

**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

January 7, 2025

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in San Diego, California, on January 7, 2025. The following members attended:

Judge John D. Bates, Chair  
Judge Paul J. Barbadoro  
Elizabeth J. Cabraser, Esq.  
Louis A. Chaiten, Esq.  
Judge Stephen Higginson  
Justice Edward M. Mansfield  
Dean Troy A. McKenzie

Judge Patricia A. Millett  
Hon. Lisa O. Monaco, Esq.\*  
Andrew J. Pincus, Esq.  
Judge D. Brooks Smith  
Kosta Stojilkovic, Esq.  
Judge Jennifer G. Zipp

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –  
Judge Allison H. Eid, Chair  
Professor Edward Hartnett, Reporter

Advisory Committee on Criminal Rules –  
Judge James C. Dever III, Chair  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King, Associate  
Reporter

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

Advisory Committee on Evidence Rules –  
Judge Jesse M. Furman, Chair  
Professor Daniel J. Capra, 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

Others who provided support to the Standing Committee, in person or remotely, included 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, Esq., Secretary to the Standing Committee; Bridget M. Healy, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

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

## OPENING BUSINESS

Judge John D. Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including Standing and advisory committee members, reporters, and consultants who were attending remotely. Judge Bates gave a special welcome to Judges Stephen Higginson and Joan Ericksen as the new Standing Committee members, although Judge Ericksen was unable to attend the meeting due to a scheduling conflict. Judge Bates also noted that Lisa Monaco was unable to attend the meeting.

Judge Bates informed the Committee that Thomas Byron, Secretary to the Standing Committee, would soon leave his position for a new career opportunity and thanked him for his invaluable contributions that helped guide the rules process over the prior several years. Professor Catherine Struve, reporter to the Standing Committee, also thanked Mr. Byron for his excellence as Secretary and recalled his dedication, insight, and collegiality when he served as the Department of Justice (DOJ) representative to the Appellate Rules Committee.

Judge Bates notified the Committee that Professors Bryan Garner and Joseph Kimble, consultants to the Standing Committee, authored a new book entitled *Essentials for Drafting Clear Legal Rules*. The book reflects lessons from the rules restyling project over the last 30 years and is an update on Professor Garner's previous publication on the same subject. The book is available for free download from the Rules Committees' style resources page on the [uscourts.gov](https://uscourts.gov) website, and the Administrative Office printed copies for the use of the Rules Committee members and reporters. Judge Bates added that Professors Garner and Kimble provided essential counsel to the rules committees during the restyling project as did Joseph Spaniol, who previously served as Secretary to the Standing Committee and as Deputy Director of the Administrative Office and Secretary of the Judicial Conference before his appointment as Clerk of the Supreme Court. Mr. Spaniol retired as Clerk in 1991 but has served as consultant to the rules committees.

Judge Bates also welcomed members of the public and press who were observing the meeting in person or remotely.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the June 4, 2024, meeting** with a correction that deleted the words "conducted a survey and" on page 23 of the minutes.

Mr. Byron reported that the latest set of proposed rule amendments took effect on December 1, 2024. A list of the rule amendments is included in the agenda book beginning on page 50. Mr. Byron also reported that the latest proposed rule amendments approved in the Standing Committee's June meeting are pending before the Supreme Court and, if approved, will be transmitted to Congress. Those amendments are on track to take effect on December 1, 2025, in the absence of congressional action. A list of the proposed rule amendments is included in the agenda book beginning on page 52.

Judge Bates noted that a December 2024 report on FJC research projects begins on page 79 of the agenda book. Dr. Tim Reagan explained that the FJC in November 2023 restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include

information about education as well as research conducted by the FJC. He also explained that the report does not discuss ongoing research for other Judicial Conference committees, but descriptions of such research will be included once the FJC completes the research and publishes the findings. Judge Bates thanked Dr. Reagan for the FJC's excellent work.

## **JOINT COMMITTEE BUSINESS**

### *Electronic Filing by Self-Represented Litigants*

Professor Struve reported on this item and explained that the item has two parts.

The first part relates to paper service by a self-represented litigant. The current rules appear to say that self-represented litigants who file documents in paper form must effect traditional service of those papers on others in the case even if the other litigants also receive electronic copies through CM/ECF or its equivalent. The point of this first part would be to eliminate this duplicative and burdensome requirement for papers subsequent to the complaint.

The second part relates to access to a court's electronic filing system by self-represented litigants. The rules currently set a presumption that self-represented litigants lack access to the court's system unless the court acts to provide it. This part of the project would increase access for self-represented litigants by flipping the presumption: allowing self-represented litigants access unless the court acts to prohibit access. The proposal would also require a court to provide a reasonable alternative if the court acts in a general way to prohibit self-represented litigants from accessing the court's electronic-filing system. The proposal would allow a court to set reasonable exceptions and conditions on access.

