,[20] documents submitted for in camera review, documents that have no discernible connection to any litigation,[21] correspondence to the judge that should not be filed in the case.[22]) A number of interviewees reported that their office sets a goal for the maximum time interval between the court's receipt of a paper filing and the time when that filing has been scanned and is entered into CM/ECF;[23] the goals ranged from 12 business hours[24] to one business day[25] or two business days.[26]

In some districts, a filing that is made under seal would need to be traditionally served on the other participants in the case, because in those districts that filing would not be available to the parties in the case via CM/ECF.[27] But that's true of filings made under seal by attorneys via CM/ECF, just as it would be true of paper filings made under seal by a self-represented litigants; in either event, the filer would be directed to serve the filing on the other parties by traditional

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18 D. Ariz. (implicit in answer to related question); D.S.C.; D. Utah.
19 D.S.C.
20 D. Utah (interviewee stated that depending on the filing, they would check with chambers before docketing such a submission).
21 S.D.N.Y. (the stated example was a document "talking about [the litigant's] meatloaf recipe"; the clerk's office would consult the judge before docketing such an item).
22 W.D. Pa. (judge might determine that certain correspondence should not be filed, e.g., a letter from a criminal defendant discussing their lawyer's performance in ways that implicate attorney-client privilege); S.D.N.Y. (letter threatening the judge).
23 I did not note a specific goal stated by the interviewees from the W.D. Pa., but they stated that the usual turnaround time from opening to scanning to docketing is generally from 4 to 6 business hours.
24 N.D. Ill. (this is the goal, but it is hard to meet on the Tuesday after a Monday holiday).
25 W.D. Mo. (interviewee stated that the informal deadline is 24 hours not counting weekends, but "99.5 percent" of paper filings are docketed the day that the court receives them); D.S.C.; D. Utah (goal is to enter paper documents within 24 hours, excluding holidays and weekends).
See also D.D.C. (for filings in an existing case; listed here as a "see also" because D.D.C. apparently does not exempt paper filers from serving those who get NEFs).
26 D. Ariz. (goal is same day or next day; in context I think "business day" was implicit); S.D.N.Y. (48 hours – not counting weekends – from stamping the document received to docketing on CM/ECF).
27 E.g., D. Ariz.; N.D. Ill. (local provision points out that the NEF for a sealed filing does not count as service); W.D. Mo. CM/ECF Admin. Manual at 8; W.D. Pa.; D. Utah ECF Admin. Procedural Manual 21, 28-29.

means.[28] In other districts, it is possible to set the restrictions for the CM/ECF filing so that the document is viewable both by the court and the other parties.[29]

It appeared that some but not all of the districts had thought about how to treat the calculation of time periods measured from service when the service is effected through CM/ECF but the filing was filed other than through CM/ECF. An interviewee in one district reported that this issue does not come up, but thought that a sensible way to approach this question is to count the date of entry in the CM/ECF docket (i.e., the date of the NEF) as the date of service.[30] An interviewee in another district stated that the issue has not arisen in their experience, perhaps because the clerk's office tends to get paper filings up onto CM/ECF pretty quickly.[31] An interviewee in a third district also reported that the issue has not come up, probably because briefing schedules are typically set by the judge.[32] An interviewee in another district treats the date of entry into CM/ECF (that is, the date of the NEF) as the relevant starting point for response periods that run from service.[33] Two districts apparently treat the date the court receives the filing (not the date of entry into CM/ECF) as the relevant starting point for response periods that run from service, and do not accord the responding party three extra days for the response.[34]

II. Access to CM/ECF for self-represented litigants

When interviewing personnel from districts that provide CM/ECF access to non-incarcerated self-represented litigants (either across the board or by permission), we asked a number of questions about how that is working. Since this suite of questions concerned experience with CM/ECF access for self-represented litigants, we posed these questions only to those from districts that provide that access to some degree.[35] Among the districts encompassed

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28 D. Ariz. ("attorneys are often worse" than self-represented litigants about separately serving sealed documents on the other parties); N.D. Ill ("attorneys get into trouble on this"); W.D. Mo. (noting that the other party would know of the filing's existence based on the NEF, so they would know to follow up with the filer if the document were not separately served on them as required by the local provision).
29 S.D.N.Y. ECF Rules & Instructions 6.9 ("The filing party has the ability to designate which case participants will have access by selecting the appropriate Viewing Level for the document from the list below."); D.S.C.
30 N.D. Ill.; see also S.D.N.Y. (interviewee stated that the date of entry stated on the NEF would be considered to be the date of service).
31 W.D. Mo.; see also supra note 25 regarding typical time interval in W.D. Mo. between receipt of paper filing and entry in CM/ECF.
32 W.D. Pa.
33 D.S.C.
34 D. Ariz.; D. Utah.
35 The D.S.C. does not permit any self-represented litigants to use CM/ECF. An interviewee

in our interviews, the districts that provide access to all self-represented litigants (at the litigant's option) without the need for special permission are:

- District of Kansas (where an interviewee reports that "one or two percent of our [CM/ECF] filers are pro se users").
- Western District of Missouri (where an interviewee estimates that there are about 20 to 25 self-represented litigants currently using CM/ECF).[36]
- Western District of Pennsylvania (where an interviewee estimates that there are "maybe a couple of dozen" self-represented litigants using CM/ECF at any given time).[37]

The districts that provide access to self-represented litigants with court permission are:

- District of Arizona[38] (where an interviewee reports that CM/ECF participation by self-represented litigants is "not rare").
- District of the District of Columbia (where an interviewee reports "a lot of pro se filers on CM/ECF").
- Northern District of Illinois.
- Southern District of New York (where the interviewee reports that it is unusual for a self-represented litigant to use CM/ECF; those who do are usually pro se attorneys).

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from that district volunteered that she would oppose any rule amendment that required a district to allow such litigants to access CM/ECF. I responded that the proposals currently under consideration would, at most, foreclose a district from having a blanket ban on CM/ECF access [see Suggestion No. 20-CV-EE (John Hawkinson)]. The interviewee stated that a blanket ban is necessary in her district because the court wishes to treat all pro se litigants uniformly.

36 The district initially provided access based on permission from the judge (starting in about 2009), but five years ago it changed its approach and the clerk's office grants access "on a routine basis."

37 See W.D. Pa. ECF Policies & Procedures at 2-3: "A person who is a party to an action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. If during the course of the action the person retains an attorney who appears on the person's behalf, the attorney must advise the clerk to terminate the person's filing privileges as a Filing User upon the attorney's appearance.
When registering, an individual must certify that ECF training has been completed, and then requests a CM/ECF account for the Western District of Pennsylvania through PACER. Once the request is processed by the clerk, the Filing User will receive notification that the request was approved."

38 See D. Ariz. Pro Se Handbook at 15-16.

Uniformly, the interviewees reported that there was no difficulty in keeping track of self-represented litigants on CM/ECF.[39] You will recall that this question arose in committee discussions because self-represented litigants, unlike lawyers, do not have attorney ID numbers. Interviewees in two districts stated that their court wouldn't keep track of attorneys on CM/ECF via their attorney ID numbers.[40] Several interviewees noted that each CM/ECF registrant (whether or not they are a lawyer) has a "PRID" number[41] – which is a unique personal identifier – though one of those interviewees observed that their court hardly ever uses the PRID, because they can usually just look up a self-represented litigant using their name.[42] One interviewee noted that the CM/ECF system will have an email address on file for the litigant.[43]

Interviewees from a number of districts reported that their staff do quality control on all CM/ECF filings, whether made by self-represented litigants or by attorneys.[44] Two interviewees mentioned that the filings made on behalf of attorneys are often made – in actuality – by paralegals;[45] one of these interviewees reported that mistakes occur about equally frequently by attorneys and by self-represented litigants,[46] and the other reported that their office finds far more errors by lawyers, especially by attorneys who usually practice in state court.[47] One interviewee reported that, in the course of their quality control, they will correct a wrong event choice (or the like) whether made by an attorney or by a self-represented litigant.[48] Interviewees from three districts reported that they might need to do more review for quality control and make corrections more frequently for self-represented litigants.[49] An interviewee from another district

39 D. Ariz.; D.D.C.; W.D. Mo.; W.D. Pa.; S.D.N.Y.
40 D.D.C. (attorney bar numbers are not listed in the docket); N.D. Ill. (interviewee noted that staff are not going to call up a state bar to verify attorney's bar ID number).
41 D.D.C.; W.D.Mo.; S.D.N.Y.; see also D. Kan. (interviewee stated that pro se litigants have personal ID numbers that will show in the system).
42 D.D.C.; see also D. Kan. (interviewee noted that NextGen suggests matches for a person's name, which helps with "matching" a person if they have filed more than one case in the district; "at any given moment, we have ten to 15 electronic filers that we are relatively familiar with, and they tend to be repeat litigants").
43 D. Ariz.
44 D.D.C.; N.D. Ill.; D. Kan.; S.D.N.Y.
45 N.D. Ill. (estimating that nine out of ten attorneys have a paralegal do the filing).
46 D.D.C.
47 N.D. Ill.
48 D.D.C. Compare S.D.N.Y. (court flags the error for the litigant to correct, and the litigant can call the help desk for further explanation).
49 D. Ariz. (but this interviewee also noted that a lot of self-represented litigants "actually do a pretty good job," and that "attorneys are terrible at [choosing the right events when filing], too"); D. Kan. (interviewee noted that some self-represented litigants "are better than some paralegals, because we are in better communication with them," while other self-represented litigants are

reported that problems with the format of PDFs are more frequent in attorney filings than self-represented litigants' filings,[50] and an interviewee from a third district reported that attorneys use the wrong event more often than self-represented litigants do.[51] An interviewee from another district reported that their office does quality control by checking for legibility and use of the right event, and does correct errors, but stated that "if anything" the only "appreciable burden" is the time spent on the phone with the self-represented litigants who are getting used to the system.[52]

Among the seven relevant districts, one requires training for both attorneys and self-represented users of CM/ECF,[53] while (probably) two require training only for the self-represented users[54] and three do not require training for either group.[55] One district requires that the self-represented litigant certify completion of the training as part of their application for permission to use CM/ECF.[56] Training and/or information varied among the districts that provide it, with written training materials being the most common but with some districts providing video training modules[57] and one district providing a particularly helpful step-by-step

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much less functional; "overall we spend a little more time on quality control with the pro se's, but not a lot more"); W.D. Pa. (there might be additional quality control that needs to be done and quality-control messages that need to go out a little more frequently – for example, if the litigant selects the wrong event or fails to separate documents – but some of the self-represented litigants are just as good as the attorney filers).

50 D.D.C. (attorneys sometimes file fillable PDF forms without first "printing" them to PDF; self-represented litigants are less likely to do this because they are more likely to file PDFs created by scanning).

51 N.D. Ill.

52 W.D. Mo.

53 N.D. Ill.

54 S.D.N.Y. is in this category. See S.D.N.Y. Motion for Permission for Electronic Case Filing. D.D.C. appears to also fall in this category, see D.D.C. Local Civil Rules 5.4(b)(1) (no mention of training requirement for lawyers) & (2) (self-represented applicant to use CM/ECF must certify "that he or she either has successfully completed the entire Clerk's Office on-line tutorial or has been permitted to file electronically in other federal courts").

55 D. Ariz.; D. Kan. (training is "offered and encouraged" but not required; self-represented litigants must have a conversation with an Administrative Specialist at the court before they receive CM/ECF credentials); W.D. Mo.

In the Western District of Pennsylvania, the ECF Policies & Procedures state that when registering for CM/ECF one "must certify that ECF training has been completed," but our interviewees stated that training resources were offered but not required.

56 D.D.C. (see D.D.C. Local Civil Rule 5.4(b)(2)).

57 D. Kan. (one civil-case video module accessible at https://www.ksd.uscourts.gov/cmecf); S.D.N.Y. (selected videos at https://nysd.uscourts.gov/programs/ecf-training).

I do not count the Western District of Missouri's video on case-opening procedures because self-represented litigants are not permitted to open cases via CM/ECF.

interactive automated training.[58]

Interviewees reported favorably on their court's experience with CM/ECF access for self-represented litigants.[59] The most commonly noted benefit (to the court)[60] of CM/ECF access for self-represented litigants was the decrease in the volume of paper filings.[61] A number of our interviewees pointed to a huge savings in court time – that is, opening mail, sorting it, scanning it, and uploading the electronic version to the docket.[62] Some also like not having to handle tangible papers that might be hard to scan, fragmentary, or odorous.[63] Because CM/ECF access also includes electronic noticing via the NEF, interviewees also strongly praised the saving in court time spent on sending notice of court orders – printing, mailing, and re-sending the mailings that are returned by the Post Office – and also the savings on mailing costs.[64] A number of interviewees also praised the benefits of the electronic record, which averts disputes with the litigant concerning what the litigant filed and when[65] and what orders the court sent out and when.

The interviewees had a range of views about the burdens on the clerk's office occasioned by self-represented litigants' access to CM/ECF.[66] One interviewee noted that sometimes a self-represented litigant might complain that they had a problem with their "one free look" at a filing via the NEF.[67] An interviewee from another district reported no extra burdens occasioned

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58 This is the D.D.C. See https://media.dcd.uscourts.gov/ecf2d/ . They acquired these training modules from another court. The District of Kansas website describes a similar training system, but when I clicked the link to access it, https://ecf-test.ksd.uscourts.gov/, I received an error message. Similarly, I could not get the Western District of Pennsylvania's training module, available via https://www.pawd.uscourts.gov/cm-ecf-training , to work for me.
59 N.D. Ill. ("The benefits outweigh the risks").
60 It is notable that a number of our interviewees also expressed the importance of striving for equality of court access for self-represented litigants. See D.D.C. (noting convenience to litigants of ability to file after hours).
61 N.D. Ill.; W.D. Pa.
62 D. Ariz. (not having to scan the paper documents); D.D.C. (same); W.D. Mo. (same; interviewee noted that due to the combined effect of CM/ECF access and EDSS access, court staff time on processing and scanning paper filings was about 30 minutes per day, down from a couple of hours per day).
63 D. Ariz.
64 D. Ariz. (printing court orders, time and cost of mailing them); S.D.N.Y. (mailing costs).
65 D.D.C. (clerk's office need not worry whether it correctly scanned all the pages of a filing); N.D. Ill. (electronic filing avoids the risk that an unethical filer might say that a paper filing scanned by the court differed from the original document).
66 See above for discussions of whether there was an increased need for quality control for self-represented CM/ECF users' filings.
67 D. Ariz.

by self-represented litigants' CM/ECF access.[68] Interviewees from another district noted that they will check whether a litigant is subject to a filing restriction, and that occasionally the court has removed the CM/ECF privileges of a problem filer (with the problematic filings in such cases typically being problematic because of their volume, that is, too many filings); but these interviewees reported (respectively) no "undue stress on the system" and that "overall [the access] is probably helpful".[69]

On the question of inappropriate filings, the overall view was that these could present problems whether filed in paper or electronically, and that either way the burden on the court was manageable.[70] One interviewee observed that self-represented litigant CM/ECF privileges did open the possibility that an inappropriate filing would be viewable on CM/ECF until court staff had a chance to review it; on the other hand, this interviewee observed that the staff in their district – when scanning in a paper filing – check only the caption, case number, and signature, but not every page of the document.[71] This interviewee could only think of one self-represented litigant, in the course of a decade, who filed an inappropriate item in CM/ECF; staff spotted the filing (a document containing inappropriate images) while auditing and immediately restricted access to it, and revoked the petitioner's CM/ECF privileges.[72] In another district, the interviewees could not think of an instance of inappropriate language or images filed via CM/ECF, though they could think of one involving a paper filer.[73] And in a third district, the interviewee noted that court personnel will simply restrict access to a problematic filing when necessary, and that even those filings tend to be made in good faith (e.g., pictures relating to a surgery or an injury);[74] this interviewee could think of only one self-represented litigant who made "scandalous" filings, and observed that the court promptly handled that situation by order.[75] In another district, the interviewee did note that services such as Lexis and Westlaw

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68 N.D. Ill.
69 D. Kan.
70 D. Ariz. ("The vast majority of litigants are trying to get their case heard and are not filing a bunch of inflammatory stuff and clerk's offices are good at reacting quickly if something should be sealed and it hasn't been a burden to do that."); W.D. Mo ("litigants aren't attaching deliberately scandalous material, just sensitive information about themselves"); W.D. Pa. (generally the pro se filer who is technically savvy enough to use CM/ECF is not among the pro se litigants who are submitting problematic materials); S.D.N.Y. ("I would rather have frivolous electronic filings than frivolous paper filings.").
71 N.D. Ill.
72 N.D. Ill. The interviewee also noted an instance where a self-represented litigant's filing in a state (not federal) court contained the home addresses of judicial personnel.
73 D. Kan. (noting a litigant who brought the court "boxes full of porn").
74 W.D. Mo. (interviewee noted options of restricting access to parties only or court only).
75 W.D. Mo. ("that was a bit of an ordeal when it was happening, but the judge acted quickly, and there was no public interest in the documents"; the court set up immediate notifications to chambers when this litigant made a filing, so that the court could quickly review them and decide whether to restrict electronic access).

scan the court's electronic dockets constantly and will download new filings right away.[76] Multiple interviewees observed that rescinding CM/ECF privileges is always an option.[77]

None of the districts in question uses a "gating" system (that is, holding self-represented litigants' court filings for clerk's office review after a document is filed in CM/ECF and before it is made viewable by people other than court personnel). A number of our interviewees noted that it would be possible to configure CM/ECF so that it worked this way (for example, by creating a separate user group for self-represented litigants and then only giving that user group access to events that would be restricted to court viewing only).[78] But two interviewees observed that their district hadn't felt the need to adopt such a practice.[79] One interviewee observed that it would take valuable clerk's office time to engage in such a review.[80] And another interviewee suggested that the relevant court of appeals would look askance at the constitutionality of restricting (even temporarily) who could view a litigant's filings.[81]

We asked about inappropriate sharing of CM/ECF credentials, and among our interviewees, only one cited an example involving a self-represented litigant – specifically, a case in which a mother was the listed plaintiff in a case but her son would use her PACER account to file documents.[82] But the interviewee who provided that example also stated that they "had not seen a huge problem," and that the "majority of mistakes concerning sharing of credentials come from law firms."[83] A number of interviewees observed that, because access to NextGen CM/ECF entails linking the person's PACER account with the particular case, sharing credentials would mean sharing the PACER login – and there is a built-in disincentive to share the PACER login because that would enable the other person to run up PACER bills on the person's PACER account.[84] Also, a number of these districts restrict a self-represented litigant's CM/ECF access to only those cases in which the self-represented litigant is a party,[85]

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76 S.D.N.Y.
77 D. Ariz.; D.D.C. (interviewee noted that in a few instances the court had rescinded access); N.D. Ill. (interviewee noted that the court had revoked an attorney's CM/ECF privileges too); D. Kan.; W.D. Pa.
78 D.D.C.; D.Kan.; S.D.N.Y.
79 D. Ariz. (interviewee noted that court could simply rescind CM/ECF access if necessary); D. Kan. (same).
80 D. Kan.
81 N.D. Ill.
82 D. Kan.
83 D. Kan. See also S.D.N.Y. (interviewee noted that a lot of lawyers share their credentials, and asked why credential sharing would be a bigger deal when done by a pro se litigant).
84 D.D.C.; W.D. Mo.
85 D. Ariz.; D.D.C. (access is granted on a per-case basis); D. Kan. (interviewee stated that "you have to be associated with the case, and there is a mechanism within the profile for that case, where we have to turn on their e filing privileges"); W.D. Mo.; W.D. Pa.; S.D.N.Y.

which by definition limits the incentive to share the credentials with some other person for reasons unrelated to the litigant's case.

All but one of these districts require the self-represented litigant to initiate their case by other means; so CM/ECF access for self-represented litigants in these districts occurs only once the case has gotten started.[86] (By contrast, in some of these districts lawyers can initiate a case via CM/ECF, while in others even lawyers cannot do so.) In one district, new cases can be initiated electronically in a "shell case," and then the clerk's office moves the case over in a real case docket; and this process is available to self-represented litigants who are registered in CM/ECF; but only a handful of self-represented litigants have used this method.[87]

We also asked these interviewees what resources a court would find necessary or useful if it were to permit or expand CM/ECF access for self-represented litigants. Here are their suggestions:

- Learn from your peers in other courts.[88]
- Use a pilot program, take things one step at a time, and see how a new program goes.[89]
- Involve your pro se law clerks in drafting your CM/ECF rules and procedures.[90]
- Plan how you will rescind CM/ECF access if necessary.[91]

By contrast, our interviewee from the Northern District of Illinois asserted that it is not technically possible to limit access to just one case. I now think that what he may have meant is that if you grant a litigant access to CM/ECF for one of their cases, and they have multiple cases in the district, the grant of access operates across all of their cases. We certainly did hear from other districts that it was possible to limit access such that the self-represented litigant could not file in cases to which they are not a party.

86 D. Ariz. (interviewee noted that, for IFP cases, this effectively means no CM/ECF filing access until after the case has survived the initial IFP case review); D.D.C. (interviewee noted that "case initiating filings are the most likely to be problematic"); N.D. Ill. (interviewee noted that this helps the court to know who a litigant is); D. Kan. (see https://www.ksd.uscourts.gov/filing-without-attorney/faq); W.D. Mo. CM/ECF Admin. Manual at 17; S.D.N.Y. ECF Rules & Instructions 14.2.

87 See W.D. Pa. CM/ECF Version 6.2 Attorney User Guide at 19.

88 D.D.C. (interviewee advocated use of listserves that have been set up by someone in EDNY – such as a listserve for ECF coordinators – and observed that these listserves have searchable archives); N.D. Ill. (suggestions included convening a seminar at which courts that don't yet allow self-represented litigants to use CM/ECF can learn peer-to-peer (chief judge to chief judge, clerk to clerk) how it works in the districts that have been doing it for a while); W.D. Mo. (interviewee suggested consulting personnel in districts that are similar in size or within the same circuit).

89 D.D.C.

90 S.D.N.Y.

91 N.D. Ill.

- Build a very simple menu in CM/ECF for the pro se filers, with only a few simple events, so as to limit the options that they will see when they use the system.[92]
- Put together a training on CM/ECF (which the court should already have done for their attorney filers).[93]
- Have good instructional documentation online. [94]
- Make sure that your help-desk staff can explain how the system works, especially how to select the right event when filing.[95]
- Make clear to the would-be self-represented CM/ECF filer that the court will not provide remedial technical support such as teaching them how to make PDFs or how to troubleshoot their wi-fi connectivity.[96]
- In one district, the interviewees were equivocal as to whether staffing would be a consideration.[97] In another district,[98] interviewees emphasized the need for proper staffing – both having someone on staff who knows how to configure the system for use by self-represented litigants and having adequate personnel to do quality control.

III. Alternative (non-CM/ECF) modes of electronic access

A number of these districts provide alternative methods of access for self-represented litigants – both for filing their own papers and for receiving others' filings in the case. As to those districts, we had a set of questions for the interviewees. The districts (in our interview set) that provide alternative electronic filing access[99] are:

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92 S.D.N.Y.

93 N.D. Ill.

94 D. Kan.

95 D. Kan.

96 S.D.N.Y.

97 D. Kan. (one interviewee first advised, "make sure you have the manpower to handle what might be a huge influx," but then stated that self-represented access to CM/ECF "does not seem like that big of a deal"; a second interviewee noted that their district had not seen a flood of self-represented litigants on CM/ECF and predicted that a court won't necessarily have to increase its staffing but instead should just make sure its existing staff are trained and prepared).

98 W.D. Pa.

99 I am omitting the D.D.C. from this list, because although the court accepted email filings in civil cases during COVID, it no longer does so (though it is still accepting email filings in criminal cases).

For similar reasons, I am omitting the District of South Carolina. The D.S.C. permitted pro se email submissions during COVID, but ended that program in June 2021. The interviewee from the D.S.C. explained that few litigants were using it, and those who were using it made some frivolous filings, so this mode of access was being used "improperly or not much."

I am also omitting the Western District of Pennsylvania, which allows certain sealed filings to be submitted by email, but does not otherwise allow alternative means of electronic submission.

- Northern District of Illinois (upload via Box.com; court previously had a temporary email address for pro se filings)
- District of Kansas (email)
- Western District of Missouri (upload) (interviewee estimates that around 50 self-represented litigants are using the EDSS system, up from half that number the previous year)[100]
- Southern District of New York (email, including to start a new case)
- District of Utah (email; interviewee stated that probably 70 percent of non-incarcerated self-represented litigants are filing by email)

The districts (in the interview set) that provide an electronic noticing program[101] are:

- District of Arizona
- District of the District of Columbia
- Northern District of Illinois
- District of Kansas (an interviewee reported that this is "more popular than electronic filing")
- Western District of Missouri (only if the litigant signs up for EDSS)
- Southern District of New York
- District of Utah

The interviewees from districts that permit email or portal submissions did not report any significant difficulties with virus scanning,[102] file size,[103] or other technical problems.

As noted above in the section concerning CM/ECF access, the key benefit of electronic

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100 https://www.mow.uscourts.gov/content/electronic-document-submission-system .

101 In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish.

102 A D.D.C. interviewee expressed confidence in the fact that the court's IT department keeps their virus protections up to date.

A District of Kansas interviewee noted that court personnel will send any questionable-looking file to their IT department for review, but also noted that they knew of no malicious submissions; "the biggest problem is that they'll scan in something you can barely read."

A Western District of Missouri interviewee reported that the court's IT department set up the court's security system, which the interviewee presumes addresses any virus issues.

The Southern District of New York interviewee stated that, nationwide, the AO has provided all districts with a version of Outlook that blocks attachments that appear malicious.

The District of Utah interviewee stated that viruses have not been a concern.

103 D. Kan. (people will usually file multiple attachments rather than trying to consolidate all of them into one big file); W.D. Mo.

submission methods, from the clerk's office perspective,[104] is the avoidance of the need to handle paper filings.[105] Some interviewees also noted the benefit of an electronic trail concerning what was filed and when.[106] And one interviewee noted that unlike paper filings scanned by the court, some electronic submissions are native PDF files that are text searchable.[107]

Our interviewees did not note many difficulties or burdens associated with their programs. An interviewee in one district reported that occasionally a litigant will email the court a complaint without including contact info besides their email.[108] In another district, the interviewee noted one problematic litigant with seven cases before the court who was abusive in interactions with court staff, but that situation was handled by the judge and was "a rarity" because most EDSS users "file on time and properly and do well."[109] The interviewee in another district stated that there is "a love/hate relationship" with the court's email filing program: on one hand, some email submissions are crazy and abusive, but on the other hand, abuse can be submitted via paper as well, and with email submissions, the court avoids the need to deal with paper filings.[110] In another district the interviewee noted that the main challenges were making sure that a litigant submitted the required form to register for email filing[111] and that litigants sometimes make improperly formatted or too-frequent submissions; but this interviewee reported that most self-represented email filers do well, and that it is faster to deal with electronic submissions than paper submissions.

In districts that provide an alternative electronic submission method (email or portal), we asked whether such filings qualified for the same time-computation treatment as CM/ECF filings – that is, would a filing submitted at 11:30 pm on Tuesday be counted as filed on Tuesday? The

104 As with CM/ECF, so too here, some personnel also noted benefits to the litigant. E.g., W.D. Mo. (interviewee stated that access to the EDSS system gives litigant greater control over their case).

105 N.D. Ill. (avoidance of need to scan paper filing, audit scanned e-copy, retain paper copy for a period of time); D. Kan. (avoidance of need to scan paper filing); W.D. Mo. (same).

106 N.D. Ill. (contrasting this with the disputes that can arise with respect to what a litigant filed via a physical drop box).

107 S.D.N.Y.

108 D. Kan. (interviewee added, "but that's a handful of noncompliant people," and overall the email filing program saves the court a "tremendous" amount of effort).

109 W.D. Mo.

110 S.D.N.Y. This interviewee stated uncertainty as to whether the court would continue its email submission program.

111 D. Utah. Some litigants submit by email without first filling out the form, which sets out the ground rules for the program, see D. Utah Email Filing & Electronic Notification Form for Unrepresented Parties.

answer in all five districts is yes.[112]

In the districts that provide an electronic noticing program, the electronic noticing programs all work the same basic way: The system is set to generate an email notice of electronic filing (NEF) to those litigants who are enrolled in the electronic noticing program just as it generates a NEF to those litigants who are on CM/ECF. So the electronic noticing works similarly for its enrollees as for CM/ECF participants: the email notice includes a link to the underlying filing (whether it be a litigant's filing or a court order)[113] and the person gets "one free look" by which to view and download the document (after that one free look, any applicable PACER fees would be incurred by subsequent "looks").

Our interviewees noted a few minor issues with their court's electronic noticing system: the need to alert litigants to its limitations,[114] the occasional user who messes up their "one free look,"[115] the occasional typo in an email address or change in email address.[116] They tended to stress the benefit to the court of avoiding the need to mail court orders[117] as well as having an electronic record of what the litigant received.[118] A number of interviewees observed that their court encourages self-represented litigants to sign up for electronic noticing.[119]

In at least one instance, we also obtained details on how electronic noticing works for

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112 N.D. Ill.; D. Kan.; W.D. Mo. (answer provided by W.D. Mo. EDSS Admin Procedure III.B); S.D.N.Y.; D. Utah Local Civil Rule 5-1(b)(1)(A)(iv).

113 N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; D. Utah.

An interviewee from D.D.C. pointed out an exception to this: the documents cannot be accessed electronically in Social Security or immigration cases. (This may be specific to the way in which the email noticing program is set up. Compare Civil Rule 5.2(c)(1) (presumptively allowing "remote electronic access to any part of the case file" for "the parties and their attorneys" in Social Security and immigration cases).

114 A D.D.C. interviewee stressed the need to make sure that litigants understand the lack of electronic access to documents in Social Security and immigration cases.

115 D.D.C. (interviewee noted that the court will generate a new NEF for the person so long as it's not always the same person having this difficulty). Compare D. Kan. (interviewee noted that this issue arises much more frequently with attorneys than with self-represented litigants).

116 N.D. Ill. (interviewee noted that this problem arises "more frequently with attorneys" than with self-represented litigants); D. Utah (interviewee noted the need to keep the email addresses up to date and monitor for bouncebacks).

117 D. Kan. (interviewee noted that for many self-represented litigants, their email address may be more stable over time than their physical address); S.D.N.Y. (between CM/ECF access and electronic noticing program, court is avoiding the need to mail out about 3,000 orders per week); D. Utah (savings on printing and postage and trips to the mail drop).

118 D. Utah.

119 D. Ariz.; D.D.C. (courtroom deputies boosted awareness of the program by sending flyers to self-represented litigants); N.D. Ill.; D. Kan.

incarcerated litigants.[120] In the interests of brevity, I am omitting from this memo that and other details specific to incarcerated litigants, but that will be useful information for future work on that topic.

120 D. Ariz.

TAB 4B

MEMORANDUM

DATE: August 24, 2023

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

CC: H. Thomas Byron III

FROM: Judge Jay S. Bybee
Catherine T. Struve

RE: E-Filing Deadlines Joint Subcommittee

We write on behalf of the E-Filing Deadlines Joint Subcommittee to summarize the Subcommittee's recommendations concerning Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U. Those docket numbers refer to a 2019 proposal by now-Chief Judge Michael Chagares that the national time-counting rules[1] be amended to set a presumptive electronic-filing deadline earlier than midnight.[2]

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1 Civil Rule 6(a)(4) is representative of the operative portions of the national time-counting rules. It provides in relevant part:

> (a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time….
>
> > (4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:
> >
> > > (A) for electronic filing, at midnight in the court's time zone; and
> > >
> > > (B) for filing by other means, when the clerk's office is scheduled to close.

Bankruptcy Rule 9006(a)(4) and Criminal Rule 45(a)(4) are materially similar. Appellate Rule 26(a)(4) is slightly more complicated (in part because it addresses electronic filings in both the district court and the court of appeals) but, like the other three rules, it sets a presumptive deadline of midnight for electronic filings.

2 Chief Judge Chagares summarized his proposal thus:

The subcommittee requested information from the Federal Judicial Center ("FJC") about actual filing patterns by time of day. The FJC released two studies in 2022 – one concerning e-filing in federal court,[3] and another concerning e-filing in state courts.[4] The study of federal-court filings included a survey component, but that survey was truncated due to challenges arising from the pandemic.[5] The study also included a quantitative analysis of more than 47 million docket entries made in 2018 in the federal bankruptcy courts, district courts, and courts of appeals. That analysis enabled the researchers to reach this estimate: "About four out of five attorney filings in all three types of courts were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before 8:00, about one in six was made after 5:00, and about one in ten was made after 6:00."[6]

This year, the Third Circuit adopted (effective July 1, 2023) a new local rule that moves the presumptive deadline for most electronic filings in that court of appeals from midnight to 5:00 p.m.[7] The Standing Committee asked the subcommittee to update its consideration of the

> I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

The full proposal is enclosed.

3 See Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingDeadlineStudy.pdf .

4 See Marie Leary & Jana Laks, Electronic Filing Deadlines in State Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingStateCourts.pdf .

5 See Reagan et al., supra note 3, at 1 ("We planned to ask a random sample of judges and attorneys about their practices and preferences, but we brought the survey to a close during its pilot phase because of the still-present COVID-19 pandemic.").

6 See id. at 4.

7 Third Circuit Local Appellate Rule 26.1 provides:

> 26.1 Deadline for Filing
>
> (a) Unless a different time is set by a statute, local rule, or court order:
>
> > (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
> >
> > (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and

2019 proposal in the light of that development.

The subcommittee met by Zoom on August 21, 2023. All members participated, as did the Rules Committee Secretary and reporters from all four of the relevant advisory committees. Subcommittee members gave consideration to the Third Circuit's stated reasons for its new local rule, and also to reported comments concerning that local rule. It was noted that the local rule proposal had evoked strong negative reactions from the bar. An internal DOJ survey of attorneys concerning the idea of moving the presumptive e-filing deadline earlier than midnight had also elicited negative comments about that idea. A subcommittee member reported a similar reaction from members of a law firm.

After careful discussion, the subcommittee voted unanimously to recommend that no action be taken on Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U, and that the subcommittee be disbanded.[8]

Encls.

> > (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.
>
> (b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.
>
> (c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
>
> > (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
> >
> > (2) a party is providing paper copies of previously filed electronic briefs and appendices.
>
> (d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

The Third Circuit's Public Notice dated May 2, 2023 is enclosed.

8 It was noted that the Appellate Rules Committee currently has before it a suggestion from Howard Bashman, Esq., proposing various possible responses by the Appellate Rules Committee to the Third Circuit's local rule. See Suggestion 23-AP-F. The Appellate Rules Committee, however, has not yet discussed that proposal, which remains for future consideration by that advisory committee.

19-AP-E
19-BK-H
19-CR-C
19-CV-U

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
>
> (A) for electronic filing, at midnight in the court's time zone; and
>
> (B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at: https://courts.delaware.gov/forms/download.aspx?id=105958. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by 'holding' briefs for filing until midnight themselves as a response, even when their brief was done." Delaware Bar Report 33-34.[1]

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline "will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day." Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association's Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline "has provided a healthier work-life balance" and that the order "has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country."). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court's time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court's time zone>. Another

[1] The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing "does not promote the submission of carefully considered and edited filings," id. at 32, and that quality "is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable," id. at 39-40.

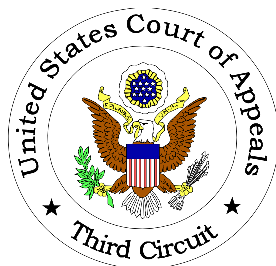
approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk's office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.



Public Notice – May 2, 2023

The United States Court of Appeals for the Third Circuit has adopted amendments to its Local Appellate Rules (L.A.R.), creating a new L.A.R. 26.1 and modifying L.A.R. Misc. 113.3(c). The amended rules create a uniform 5:00 p.m. E.T. deadline for filings (electronic and otherwise) and will become effective on July 1, 2023. The Clerk's Office will apply the 5:00 p.m. E.T. deadline to deadlines set on or after July 1, 2023, and also observe a grace period until December 31, 2023, for papers mistakenly filed after 5:00 p.m. E.T. The amendments are below.

By way of background, Federal Rules of Appellate Procedure 25(a) and 26(a) create two general presumptive filing deadlines, with electronically filed documents due at midnight and documents filed otherwise (such as paper filings) due when the Clerk's Office closes. The hours of the Clerk's Office in the Court of Appeals for the Third Circuit are 8:30 a.m. to 5:00 p.m. E.T.

Rule 26(a)(4) also authorizes courts to establish their own deadlines by court order or local rule. The Court consulted its Lawyers Advisory Committee, which studied and approved the proposed rule changes. The Court then determined that it would solicit comments from the public about the proposed new local rule and conforming amendment. A Public Notice encouraging comments was issued on January 17, 2023. The period for public comment closed on March 3, 2023.

The Court received wide variety of comments from a diverse group of entities and people, including senior attorneys, junior attorneys, pro se litigants, professors, paralegals, and legal assistants. "The Court is grateful for all of the comments received and they were quite helpful in our decision-making. As a matter of fact, several modifications to the proposed rules were made because of suggestions made in the comments, such as excepting filings initiating cases in the Court, like petitions for review," stated Chief Judge Michael A. Chagares. Further, the Court took notice of the successes of the United States District Court for the District of Delaware and state courts of Delaware, which relied principally on work/life balance and quality of life concerns in similarly modifying their filing deadlines years ago. Other courts have also rolled back their deadlines.

Reasons supporting the Court's adoption of the amendments include, in no particular order:

- permitting the Court's Helpdesk personnel to assist electronic filers with technical and other issues when needed during regular business hours and permitting other Clerk's Office personnel to extend current deadlines (the average non-extended filing period is thirty days) in response to a party's motion or for up to fourteen days by telephone, during regular business hours. In addition, the amendments permit judges to read and consider filings at an earlier hour.

- insofar as over half of the Court's litigants are pro se, many of whom cannot or will not use the Court's CM/ECF system (and attorneys must use the system), the rule largely equalizes the filing deadlines for pro se litigants and attorneys.

- consistent with the collegiality and fairness the Court encourages, the rule ends the practice by some of unnecessary late-night filings intended to deprive opponents from hours that could be used to consider and formulate responses to such filings. Further, the rule obviates the need by opposing counsel to check whether opposing papers were filed throughout the night. About one-quarter of the Court's filings are currently received after business hours.

- alleviating confusion by equalizing the filing deadlines for electronically filed and non-electronically filed documents in most cases.

While the new rule sets a 5:00 p.m. E.T. deadline for filing, parties reserve the autonomy to prepare their papers whenever they choose, and as Chief Judge Chagares notes, "the virtual courthouse remains open twenty-four hours a day for electronic filing."

The Clerk's Office will proactively advise and remind parties of the new deadline in, for instance, scheduling orders.

L.A.R. 26.0 COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

(a) Unless a different time is set by a statute, local rule, or court order:

(1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;

(2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and

(3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

(b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.

(c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
  (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
  (2) a party is providing paper copies of previously filed electronic briefs and appendices.

(d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as "midnight in the time zone of the circuit clerk's principal office" for electronic filing and "when the Clerk's office is scheduled to close" for other means of transmission of documents to the clerk's office. This rule applies "[u]nless a different time is set by statute, local rule, or court order." L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

….

(c) Except as stated in L.A.R. 26.1, ~~F~~filing must be completed by ~~midnight on the last day Eastern Time~~ 5:00 p.m. Eastern Time on the last day to be considered timely ~~filed that day~~.

….

Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

TAB 4C

Item 4C will be an oral report.

TAB 5

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Costs on Appeal (21-AP-D) & Bankruptcy Appeals

Date: September 22, 2023

In August of 2023, proposed amendments to Rule 6 (dealing with bankruptcy appeals) and Rule 39 (dealing with costs on appeal) were published for public comment. https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf

As of the date of this memo, no comments have been received.

The comment period remains open until February 16, 2024, and I expect that we will receive comments before then. The subcommittees will meet in the spring of 2024 to consider any comments.

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Subcommittee

Re: Possible amendments to FRAP 29 (21-AP-C; 23-AP-A; 23-AP-B)

Date: September 19, 2023

The subcommittee continues to consider possible amendments to FRAP 29, dealing with amicus briefs. This issue has been under consideration for several years, and this memo does not repeat the analysis from prior subcommittee memos. At its latest meeting, the subcommittee considered the input from the June 2023 meeting of the Standing Committee as well as issues raised at the last meeting of the Advisory Committee. The Advisory Committee had asked the Standing Committee to focus on two issues:

> 1) Whether the lookback period for disclosure of party contributions should be the prior 12 months (to reduce evasion) or should be the prior calendar year (to reduce burdens); and
>
> 2) Whether to eliminate the member exception for earmarked contributions by non-parties (to reduce evasion), coupled with some dollar threshold.

1) The Lookback Period

Discussion of the working draft of 29(b)(4) did not lead to any consensus regarding the lookback period, other than perhaps to think about other alternatives. In addition, at least one member of the Standing Committee found the "disregarding" clause in the working draft of Rule 29(b)(4) confusing. The working draft of Rule 29(b)(4) would require disclosure:

> whether a party, counsel, or any combination of parties and counsel has contributed 25% or more of the gross annual revenue of an amicus curiae during the 12 month period before the brief was filed—disregarding amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business.

The "disregarding" clause was derived from the AMICUS Act, which had an exception for "amounts received by a covered amicus . . . in commercial transactions in the ordinary course of any trade or business conducted by the covered amicus or in the form of investments (other than investments by the principal shareholder in a

limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the covered amicus." (proposing new 28 U.S.C. §1660(b)(2)).

On further reflection, the subcommittee does not see any need for the "disregarding" clause at all. The disclosure threshold in the AMICUS Act was 3%. With a threshold that low, a company that wanted to submit an amicus brief in a case in which a company with which it did business was a party would have to be concerned whether those ordinary business transactions added up to 3% of its revenue. If those were truly ordinary business transactions, the burden of such disclosure would exceed the benefit.

But with a threshold of 25%, the balance between the benefit and the burden is quite different. Even if we are talking about ordinary business transactions, if an amicus gets 25% of its revenue from a party, that suggests that the party has considerable influence over the amicus. And the burden of determining whether 25% of a company's revenue comes from a party is not great; officers of that company would likely be able to name such an important revenue source off the top of their heads. The burden might be somewhat greater if there are multiple parties, but even then, the amicus need only check the revenue it receives from those parties.

The subcommittee believes that there is a way to achieve both the benefit of a 12-month lookback and the benefit of a prior calendar year or fiscal year lookback while avoiding the drawbacks of both. The way to do so is to calculate the dollar threshold that must be disclosed by using the prior calendar or fiscal year, but then apply that dollar threshold to contributions made within the past 12 months. That is, an amicus would look at its prior calendar or fiscal year gross revenue and multiply that by 25%. The resulting dollar threshold would be the disclosure threshold for any contribution made within the 12-month period before the amicus brief was filed.

If the revenue of an amicus largely holds steady from the prior calendar or fiscal year, this approach will not result in significantly different disclosures. If the revenue of an amicus has grown dramatically since the prior calendar or fiscal year, this approach might result in more disclosures. But the subcommittee is not troubled by that result: If the parties are a significant part of the revenue growth of an amicus, that would be good to know. If the revenue of an amicus has shrunk dramatically since the prior year, this approach might result in fewer disclosures. Losing such disclosures could be significant if an amicus is failing and a party is keeping it afloat. But the subcommittee believes that possibility is likely to be sufficiently unusual to tolerate in the interest of reducing the burden of disclosure.

To further reduce the burden, the subcommittee suggests that the calculation be based on the prior fiscal year rather than the prior calendar year. Although none of the Federal Rules uses the term "fiscal year," a search in the Westlaw United States Code Annotated database returns over 10,000 results—and some 6842 results

when that search is limited to the statutory text field. See also https://www.investopedia.com/terms/f/fiscalyear.asp

With these changes, Rule 29(b)(4) would require the disclosure of:

> whether a party, its counsel, or any combination of parties and their counsel has, during the 12-month period before the brief was filed, contributed or pledged to contribute an amount equal to or greater than 25% of the gross revenue of the amicus curiae for the prior fiscal year.

2) Earmarked Contributions by Non-Parties

The Standing Committee did not reach any consensus regarding earmarked contributions and whether to retain the member exclusion. The subcommittee considered the possibility of separate thresholds for members and nonmembers. The threshold for nonmembers would be fairly low, essentially creating a de minimis exception so as not to ensnare crowd funders. The threshold for members would be comparatively high. This would allow for less evasion than the current rule but still respect the significance of membership.

But it concluded that the better approach would be to retain the member exception while limiting the ability of those who fund particular briefs to avoid disclosure through the simple device of becoming a member. This approach protects against disclosure of earmarked contributions made by those who have been members of the amicus for the prior 12 months, but not those who have become members more recently.

This approach raises an additional issue: What to do about an amicus that was created within the prior 12 months? The subcommittee did not want to require the disclosure of all earmarked contributions, thereby removing all member protection. Instead, it concluded that no member contributions would have to be disclosed in that situation, but that the amicus would have to disclose the date of its creation. This specific requirement dovetails with the more general requirement that an amicus disclose its history, and serves to reveal an amicus that may have been created for purposes of the litigation.

With these changes, Rule 29(d) would provide as follows:

> (d) **Disclosing a Relationship Between the Amicus and a Nonparty**. An amicus brief must name any person—other than the amicus, or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief. But an amicus brief need not disclose a person who has been a member of the amicus for the prior

12 months. If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date of creation of the amicus.

3) Improper Content in Amicus Briefs

At the last meeting of the Advisory Committee, some concern was expressed that Rule 29 not broadly invite amici to submit "relevant matter," because that could be read to invite the submission of inappropriate materials, such as waived or forfeited arguments. There is also a serious concern over the submission and consideration of factual material not in the record.

The subcommittee suggests dealing with this concern by further limiting the "relevant matter" to "relevant matter that is properly considered by the court." But the subcommittee does not want to try to specify in the text of the Rule what is proper and improper in an amicus brief. Blocking all forfeited or waived matters goes too far: Some forfeitures can be excused, and some matters cannot be waived. As for factual matter outside the record, this seems proper when dealing with legislative facts or facts subject to judicial notice, but not when dealing with adjudicative facts not subject to judicial notice. A Committee Note could mention such topics, but not attempt to draw precise lines.

So revised, the relevant part of Rule 29(a) could provide:

> (2) **When Authorized**. An amicus curiae brief that brings to the court's attention relevant matter that is properly considered by the court but not already brought to its attention by the parties may be of considerable help to the court. An amicus curiae brief that does not serve this purpose burdens the court, and its filing is not favored.

4) Amicus Briefs at Other Stages

Current Rule 29(a) deals with "amicus filings during a court's initial consideration of a case on the merits." Current Rule 29(b) deals with "amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc." At the last meeting of the Advisory Committee, the question was raised whether there should be some provision dealing with amicus briefs at other stages, such as stay applications.

The subcommittee tends to think not. It suspects that amicus briefs in the courts of appeals on stay applications are filed only in major, high-profile cases, that lawyers seeking to files such briefs are sophisticated enough to make motions for

leave to file them, and that a Rule addressed to them might result in encouraging more of them.

If the Advisory Committee concludes that such a Rule would be useful, it might look something like the Supreme Court's Rule 37.4:

> An *amicus curiae* brief in connection with an application under Rule 22 must be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action. In light of the time-sensitivity of such applications, the filing of these briefs is discouraged, and an amicus curiae brief should be filed only if it brings to the attention of the Court relevant matter not already presented by the parties that will be of considerable help to the Court.

Taking all these changes into account, here is the latest working draft:

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **When Authorized ~~Permitted~~**. An amicus curiae brief that brings to the court's attention relevant matter that is properly considered by the court but not already brought to its attention by the parties may be of considerable help to the court. An amicus curiae brief that does not serve this purpose burdens the court, and its filing is not favored. ~~The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.~~

(3) **~~Motion for Leave to File~~Striking a Brief**. A court of appeals may strike an amicus brief that would result in a judge's disqualification.~~The motion must be accompanied by the proposed brief and state:~~

~~(A) the movant's interest; and~~

-

~~(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.~~

(4) **Contents and Form**. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities — cases (alphabetically arranged), statutes and other references to the pages of the brief where they are cited;

(D) ~~a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;~~a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will be helpful to the court;

(E) unless the amicus is the United States or its officer or agency or a state, the disclosures required by Rule 29(b) and (d)~~unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:~~

~~(i) a party's counsel authored the brief in whole or in part;~~

-

~~(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and~~

-

~~(iii) a person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person~~;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) **Length**. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) **Time for Filing**. An amicus curiae must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. Except by the court's permission, an amicus curiae may not file a reply brief.

(8) **Oral Argument**. An amicus curiae may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between the Amicus and a Party. An amicus brief must disclose:

(1) whether a party or its counsel authored the brief in whole or in part;

(2) whether a party or its counsel contributed or pledged to contribute money intended to fund—or intended as compensation for—preparing, drafting, or submitting the brief;

(3) whether a party, its counsel, or any combination of parties and their counsel has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(4) whether a party, its counsel, or any combination of parties and their counsel has, during the 12-month period before the brief was

filed, contributed or pledged to contribute an amount equal to or greater than 25% of the gross revenue of the amicus curiae for the prior fiscal year.

(c) **Identifying the Party or Counsel; Disclosure by a Party or Counsel.** Any disclosure required by paragraph (b) must name the party or counsel. If the party or counsel knows that an amicus has failed to make the disclosure, the party or counsel must do so.

(d) **Disclosing a Relationship Between the Amicus and a Nonparty**. An amicus brief must name any person—other than the amicus, or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief. But an amicus brief need not disclose a person who has been a member of the amicus for the prior 12 months. If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date of creation of the amicus.

(e~~b~~) During Consideration of Whether to Grant Rehearing.

(1) **Applicability**. ~~This Rule 29(b)~~ Rule 29(a) through (d) govern~~s~~ amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in 29(e)(2) and (3), and unless a local rule or order in a case provides otherwise.

(2) ~~**When Permitted**. The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.~~

~~(3) **Motion for Leave to File**. Rule 29(a)(3) applies to a motion for leave.~~

~~(4) **Contents, Form, and** ~~**Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ The brief must not exceed 2,600 words.

(3~~5~~) **Time for Filing**. An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief ~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than the date set by the court for the response.

TAB 6B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Intervention Subcommittee

Re: Initial sketch of possible rule on intervention (22-AP-G; 23-AP-C)

Date: September 19, 2023

This subcommittee was created to evaluate whether there should be a new appellate rule dealing with intervention on appeal.

Last year, in *Cameron v. EMW Women's Surgical Center*, 142 S. Ct. 1002 (2022), the Supreme Court noted:

> No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed. The Federal Rules of Appellate Procedure make only one passing reference to intervention, and that reference concerns the review of agency action. See Rule 15(d); *Amalgamated Transit Union Int'l, AFL–CIO v. Donovan*, 771 F.2d 1551, 1553, n. 3 (C.A.D.C. 1985). Without any rule that governs appellate intervention, we have looked elsewhere for guidance. Thus we have considered the "policies underlying intervention" in the district courts, *Automobile Workers v. Scofield*, 382 U.S. 205, 217, n. 10, (1965), including the legal "interest" that a party seeks to "protect" through intervention on appeal. Fed. Rule Civ. Proc. 24(a)(2).

Id. at 1010. This year, another case was pending before the Supreme Court presenting the issue of intervention on appeal, but it became moot. *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (vacating order denying motion to intervene and remanding case with instructions to dismiss the motion as moot).

In 2010, the Advisory Committee, at the suggestion of Douglas Letter, considered whether the Appellate Rules should address the question of intervention on appeal. Professor Cathie Struve, then the Reporter for the Advisory Committee, prepared a memo regarding the question. She noted several themes in the caselaw beyond the Civil Rule 24 requirements:

- A good explanation for not intervening earlier
- Prejudice to existing parties
- Preventing end runs around the time to appeal
- Injecting issues not raised below or by the existing parties
- Why amicus status is insufficient

Struve Memo 6-13 (September 16, 2010). She also noted topics that a rule could address:

- the standards for intervention as of right or by permission
- the timing of requests to intervene
- the identity of the decisionmaker
- disclosure requirements for intervenors
- the timing and content of intervenors' briefs
- intervenors' participation (or not) in oral argument
- matters of costs

Id. at 14.

The Advisory Committee discussed the matter at its fall 2010 meeting. Concerns were raised including:

- dual tracks for intervention in the district court and court of appeals
- whether there was sufficient variation among the circuits to warrant rule making
- that the United States is in a different position than privates parties
- discouraging belated intervention
- not increasing the practice of seeking intervention on appeal
- the possibility of directing the motion to the district court

Minutes of October 2010 meeting at 23-24.

In April of 2011, the Advisory Committee decided without dissent to remove the item from the agenda. The minutes reflect the following discussion immediately before this decision:

> Judge Sutton invited discussion of this item, which arose from Mr. Letter's observation that Civil Rule 24 sets standards for intervention in the district courts, but that no comparable provision covers the general question of intervention in the courts of appeals. Mr. Letter noted that the United States has been successful in moving to intervene in a number of appeals. He observed that unless a statute provides a right to intervene, the decision whether to allow intervention rests in the court's discretion. An attorney member expressed concern with the idea of formalizing a procedure for seeking to intervene in the court of appeals (instead of in the district court); such a measure, this member suggested, might have unintended consequences.

Minutes of April 2011 meeting at 18.

In an amicus brief submitted to the Supreme Court in the *Mayorkas* case, Judith Resnik and others argued for rule making. They note that the Supreme Court has focused on three factors: (1) the timeliness of the intervenor's request; (2) the nature and importance of the "legal 'interest' that a party seeks to 'protect' through intervention on appeal"; and (3) potential prejudice to existing parties. Brief at 8.

They also provide a non-exhaustive list of some questions in need of consideration:

> • What kind of an interest must a party assert to be eligible to intervene on appeal? Does such an "interest" differ from those to be demonstrated at the district court? See generally [Caleb Nelson, Intervention, 106 Va. L. Rev. 271 (2020); David L. Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721 (1968)].
>
> • How should appellate courts deal with factual disputes that relate to legal arguments in appellate intervention? If the proposed intervention implicates material facts and cannot be resolved as a matter of law, should intervention be categorically disallowed? Or should the courts of appeals remand motions for intervention to district courts?
>
> • Should the threshold for intervention on appeal be higher than that for intervention at the district court to prevent "procedural gamesmanship to skirt unfavorable standards of review"? Richardson v. Flores, 979 F.3d 1102, 1105 (5th Cir. 2020).
>
> • Should States receive special solicitude in the analysis of interests? See generally Ann Woolhandler & Michael G. Collins, State Standing, 81 Va. L. Rev. 387 (1995) (analyzing the evolution of legally protected state interests in the context of standing); see also Cal. Code Civ. P. 902.1 ("[T]he Attorney General shall have the right to intervene and participate in any appeal taken [from an order or judgment in which a statute or regulation was found unconstitutional]. These rights shall apply regardless of whether the Attorney General participated in the case in the trial court."). Should governments in general? See Advisory Comm. on App. Rules, Minutes of Fall 2010 Meeting 23-24 (Oct. 7-8, 2010).
>
> • Should a rule preclude intervention in instances that raise questions of or undermine principles of estoppel? See Cameron, 142 S. Ct. at 1024 (Sotomayor, J., dissenting).

• What should happen when a court denies a nonparty's initial motion to intervene and the proposed intervenor does not later renew that motion?

• Should motions for intervention that meet some but not all of an appellate rule's criteria for intervention be considered as a motion for leave to participate as an amicus curiae? See Atl. Mut. Ins. Co. v. Nw. Airlines, Inc., 24 F.3d 958, 961 (7th Cir. 1994).

• Should intervenors be allowed to supplement the record on appeal? See Loc. 322, Allied Indus. Workers of Am., AFL-CIO v. Johnson Controls, Inc., 921 F.2d 732, 734 (7th Cir. 1991).

• Once a court of appeals grants intervention, should it be limited to that stage or should the grant of intervention travel with the remand if any? See United States v. Laraneta, 700 F.3d 983, 986 (7th Cir. 2012).

• Should an appellate rule mirror Rule 24 in contemplating both mandatory and permissive intervention?

Brief at 8-11.

One particular difficulty with a doctrine that leans on Civil Rule 24 is that the Supreme Court has provided scant guidance on the proper interpretation of that rule, which provides, in part:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Caleb Nelson has argued that some lower courts have allowed intervention as of right in circumstances far beyond the best interpretation of Rule 24. As he sees it, Rule 24's requirement that a person "claim[] an interest relating to the property or transaction that is the subject matter of the action," means that an intervenor as of right must have a legal interest "that the law recognizes as the basis for a claim or defense." Nelson, 106 Va. L. Rev. at 385-86. By contrast, some lower courts have tended to treat an "interest" so much more broadly as to reach people who "have

reason to care about the outcome of the case." *Id*. at 275-76 (noting that the word can "refer to anything that a person wants, whether or not the law protects that desire"). As he tells the story, the broad reading of "interest" is connected to the notion developed in the 1960s and 1970s of an "interest representation" model of litigation. *Id*. at 337. He suggests that "most or even all" of the current Justices may accept the traditional model of litigation rather than the interest representation model. *Id*. at 369.

Perhaps significantly, *Cameron*'s summary of the Court's approach to intervention on appeal refers to "the *legal* 'interest' that a party seeks to 'protect' through intervention on appeal." *Cameron*, 142 S. Ct. at 1010 (emphasis added), rather than simply "the 'interest' that a party seeks to protect . . . . " That is, even though the text of Rule 24 quoted in the passage uses the unadorned word "interest," the Court prefaced it with the word "legal."

This presents a potential problem for drafting any rule for intervention on appeal: A rule that simply borrows the existing language of Civil Rule 24 replicates its ambiguity.

One reason to adopt a more demanding standard for intervention on appeal is that appears to be the dominant approach in the courts of appeals. Over sixty years ago, the Court of Appeals for the Fifth Circuit held, in a one paragraph opinion, "A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (per curiam) (citation omitted). That standard has been approved in other circuits. *See In re Grand Jury Investigation*, 587 F.2d 598, 601 (3d Cir. 1978); *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551 (D.C. Cir. 1985) (per curiam); *Craig v. Simon*, 980 F.3d 614, 618 n.3 (8th Cir. 2020); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997); *Synqor, Inc. v. Artesyn Techs., Inc.*, 410 F. App'x 336, 337 (Fed. Cir. 2011). *Cf. Ruthardt v. United States*, 303 F.3d 375, 386 (1st Cir. 2002) (affirming district court's denial of intervention while stating, "Given the magnitude of the stakes and the helpful advocacy the funds have provided to us, we choose in these unusual circumstances to exercise our own discretion to allow the guaranty funds to intervene in the case at this time on a going-forward basis.").[1]

The subcommittee does not want to encourage more attempts to intervene on appeal, and certainly does not want to encourage attempts to intervene on appeal as end-runs around seeking intervention in the district court subject to (frequently deferential) appellate review. There is an additional concern in diversity cases that

---

[1] The court of appeals concluded that district court properly denied intervention because the proposed intervenors' interests were adequately represented by the Massachusetts Commissioner of Insurance, but nevertheless granted intervention going forward. 303 F.3d at 386.

intervention on appeal not undermine the statutory restrictions on supplemental jurisdiction.

The subcommittee therefore favors consideration of a restrictive rule for appellate intervention, without taking a position on the proper reading of Civil Rule 24.

Here is the subcommittee's working draft to help guide the Advisory Committee's consideration:

Rule 7.1 Intervention on Appeal*

(a) Motion to Intervene. The preferred method for a nonparty to be heard is by filing an amicus brief under Rule 29. Intervention on appeal is reserved for truly exceptional cases. A person may move to intervene on appeal by filing a motion in accordance with Rule 27. The motion must

(1) be filed promptly;

(2) show that the movant meets the requirements of (b); and

(3) specify and explain the movant's legal interest required by (c).

(b) Criteria. A court of appeals may permit a movant to intervene on appeal who:

(1) demonstrates a compelling reason why intervention was not sought previously or, if it was sought previously, provides a compelling explanation of how circumstances have changed;

(2) has a legal interest as described in (c);

(3) is so situated that disposing of the appeal in the movant's absence may as a practical matter impair or impede the movant's ability to protect that interest;

(4) shows that existing parties will not adequately protect that interest;

---

* It is far from clear where any new rule should be located. On the assumption that the rule would be used mainly if not exclusively in appeals from district courts in civil cases, *cf*. Rule 15(d) (providing for a motion to intervene in a proceeding to review or enforce an agency order), this draft is numbered between Rule 7 (bonds for costs on appeal in a civil case) and Rule 8 (stay or injunction pending appeal).

(5) shows that submission of an amicus brief would be insufficient to protect that interest;

(6) shows that existing parties will not be unfairly prejudiced by permitting intervention; and

(7) in any civil action of which the district courts have original jurisdiction founded solely on section 1332 of title 28, shows that intervention would be consistent with the jurisdictional requirements of section 1367(b) of title 28.

(c) Legal Interests. The following legal interests support intervention on appeal:

(1) a claim or defense, including one that could be asserted in an action for a declaratory judgment, that could be currently asserted against an existing party;

(2) a claim, including one that could be asserted in an action for a declaratory judgment, that could be asserted against an existing party if the current case resulted in a judgment sought by an existing party;

(3) a claim that is being litigated on behalf of the proposed intervenor by a party acting in a representative capacity; and

(4) a claim to a property interest in the property that is the subject of the action.

(d) Governments, Agencies, and Officials.

(1) The United States or a State may also move to intervene to defend the legality of any law it has enacted or action it or one of its agencies or officers has taken.

(2) An agency or officer of the United States or of a State may also move to intervene to defend the legality of any law it has enacted or action it or one of its agencies or officers has taken, if that agency or officer is empowered by the law of the United States or that State to do so.

(3) A motion under (d) need not comply with (a)(2), (a)(3), (b), or (c).

(e) Disposition of Motion. The court may grant the motion, deny the motion, or transfer the motion to the district court. If the court grants the motion, the intervenor becomes a party for all purposes, unless the court orders otherwise. Denial of a motion to intervene does not preclude the filing of an amicus brief under Rule 29.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Contempt Procedures (23-AP-D)

Date: September 16, 2023

Joshua Carback has suggested a new Appellate Rule 42 to deal with contempt procedures. The proposed Appellate Rule is a minor part of a complete package of proposed legislation coupled with proposed amendments to the Federal Rules of Bankruptcy Procedure, Civil Procedure, and Criminal Procedure. The submission is eighty-three pages long, including a seventy-two page law review article.

Rather than include the entire submission in the agenda book, the following excerpts demonstrate how any action on this proposal would depend on action by other committees. The relevant discussion in the law review article states:

> I propose that the Standing Committee modify the Federal Rules of Appellate Procedure by adopting a new rule governing contempt in appellate proceedings that is designated as Federal Rule of Appellate Procedure 42. All rules subsequent to New Appellate Rule 42 should "bump down." New Appellate Rule 42 should simply state that New Civil Rule 42 and revised Criminal Rule 42 govern contempt matters in proceedings before federal appellate courts. Again, this will improve the harmony, efficiency, and clarity of the federal rules of practice and procedure as a whole.

Joshua Carback, *Contempt Power and the United States Courts*, 44 Mitchell Hamline Law Journal of Public Policy and Practice 135-36 (2023) (footnotes omitted).

The proposed new Federal Rule of Appellate Procedure 42 would read, in its entirety:

> Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42 govern contempt proceedings.

I suggest that the Committee table this suggestion pending action by other Advisory Committees.

TAB 7B

J O S H U A   T .   C A R B A C K

23-AP-D
23-BK-E
23-CV-K
23-CR-C
23-EV-A

April 1, 2023
H. Thomas Byron III, Esq., Secretary
ADMINISTRATIVE OFFICE OF THE U.S. COURTS
Office of the General Counsel, Rules Committee Staff
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Secretary Byron,

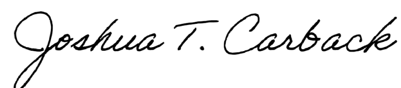
I write to you to formally submit my proposal for reforming judicial rules governing contempt proceedings. The inherent power of the judiciary to initiate contempt proceedings is well established. The culmination of decades of rulemaking under the interbranch framework instituted by the Rules Enabling Act of 1934, unfortunately, transformed what was once a relatively simple exercise of discretion into a more onerous and complicated task than it needs to be. Federal contempt law, by my count, now consists of at least 178 opinions issued by the United States Supreme Court, 182 statutes in the United States Code, 95 regulations in the Code of Federal Regulations, 37 nationwide rules of federal practice and procedure, 10 circuit wide rules governing policy and procedure, and 151 local rules governing practice and procedure.

I attach to this letter a published law review article expressing my proposal for reforming federal contempt law, including my proposed revisions to federal statutes, rules, and regulations. I also attach a supplement containing proposed revisions that I updated since that article was published. My proposal is comprehensive and systematic. My proposed rule revisions, in particular, affect appellate procedure, bankruptcy procedure, civil procedure, criminal procedure, and evidence. I therefore request that you transmit my proposal to the Standing Committee on Rules of Practice and Procedure and its five advisory committees for their mutual consideration. My proposal recommends, among other things, the creation of a civil analogue to Criminal Rule 42; the revision of Criminal Rule 42; the revision of 18 U.S.C. §§ 401, 3484, and 3499; and the repeal of 18 U.S.C. §§ 1703, 1503, 1509, 1512–13, 1621–23, 3146–49. This proposal will thereby fulfill the following objectives:

1. Define and distinguish criminal contempt and civil contempt;
2. Explain the scope of criminal contempt and civil contempt;
3. Create a formal process for parties to petition for contempt proceedings;
4. Clarify the range of penalties and purge conditions for contempt proceedings;
5. Shift discretion for contempt prosecutions from the executive to the judiciary; and
6. Authorize bankruptcy courts to wield contempt power.

I believe that the adoption of my proposal will promote the clarity, simplicity, efficiency, and fairness of contempt proceedings.

Respectfully,



Joshua T. Carback, Esq.

SUPPLEMENTAL PROPOSED REVISIONS TO CONTEMPT AUTHORITIES

New Fed. R. Civ. P. 42: Civil Contempt

(a) Definition.

(1) Civil contempt is disobedience out of the court's presence, such as

(i) A violation of a court order or decree;

(ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(iii) A violation of a statute constituting contempt per se.

(2) Civil contempt is coercive, not punitive.

(3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to compel compliance with an order or decree.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or tribunals who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

(1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or a tribunal that lacks authority to conduct the proceeding.

(2) The court may initiate a civil contempt proceeding sua sponte.

(3) A party to an action can request a civil contempt proceeding by filing a petition with the court against the alleged contemnor.

(4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must

(i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);

(ii) schedule deadline for the filing of an answer by the alleged contemnor;

(iii) state the time and place of any prehearing conference or hearing; and

(iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fine and any period of incarceration.

(5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:

(i) A valid order or decree of the court was in effect;

(ii) The alleged contemnor knew of that order or decree; and

(iii) The alleged contemnor breached that order or decree.

(6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that

(i) provides a short and concise explanation of its disposition;

(ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and

(iii) states the precise manner in which the purge conditions must be satisfied.

(7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. Purge conditions may be imposed individually or in combination. Purge conditions may be imposed immediately upon a finding of civil contempt or contingently in the event that a contemnor does not comply with an order or decree of court by a specified deadline. The following is an inexhaustive list of purge conditions:

(1) Reprimand;

(2) Report to any state bar or equivalent professional body; and

(3) Fine;

   (i) A fine may be payable to the court, a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.

   (ii) A fine must be calculated according to the character and magnitude of the harm or prejudice threatened by continued breach of the court's order or decree.

(e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or contingently if another purge condition is not timely satisfied.

(f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

Revised Fed. R. Crim. P. 42: Criminal Contempt

(a) Definition.

(1) Any disrespect or violation of the court's dignity may be liable for criminal contempt.

(2) Criminal contempt is punitive, not coercive.

(3) Direct criminal contempt is misbehavior in the court's presence or so near to it as to obstruct the administration of justice.

(4) Constructive criminal contempt is disobedience to the court outside of the court's presence, and can involve the following:

   (i) violation of a court order or decree;

   (ii) interference with or obstruction of the administration of justice, including improper threats, tampering, or other undue influences directed toward grand jurors, petit jurors, witnesses, officers of the court, and other persons operating under court order or decree;

   (iii) violation of bail or parole conditions;

   (iv) material misrepresentation to the court, including perjury;

   (v) violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(vi) violation of a statute constituting contempt per se.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend criminal contempt sanctions and certify them for disposition by a court with proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or tribunals that do not possess authority to adjudicate civil contempt proceedings but are authorized to recommend them may certify those recommendations for disposition under this rule.

(c) Direct Criminal Contempt Procedure

(1) Misbehavior committed in the court's presence can be adjudicated through summary proceedings if the presiding judge certifies that he saw or heard the misbehavior.

(2) Direct criminal contempts are sui generis and therefore have no elements, mens rea, or standard of proof.

(3) Following a summary proceeding, the presiding judge must promptly issue a signed order filed with the clerk providing a short and concise statement of facts and an explanation for his disposition.

(4) The court cannot enter a summary contempt judgment relating to misbehavior in its presence nunc pro tunc.

(5) A presiding judge who can lawfully preside over a summary proceeding for direct criminal contempt can nevertheless refer the matter for a constructive criminal contempt proceeding under section (d) of this rule if doing so is in the interest of justice.

(d) Constructive Criminal Contempt Procedure

(1) Constructive criminal contempts must be adjudicated through a separate proceeding with a separate caption from the action in which the contempt arose.

(2) The court may initiate a constructive criminal contempt proceeding sua sponte or by petition.

(3) The court must give the alleged contemnor notice in open court and issue a show cause order or an arrest order. The alleged contemnor must be released or detained as Federal Rule of Criminal Procedure 47 [former Rule 46] provides. The alleged contemnor is entitled to a trial by jury. The show cause order or arrest order must

(i) Recite a short and plain basis for the criminal contempt proceeding, including the essential facts constituting the criminal contempt charged;

(ii) Schedule the time and place of a trial;

(iii) Allow the alleged contemnor a reasonable time to prepare a defense; and

(iv) Expressly state any penalties requested under (d)(2) if offered.

(4) The court may request that the alleged criminal contempt be prosecuted by the government or, if interest of justice so requires, another attorney. If the government declines to prosecute, the court must appoint another attorney to prosecute.

(5) The prosecuting attorney must prove the following elements beyond a reasonable doubt:

(i) There was a lawful and reasonably specific order, decree, or proceeding;

(ii) The alleged contemnor violated that order or decree, or misbehaved in the court's presence; and

(iii) The alleged contemnor's conduct was willful.

(6) If the alleged criminal contempt involved disrespect or criticism towards a judge, that judge is disqualified from presiding over the trial or hearing unless the alleged contemnor consents.

(7) Upon a finding or verdict of guilty, the court may impose punishment.

(e) Punishment. Punishment for criminal contempt must involve the least possible power adequate to the end proposed. Penalties for direct and constructive criminal contempt can be imposed individually or in combination. The following is an inexhaustive list of potential penalties:

(1) Reprimand

(2) Fine

(i) The fine can be imposed on a per diem basis or consist of a single sum.

(ii) The fine may be payable to the court, to a party prejudiced by the contempt as compensation, or some other recipient for the purpose of atoning for any disrespect or indignity.

(iii) The fine must be calculated according to the character and magnitude of any disrespect or indignity.

(3) Incarceration

(i) Direct Criminal Contempt. If the alleged contemnor is found guilty of direct criminal contempt, he can be sentenced to a period of incarceration not exceeding six months for a single contemptuous act. He may, however, be sentenced to a period of incarceration exceeding six months for more than one contemptuous act, provided that the increment of incarceration attributed to each act does not exceed six months.

(ii) Constructive Criminal Contempt. If the alleged contemnor is found guilty of constructive criminal contempt, he can be sentenced to a period of incarceration exceeding six months.

(f) Civil Contempt. Nothing in this rule can be construed to detract from the court's authority to correct defiance of its orders or decrees through civil contempt proceedings under Federal Rule of Civil Procedure 42 and any other relevant authorities.

Criminal Amendments and Federal Judgeship Act of [Year]

An Act

To amend Title 18 of the United States Code regarding the authority of federal courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Criminal Amendments and Federal Judgeship Act of [Year].

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Sec. 401 of Title 18, United States Code, is amended to read as follows:

"§ 401. Power of Court

"(a) A court of the United States has power to punish and correct contempt of its authority and none other, sua sponte or by petition, including—

(1) Misbehavior or disobedience in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any judicial officer in their official transactions; and

(3) Disobedience or resistance to their lawful writs, processes, orders, rules, decrees, or commands out of their presence.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Fine;

(3) Imprisonment.

Sec. 1073 of Title 18, United States Code is deleted.

Sec. 1503 of Title 18, United States Code is deleted.

Sec. 1509 of Title 18, United States Code is deleted.

Sec. 1512 of Title 18, United States Code is deleted.

Sec. 1513 of Title 18, United States Code is deleted.

Sec. 1346 of Title 18, United States Code is deleted.

Sec. 1347 of Title 18, United States Code is deleted.

Sec. 1348 of Title 18, United States Code is deleted.

Sec. 1349 of Title 18, United States Code is deleted.

Sec. 1523 of Title 18, United States Code is deleted.

Sec. 1621 of Title 18, United States Code is deleted.

Sec. 1622 of Title 18, United States Code is deleted.

Sec. 1623 of Title 18, United States Code is deleted.

Sec. 3484 of Title 18, United States Code is deleted.

Sec. 3498 of Title 18, United States Code is deleted.

Sec. 3499 of Title 18, United States Code is deleted.

Revised 18 U.S.C. § 401 – Power of Court

(a) A court of the United States ~~shall~~ ~~have~~ has power to punish ~~by fine or imprisonment, or both,~~ and correct contempt of its authority ~~and none other~~, sua sponte or by petition, ~~as~~ including—

  (1) Misbehavior or disobedience of any person in its presence or so near ~~thereto~~ as to obstruct the administration of justice;

  (2) Misbehavior or disobedience of any of its officers in their official transactions;

  (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

  (1) Reprimand;

  (2) Report to any state bar or comparable ethics institution;

  (3) Fine; and

  (4) Imprisonment.

Mitchell Hamline Law Journal of Public Policy and Practice

Volume 44 | Issue 1 Article 6

2023

Contempt Power and the United States Courts

Joshua Carback

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Recommended Citation
Carback, Joshua (2023) "Contempt Power and the United States Courts," *Mitchell Hamline Law Journal of Public Policy and Practice*: Vol. 44: Iss. 1, Article 6.
Available at: https://open.mitchellhamline.edu/policypractice/vol44/iss1/6

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CONTEMPT POWER AND THE UNITED STATES COURTS

Joshua T. Carback[*]

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[*]Joshua T. Carback© is an independent author and a civil litigator. He thanks the editors of the *Mitchell Hamline Law Journal of Public Policy and Practice* for their work on this manuscript. The opinions expressed in this article are strictly those of the author and should not be construed to reflect the views of any other person or institution.

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TAB 7C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Comment on Amicus Disclosures (23-AP-E)

Date: September 16, 2023

People United for Privacy Foundation has submitted a comment on the working drafts produced by the amicus subcommittee regarding amicus disclosures. Because no proposal has been published for public comment, the submission has been docketed as a new suggestion.

I recommend that this comment be referred to the amicus subcommittee.

TAB 7D

March 28, 2023

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, NV 89101

Re: Rule 29 Amendments; Opposition to General Disclosure of Non-Party Donors to Amici

Dear Judge Bybee,

People United for Privacy Foundation[1] writes to express its support for the direction the Amicus Subcommittee is taking in protecting donor privacy rights with its working draft language for potential amendments to Rule 29, specifically with respect to disclosures of *non-party donors* by organizations filing amicus briefs.

While an earlier draft of proposed amendments had threatened to impose a broad disclosure requirement based solely on ownership and contribution percentage thresholds, the latest drafts appropriately follow the approach of current Rule 29 by limiting disclosure to supporters who earmark their contributions for the purpose of drafting or filing the brief.[2] The limited disclosure of non-party donors contemplated in the latest drafts strike the proper balance between the judiciary's narrow interest in knowing who is funding amicus briefs and the amici's organizational and donor privacy interests. For that reason, the most recent rule drafts are consistent with the constitutional jurisprudence on donor disclosure requirements, and we urge the Judicial Conference not to abandon its respect for personal privacy.

A. The Judiciary Has a Narrow Interest in Disclosure of Amici's Donors.

Much of the jurisprudence on donor disclosure has arisen in the context of campaign finance laws. While the campaign finance jurisprudence can be a helpful analogy to look to for certain purposes of the Rule 29 rulemaking (as explained more below), it also serves as an important reference point for distinguishing the judiciary's very narrow interest in requiring amici to disclose their donors.

Of relevance here, the Supreme Court has upheld campaign finance donor disclosure laws under the following theory:

---

[1] People United for Privacy Foundation (PUFPF) defends the rights of all Americans – regardless of their beliefs – to come together in support of their shared values. Nonprofit organizations perform important work in communities across the United States, and we protect the ability of nonprofit donors to support causes and exercise their First Amendment rights privately.

[2] *Compare* Memo from AMICUS Act Subcommittee (Mar. 12, 2021), reprinted in Advisory Committee on Appellate Rules Agenda Book for Mtg. of Oct. 13, 2022 (*hereinafter*, "Oct. 13, 2022 Mtg. Agenda Book") at 10 *with* Memo from Amicus Subcommittee (Sep. 15, 2022), reprinted in Oct. 13, 2022 Mtg. Agenda Book at 154 *and* Memo from Amicus Disclosure Subcommittee (Mar. 3, 2023), reprinted in Mar. 29, 2023 Mtg. Agenda Book at 163.

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> disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[3]

Voters, unlike judges, are not expected to be impartial. If, for example, a voter doesn't like the fact that a candidate is funded by donors linked to the widget industry, the campaign finance jurisprudence theorizes that donor disclosure laws allow voters to vote on the basis of that knowledge.[4]

In sharp contrast to the electoral context, the very notion that judges could decide matters on the basis of such considerations is wholly antithetical to our legal system. It is axiomatic in American law that judges are to decide matters based solely on the law and the facts of the case. Indeed, "Lady Justice" is often depicted wearing a blindfold because judges are generally supposed to be indifferent to the identities of those who appear before them.[5]

Therefore, knowing who is funding an amicus is generally irrelevant except insofar as such knowledge:

(1) "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" by funding an additional amicus brief;[6] and

(2) "*may* help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief."[7]

Of these rationales, the first rationale is irrelevant to the issue of how Rule 29 addresses disclosure of amici's *non-party* sources of funding. To wit, Rule 29(a)(4)(E)(ii) separately addresses disclosure of funding provided to amici by *parties* in the case "that was intended to fund preparing or submitting the [amicus] brief." We take no issue with how the current rule or proposed rule changes address that issue.

The second rationale – which is speculative to begin with, since it is qualified by the conditional word "may" – appears to relate to disclosure of amici's *non-party* donors. Specifically, current Rule 29(a)(4)(E)(iii) requires amici to disclose non-party donors that "contributed money that was intended to fund preparing or submitting the brief." Although not explained fully in the advisory committee notes, the theory for this requirement seems to be that it "may" help assess whether an amicus believes an "issue [is] important enough" to use its preexisting general funds "to sustain the cost and effort of filing an amicus brief." In other words, if donors separately pay an amicus for preparing and submitting the brief, then the amicus may not truly believe in its own brief, but rather may be acting as a proverbial "hired gun," and judges accordingly may take the brief with a grain of salt.

---

[3] *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (internal quotation marks and citations omitted).
[4] We take no position on the legal and policy merits of this theory in these comments.
[5] Office of the Curator, "Figures of Justice Information Sheet," Supreme Court of the United States. Available at: https://www.supremecourt.gov/about/figuresofjustice.pdf (May 22, 2003).
[6] Fed. R. App. P. 29 advisory comm. notes (2010).
[7] *Id.* (emphasis added).

At the same time, as the qualifier word "may" might recognize, it is equally possible that an amicus believes an issue is so important that it separately raises money to fund the brief. Therefore, even for donors who earmark their contributions to fund an amicus brief, it is unclear exactly what judges are supposed to glean from such disclosures.

B. The Judiciary Has No Interest in Disclosure of Amici's Non-Party General Donors.

As discussed above, the apparent rationale for current Rule 29's requirement that amici disclose donors who earmark their funds for amicus briefs is speculative at the outset. But even taking the speculative rationale on its face, it clearly does not apply to disclosing amici's non-party general donors – *i.e.*, donors who do not earmark their funds for preparation of an amicus brief.

The only rationale the AMICUS Act Subcommittee provided in its proposal for broader disclosure of general donors is "that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership in or contributions to the amicus organization that are not earmarked for the 'preparation or submission' of a particular brief."[8] However, this theory is even more speculative than the theory for the existing requirement for amici to disclose non-party donors of *earmarked* funds. By definition, if funds given to an organization are not earmarked for any particular purpose, then the organization is free to use the funds for any lawful purpose. The notion that individuals or entities with an interest in filing an amicus brief anonymously could essentially "buy" the brief by making a general-purpose contribution to an organization is simply too far-fetched and attenuated to support a requirement that amici disclose their general donors.

C. Any Purported Benefits in Broader Donor Disclosure Are Outweighed by the Resulting Harms and Are Contrary to Donor Privacy Jurisprudence.

Not only is the rationale articulated in the prior working draft for disclosure of amici's general donors highly speculative, but the purported benefit would be outweighed by the harms.

First, a requirement to disclose an organization's general donors on an amicus brief filing would result in "junk disclosure" by creating a misleading association between donors and the brief. As one federal district court judge explained in the context of a Colorado law requiring sponsors of "electioneering communications" that reference particular candidates to identify their general donors, such disclosure "would imply that a donor supported or opposed a particular candidate, when a donor may simply value [the organization's] discussion of [] issues."[9] "This creates a 'mismatch' between the interest served . . . and the information given."[10]

Similarly, a requirement that amici broadly disclose their general donors on their court briefs would imply that a donor supported the brief when a donor may simply value the organization's other activities. In fact, under the draft rule text the AMICUS Act Subcommittee considered in 2021, amici would be required to disclose even donors that earmarked their funds for a particular purpose *other than* to fund the amicus brief at issue (*e.g.*, donations earmarked for medical research, pro bono legal representation, disaster relief, etc.) if those donors merely met the funding percentage

[8] Memo from AMICUS Act Subcommittee (Sep. 8, 2021), reprinted in Oct. 13, 2022 Mtg. Agenda Book at 177.
[9] *Lakewood Citizens Watchdog Group v. City of Lakewood*, 2021 WL 4060630 at *12 (D. Colo. 2021).
[10] *Id*. (quoting *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2386 (2021)).

threshold for disclosure.[11] Such broad disclosures serve no legitimate purpose whatsoever, much less the highly speculative purpose the Subcommittee articulated.

Second, as the AMICUS Act Subcommittee acknowledged, albeit vaguely, the requirement for amici to disclose their non-party general donors in the prior working draft "would impose a substantially greater burden on amici."[12] The "substantial[] burden" alluded to is not merely an administrative one. Rather, donor disclosure requirements impose an inherent burden on the privacy interests of organizations and their donors and could deter their willingness to file briefs. This is especially so if the organizations or briefs address controversial issues or minority viewpoints.

As the Supreme Court has recognized, "'[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action,'" and there is a "'vital relationship between freedom to associate and privacy in one's associations.'"[13] As lower courts have further explained, disclosure of a group's donors is especially concerning "[i]n a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others."[14] Further, "[t]he accessibility of the Internet and the rise of 'cancel culture' are major developments since *Buckley* [upheld campaign finance reporting requirements]. Cancel culture is the phenomenon of aggressively targeting individuals or groups, whose views aggressors deem unacceptable, in an effort to destroy them personally and/or professionally. Cancel culture [is] a prominent force in today's world."[15]

In recognition of the harms posed by compulsory donor disclosure, the Supreme Court has subjected such requirements to "exacting scrutiny," meaning that they must be "narrowly tailored to the government's asserted interest."[16] As discussed above, the rationale in the prior working draft's requirement for amici to indiscriminately disclose their non-party general donors was highly speculative, and therefore automatically fails narrow tailoring.[17]

The prior working draft additionally fails narrow tailoring because, even if the purported rationale were not speculative, it could be achieved in a more targeted manner. To wit, if the concern the prior working draft attempted to address was non-parties paying off an organization to file an amicus brief on the donor's behalf by making non-earmarked contributions to the organization, there would still have to be some communication of such a request from the donor to the organization. This concern, to the extent it was not speculative, should have been addressed in a more narrowly tailored manner rather than by requiring broad exposure of an organization's donors.

---

[11] Specifically, the 2021 working draft would have required indiscriminate disclosure of any person that "has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae." Memo from AMICUS Act Subcommittee (Sep. 8, 2021), reprinted in Oct. 13, 2022 Mtg. Agenda Book) at 173. The working draft failed to account for or exempt donors who earmarked their funds for a purpose other than the amicus brief.

[12] Memo from AMICUS Act Subcommittee (Sep. 8, 2021), reprinted in Oct. 13, 2022 Mtg. Agenda Book) at 177.

[13] *Amer. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)) (brackets in the original).

[14] *Amer. for Prosperity v. Grewal*, Case No. 3:19-cv-14228 (D. N.J. Op. filed Oct. 2, 2019) at 42.

[15] *Wisconsin Family Action v. FEC*, Case No. 1:21-cv-01373 (E.D. Wis. Op. filed March 22, 2022) at 15.

[16] *AFP Found.*, 141 S. Ct. at 2383.

[17] *See Lederman v. U.S.*, 291 F.3d 36, 44 (D.C. Cir. 2002) ("We begin with the principles that guide our narrow tailoring analysis. First, we closely scrutinize challenged speech restrictions to determine if they indeed promote the Government's purposes *in more than a speculative way*.") (emphasis added) (internal brackets, quotation marks, and citations omitted).

D. The Most Recent Working Drafts Properly Limit Disclosure to Donors of Earmarked Funds and Follows Donor Disclosure Jurisprudence.

The most recent working drafts for the Rule 29 amendments abandon the prior draft's broad disclosure requirement and returns to the rule's current approach by limiting disclosure of amici's non-party donors to those who have earmarked their contributions for the brief. Specifically, the most recent draft reads:

> (d) [alternative a] **Disclosing a Relationship Between the Amicus and a Nonparty.** An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief.
>
> (d) [alternative b] **Disclosing a Relationship Between the Amicus and a Nonparty.** An amicus brief must name any person—other than the amicus, its members, or its counsel—who contributed or pledged to contribute money intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief.[18]

This is consistent with how the judiciary has addressed the earmarking issue in cases involving campaign finance "independent expenditure" and "electioneering communication" reporting requirements.[19] Courts have upheld such reporting requirements where:

- the law's "scope is sufficiently tailored to require disclosure *only of funds earmarked for the financing of such ads*;"[20]
- an organization "'need only disclose those donors who have *specifically earmarked* their contributions *for electioneering purposes*;'"[21]
- organizations need only report "contributions [that] were solicited or *earmarked* for a particular candidate, ballot issue, or petition for nomination;"[22] and
- organizations "must disclose only those donors whose contributions are *earmarked* for political purposes and are tied to a[n] election. *Absent such an earmark* and tie, the donor need not be disclosed."[23]

In the most recent working draft, Alternative A adds a $1,000 disclosure threshold. Alternative B follows the current rule by omitting any monetary threshold for disclosure. We strongly support adding a threshold to the rule. As a matter of common sense, whatever the rationale is for

[18] Memo from Amicus Disclosure Subcommittee (Mar. 3, 2023), reprinted in Mar. 29, 2023 Mtg. Agenda Book at 171; *see also* Memo from Amicus Subcommittee (Sep. 15, 2022), reprinted in Oct. 13, 2022 Mtg. Agenda Book at 154.

[19] As explained above, the campaign finance jurisprudence is distinguishable insofar as the governmental interests for disclosure of campaign donors do not apply to amicus briefs. However, the "exacting scrutiny" analysis and donor privacy doctrine apply with equal force here.

[20] *Independence Institute v. Williams*, 812 F.3d 787, 789 (10th Cir. 2016) (emphasis added).

[21] *Lakewood Citizens Watchdog Group*, 2021 WL 4060630 at *12 (quoting *Independence Institute*, 812 F.3d at 797-98) (emphasis added).

[22] *National Association for Gun Rights v. Mangan*, 933 F.3d 1102, 1117 (9th Cir. 2019) (emphasis added).

[23] *Wisconsin Family Action*, Case No. 1:21-cv-01373 at 21 (emphasis added) (internal citation omitted).

requiring amici to disclose certain donors, the judiciary has a negligible interest in knowing about donors who give an insignificant amount, even if such funds are earmarked to fund an amicus brief.

However, we suggest that even a $1,000 threshold is too low. Such an amount often pays for only one to two hours of an attorney's billable time and is insufficient to make a dent in the typical costs of preparing an amicus brief. The Amicus Subcommittee should consider adopting a higher threshold, such as $10,000 or greater, and provide that the threshold be adjusted periodically for inflation.

* * *

The Supreme Court has long recognized that organizations and their donors have a constitutional right to associational privacy. Organizations that have valuable insights to share with a court in a proceeding should not be forced to shed that right at the courthouse door when they file amicus briefs. This is especially so because the judiciary's interest in knowing the identities of amicis' donors is exceptionally narrow. Therefore, Rule 29's requirement that amici disclose their non-party donors should be commensurately and narrowly tailored to the disclosure interest so as to not unduly impinge on the organizations' and donors' privacy interest.

The most recent working drafts of the rule amendments demonstrate that the Amicus Subcommittee is moving in the right direction in accordance with these principles, and we urge any final rule to maintain a strong consideration and respect for privacy interests.

Sincerely,

Matt Nese
Vice President, People United for Privacy Foundation

Eric Wang
Counsel to People United for Privacy Foundation

TAB 7E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Deadline for Electronic Filing (23-AP-F)

Date: September 21, 2023

Several years ago, Judge Michael Chagares, then the Chair of this Advisory Committee, suggested the possibility of setting a deadline earlier than midnight for electronic filing in federal courts generally, not only in the courts of appeals. As discussed elsewhere in this agenda book, a joint subcommittee considered this suggestion and, noting that the Court of Appeals for the Third Circuit has recently implemented such a local rule, recommended that no action be taken.

Prior to this recommendation by the joint subcommittee, Howard Bashman submitted a suggestion with a different approach. While he opposed the change in the Third Circuit, and continues to think it not well-advised, he now suggests that the approach in the Third Circuit be implemented nationwide in the interest of uniformity. Alternatively, he suggests that the Advisory Committee examine whether the Court of Appeals for the Third Circuit acted within its authority when it made the change. Finally, he suggests that the Advisory Committee recommend that the Court of Appeals for the Third Circuit reinstate the midnight deadline that exists in the other courts of appeals.

The Advisory Committee's action on the joint subcommittee's recommendation is likely to determine its action on this as well. It is possible, however, that the Advisory Committee might think that, while it is premature or unwise to adopt an earlier-than-midnight deadline in the district courts and bankruptcy courts, it is appropriate in the courts of appeals. There are far fewer filings in a typical appellate case, and the due dates for typical filings in those cases are known long in advance.

As for the question of the authority of the Court of Appeals: Even if the Advisory Committee were to choose to undertake this analysis, it is hard for me to see how Federal Rule of Appellate Procedure 26(a)(4)(A) could be any clearer that the time for electronic filing is midnight, "[u]nless a different time is set by a statute, local rule, or court order."

The Judicial Conference has the statutory authority to modify or abrogate a local rule of a court of appeals. 28 U.S.C. § 2071(c)(1). But I am not aware of any time that the Judicial Conference has used that authority. Instead, rules committees have relied on persuasion regarding local rules they thought troubling. On occasion, the Chair of this Advisory Committee has written to the chief circuit judges about local rules. *See* Report on Local Rules Project 25 (Dec. 2002) (describing correspondence sent in 1990 by Judge Kenneth Ripple); Standing Committee Minutes 7 (Jan. 2007)

(describing correspondence sent by Judge Carl Stewart). *See also* Standing Committee Minutes 19 (Jan. 2004) (authorizing the sending of a report about local district court rules to the district courts).

TAB 7F

23-AP-F

M E M O R A N D U M

TO: Professor Edward Hartnett
Reporter, Advisory Committee on Appellate Rules

FROM: Howard J. Bashman

RE: Whether the U.S. Courts of Appeals should adopt a uniform 5 p.m. nationwide filing deadline

DATE: May 8, 2023

On May 2, 2023, the U.S. Court of Appeals for the Third Circuit announced that it had approved a change to its local rules to require that documents electronically filed, with the exception of case-initiating filings, must be submitted by 5 p.m. eastern time on their due date to be considered timely filed. *See* Exhibits A & B hereto.

This rule change injects disuniformity into the federal appellate CM/ECF system, since in every other federal court of appeals an electronic filing is deemed timely filed so long as it is received by 11:59:59 p.m. on its due date, as had also been the case in the Third Circuit before its recently announced rule change.

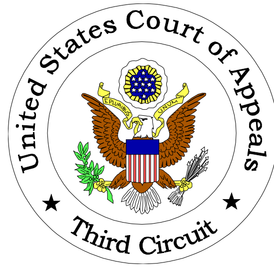
I am writing to suggest that the Advisory Committee on Appellate Rules consider whether to adopt a nationwide 5 p.m. electronic filing deadline throughout the federal appellate system, to reinstate the uniformity that had previously existed. I make this suggestion even though I strongly opposed the Third Circuit's e-filing deadline rule change, and I continue to think that the change was not well-advised.

If the Committee is not willing to propose the enactment of a nationwide 5 p.m. e-filing deadline for the federal appellate system, then I suggest that the Committee

examine whether the Third Circuit acted within the authority conferred under Fed. R. App. P. 26(a)(4) in adopting an across-the-board 5 p.m. electronic filing deadline other than for case-initiating filings. Lastly, if enactment of a nationwide 5 p.m. e-filing deadline will not be pursued, then I suggest that the Committee recommend to the Third Circuit that it reinstate the same 11:59:59 p.m. filing deadline that exists throughout the rest of the federal appellate system.

Thank you for considering these proposals. If I can be of any further assistance in this regard, please let me know.

EXHIBIT A



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ORDER ADOPTING AND AMENDING
LOCAL APPELLATE RULES

PRESENT: CHAGARES, **Chief Judge**, JORDAN, HARDIMAN, GREENAWAY, JR., SCHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, **Circuit Judges**

IT IS HEREBY ORDERED that Local Appellate Rule 26.1 and an amendment to L.A.R. Misc. 113.3(c) are adopted by the United States Court of Appeals for the Third Circuit as supplementary to the Federal Rules of Appellate Procedure. These rules are effective July 1, 2023 and supersede all prior editions and all prior orders amending the Local Appellate Rules.

s/ Michael A. Chagares

Chief Judge

DATED: May 2, 2023

A true copy:
s/Patricia S. Dodszuweit
Clerk

L.A.R. 26.0 COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

(a) Unless a different time is set by a statute, local rule, or court order:
  (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
  (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and
  (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

(b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.

(c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
  (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
  (2) a party is providing paper copies of previously filed electronic briefs and appendices.

(d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as “midnight in the time zone of the circuit clerk’s principal office” for electronic filing and “when the Clerk’s office is scheduled to close” for other means of transmission of documents to the clerk’s office. This rule applies “[u]nless a different time is set by statute, local rule, or court order.” L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

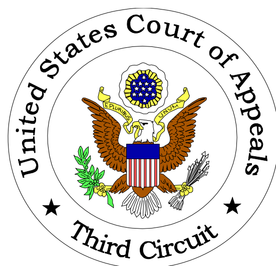
….

(c) Except as stated in L.A.R. 26.1, ~~F~~filing must be completed by ~~midnight on the last day Eastern Time~~ 5:00 p.m. Eastern Time on the last day to be considered timely ~~filed that day~~.

….

Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

EXHIBIT B



Public Notice – May 2, 2023

The United States Court of Appeals for the Third Circuit has adopted amendments to its Local Appellate Rules (L.A.R.), creating a new L.A.R. 26.1 and modifying L.A.R. Misc. 113.3(c). The amended rules create a uniform 5:00 p.m. E.T. deadline for filings (electronic and otherwise) and will become effective on July 1, 2023. The Clerk's Office will apply the 5:00 p.m. E.T. deadline to deadlines set on or after July 1, 2023, and also observe a grace period until December 31, 2023, for papers mistakenly filed after 5:00 p.m. E.T. The amendments are below.

By way of background, Federal Rules of Appellate Procedure 25(a) and 26(a) create two general presumptive filing deadlines, with electronically filed documents due at midnight and documents filed otherwise (such as paper filings) due when the Clerk's Office closes. The hours of the Clerk's Office in the Court of Appeals for the Third Circuit are 8:30 a.m. to 5:00 p.m. E.T.

Rule 26(a)(4) also authorizes courts to establish their own deadlines by court order or local rule. The Court consulted its Lawyers Advisory Committee, which studied and approved the proposed rule changes. The Court then determined that it would solicit comments from the public about the proposed new local rule and conforming amendment. A Public Notice encouraging comments was issued on January 17, 2023. The period for public comment closed on March 3, 2023.

The Court received wide variety of comments from a diverse group of entities and people, including senior attorneys, junior attorneys, pro se litigants, professors, paralegals, and legal assistants. "The Court is grateful for all of the comments received and they were quite helpful in our decision-making. As a matter of fact, several modifications to the proposed rules were made because of suggestions made in the comments, such as excepting filings initiating cases in the Court, like petitions for review," stated Chief Judge Michael A. Chagares. Further, the Court took notice of the successes of the United States District Court for the District of Delaware and state courts of Delaware, which relied principally on work/life balance and quality of life concerns in similarly modifying their filing deadlines years ago. Other courts have also rolled back their deadlines.

Reasons supporting the Court's adoption of the amendments include, in no particular order:

- permitting the Court's Helpdesk personnel to assist electronic filers with technical and other issues when needed during regular business hours and permitting other Clerk's Office personnel to extend current deadlines (the average non-extended filing period is thirty days) in response to a party's motion or for up to fourteen days by telephone, during regular business hours. In addition, the amendments permit judges to read and consider filings at an earlier hour.

- insofar as over half of the Court's litigants are pro se, many of whom cannot or will not use the Court's CM/ECF system (and attorneys must use the system), the rule largely equalizes the filing deadlines for pro se litigants and attorneys.

- consistent with the collegiality and fairness the Court encourages, the rule ends the practice by some of unnecessary late-night filings intended to deprive opponents from hours that could be used to consider and formulate responses to such filings. Further, the rule obviates the need by opposing counsel to check whether opposing papers were filed throughout the night. About one-quarter of the Court's filings are currently received after business hours.

- alleviating confusion by equalizing the filing deadlines for electronically filed and non-electronically filed documents in most cases.

While the new rule sets a 5:00 p.m. E.T. deadline for filing, parties reserve the autonomy to prepare their papers whenever they choose, and as Chief Judge Chagares notes, "the virtual courthouse remains open twenty-four hours a day for electronic filing."

The Clerk's Office will proactively advise and remind parties of the new deadline in, for instance, scheduling orders.

L.A.R. 26.0 COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

(a) Unless a different time is set by a statute, local rule, or court order:
  (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
  (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and
  (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

(b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.

(c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
(1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
(2) a party is providing paper copies of previously filed electronic briefs and appendices.

(d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as "midnight in the time zone of the circuit clerk's principal office" for electronic filing and "when the Clerk's office is scheduled to close" for other means of transmission of documents to the clerk's office. This rule applies "[u]nless a different time is set by statute, local rule, or court order." L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

….

(c) Except as stated in L.A.R. 26.1, ~~F~~filing must be completed by ~~midnight on the last day Eastern Time~~ 5:00 p.m. Eastern Time on the last day to be considered timely ~~filed that day~~.

….

Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

TAB 7G

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Civil Rule 11 (23-AP-G)

Date: September 16, 2023

Andrew Straw previously submitted a suggestion to amend Federal Rule of Civil Procedure 11. He has now submitted a new suggestion, expressing his disagreement with a passage contained in the Spring 2023 agenda book of the Advisory Committee on the Federal Rules of Civil Procedure.

It is not clear what action he wants this Advisory Committee to take. I suggest removing the item from the agenda.

TAB 7H

From: Andrew Straw
Sent: Friday, June 16, 2023 6:38 PM
To: RulesCommittee Secretary
Cc: Andrew Straw
Subject: Further Support for My Rule 11 Change Requests

RE: Commentary & Further Support for My Change Requests

https://www.uscourts.gov/sites/default/files/2023-03_civil_rules_committee_agenda_book_final_0.pdf

Dear Rules Committee,

It appears the commenter on my comments suggesting rule changes got matters exactly backwards.

I was punished by my former employer for federal cases in which **no federal judge imposed any sanction**.

To say that a state can punish what I file in federal courts is wrong and misunderstands the relationships between state and federal courts.

The idea that a state court can interfere with a federal case and punish court litigants for using federal courts was answered in the negative going back to the Founding.

There is already **a precedent that agrees with me** that has been cited positively in **every circuit** as law.

Crosley Corporation v. Hazeltine Corporation, 122 F.2d 925, **929** (3d Cir. 1941):

> **"Likewise the state courts are without power to interfere with proceedings in the federal courts. This was early settled by the Supreme Court upon principles of judicial comity. See Warren, Federal and State Court Interference, 43 Harvard Law Rev. 345."**

What happened to me was an abomination and contrary to long settled law.

- First, no sanction in 4 federal courtrooms.

- Then, 76 months of bogus suspension based on those same 4 cases and to retaliate against my own ADA complaints against that state supreme court former employer of mine.

- Federal courts that did not sanction me just followed the Indiana leader, with **no hearing at all**.

When a federal court does not sanction with even $1 in fines or 1 day of suspension, a state court (defendant in one of the cases) cannot come along afterwards and impose an irascible 76 months of suspension to punish its disabled former employee who made ADA complaints about it.

Anywhere else in society but with regard to courts, the Indiana Supreme Court would be seen as a human rights violator and punished severely.

I just want the rules to mean what they mean. State courts cannot interfere and the federal rules should state this. **All of them should state it.**

Sincerely,

Andrew U. D. Straw

TAB 7I

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Rule 17(b)(3) (23-AP-H)

Date: September 16, 2023

Rule 17 governs the filing of an agency record on appeal. Rule 17(b)(1) requires the agency to file "the original or a certified copy of the entire record or parts designated by the parties," or "a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties."

Rule 17(b)(3) requires the agency to retain any portion of the record not filed with the clerk. It then makes clear:

> All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Thomas Dougherty suggests that an additional sentence be added:

> In any event, when the agency cites in a brief filed with the court a page of its agency record, it must file with the court the pages of the full section or titled portion thereof containing that cited page, as well as any pages of its record that are cross-referenced within that cited page whether part that section or not.

He contends that it is unhelpful if an agency brief characterizes pages of the record without providing sufficient context. It would seem, however, that his proposal would require inclusion of completely unnecessary material. And it is far from clear why the existing Rule—which requires the agency to send any part of the record to the court that a party requests—is inadequate for any situation where a party believes that an agency has not provided sufficient context.

I suggest removing the item from the agenda.

TAB 7J

From: Thomas J. Dougherty
To: RulesCommittee Secretary
Subject: Proposed addition to the text of Rule 17(b)(3) of the Federal Rules of Appellate Procedure
Date: Tuesday, June 20, 2023 2:11:02 PM

To:
H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Proposed addition to the text of Rule 17(b)(3) of the Federal Rules of Appellate Procedure

Dear Secretary Byron:

I request that the Committee consider the following amendment:

Add the following sentence after the extant text of Rule 17(b)(3):

"In any event, when the agency cites in a brief filed with the court a page of its agency record, it must file with the court the pages of the full section or titled portion thereof containing that cited page, as well as any pages of its record that are cross-referenced within that cited page whether part that section or not."

Rationale:
An agency can characterize in its brief pages of its administrative record without quoting them and without filing with the court the full contents and context thereof notwithstanding the fact that the agency has merely listed its record on the docket and has not put that section of the record before the court. This can be unhelpful to all.

Members of the public as well as the court itself in preparation for, or at, oral argument, and any party that has not requested that such material to be submitted as part of the record, are disadvantaged by that occurrence. It is avoidable.

The above-referenced addition to the rule would prompt an agency to file the section and cross-referenced pages of its administrative record that contain pages it references in its brief no later than when filing the brief. Each agency exercises it discretion when recording its actions. The manner

in which it apportioned its record by sections or titled portions should be sufficient for the purpose of determining what constitutes a requisite section or titled portion of the record to file for this purpose, and cross-referenced pages provide the same completeness to the court that the agency record itself referenced. The court or a party (or others such as amici by motion) could always ask for more. This amendment better balances requisite public court administrative record filing presentation with agency briefing record references to it.

Thank you for considering this request. Please let me know if you have any questions.
Yours truly,
Thomas J. Dougherty
Member of the Bar of Massachusetts and the Bar of New York
Admitted to practice before the First Circuit and other U S Courts

TAB 8

Effective Date	Rule	Summary
December 2018	8, 11, 39	Conforms the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."
	25	Amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.
December 2019	3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.
	26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.
	25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.
	5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."
December 2020	35, 40	Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.
December 2021	3	Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the expressio unius approach, and adds a reference to the merger rule.
	6	Amendment conforms the rule to amended Rule 3.
	Forms 1 and 2	Amendments conform the forms to amended Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.
December 2022	25	Treats remote electronic access to Railroad Retirement Act cases like Social Security cases.
	42	Requires dismissal of appeal if parties agree.