Professor Struve noted that the Standing and advisory committees had been discussing this item for several meetings. The Appellate, Civil, and Criminal Rules Committees appeared open to proceeding toward recommending both parts for publication for public comment. On the other hand, the Bankruptcy Rules Committee supported the goals of the project but was skeptical about proceeding forward. One reason was that access for self-represented litigants to electronic filing systems is currently least prevalent in bankruptcy courts. Regarding the service component, bankruptcy practice is more likely to feature multiple self-represented litigants in one matter than practice in other levels of court. Self-represented litigants in bankruptcy court may include the debtor, small creditors, and some Chapter 5 trustees.

When there are multiple self-represented litigants, a self-represented filer who is not on the electronic filing system or receiving electronic notices will not be able to know which other litigants are also not receiving electronic notices and therefore require paper service. Because practice before district courts and courts of appeals is much less likely to feature multiple self-represented litigants in the same matter, this problem is not likely to afflict these courts. Accordingly, Professor Struve suggested that it might be prudent for the Bankruptcy Rules to take a different approach than the Appellate, Civil, and Criminal Rules. She asked the Standing Committee if it would be open to approving publication of a package of amendments to the Appellate, Civil, and Criminal Rules without similar proposals for amending the Bankruptcy Rules. Professor Struve noted that if this approach were taken, a question would arise as to how

courts would treat self-represented litigants when a bankruptcy matter is appealed to a district court or court of appeals.

Judge Connelly stated that the Bankruptcy Rules Committee supported the project's goals but that it had practical concerns. She indicated that if the other rules committees further explored the item, it could provide the Bankruptcy Rules Committee valuable guidance for future discussion.

Judge Bates asked whether the Committee would support approving publication of an amendment package that would effect these changes for the Appellate, Civil, and Criminal Rules without changing the service and filing approaches for self-represented litigants under the Bankruptcy Rules. He also asked whether it was necessary to discuss how to handle service and filing issues for self-represented litigants in bankruptcy appeals.

Professor Struve observed that some courts in bankruptcy appeals already allow self-represented litigants to access their electronic filing systems and exempt them from effecting paper service. She said that it does not appear that the courts in these instances are experiencing substantial difficulty, and if there are problems, the Committee has several options to resolve them.

Judge Bates commented that the Committee could set aside the bankruptcy appeals question and asked Professor Struve if a vote by the Standing Committee was needed. Professor Struve responded that she would like to hear any concerns that Committee members may have with the project.

A judge member thought that the Bankruptcy Rules taking a separate path did not raise a significant issue. He had discussed the proposal with the clerk of his court, who highlighted two features of the proposed amendments as crucial—namely, the provision permitting a court to use alternative means of providing electronic access for self-represented litigants and the provision recognizing the court's authority to withdraw a person's access to the electronic filing system. The clerk also pointed out the potential cost savings by eliminating the need to mail thousands of hardcopy letters to self-represented litigants. And he observed that as a court provides greater electronic access for self-represented litigants, the court's help desk grows in importance. The judge member turned the Committee's attention to draft Civil Rule 5(b)(3)(E)'s statement that electronic service under that provision is not effective if the sender learns that it did not reach the person to be served, and asked if this provision would require the sender to monitor the court's site.

Professor Struve commented that the member's question is a larger one that applies to the current rule. She observed that current Rule 5(b)(3)(E) is the provision that allows users of the court's electronic-filing system to rely on that system for making service, and that the provision seems to be working.

The judge member also pointed out that draft Rule 5(d)(3)(B)(iv) (authorizing the court to withdraw a person's access to the electronic filing system) appeared to be limited to self-represented litigants, and asked whether that was intended to suggest that the court lacked authority to withdraw a noncompliant lawyer's access to the system. Professor Struve acknowledged that subsection (B) is about self-represented litigants but stated that there was no intent to limit the

court's authority to withdraw a noncompliant lawyer's access; she noted that the working group could discuss ways to ensure that this provision did not give rise to a negative inference.

The judge member identified the National Center for State Courts as a source of helpful information about access to justice for self-represented litigants. Professor Struve agreed about the NCSC's expertise and invited Committee members to let her know if they thought that the NCSC should be consulted while the rule is in the development stage rather than waiting until the public comment period.

A judge member said that she supported moving forward with a proposed change to the Appellate, Civil, and Criminal Rules for the reasons previously stated.

Professor King asked whether the discussion of a different approach for the Bankruptcy Rules assumed that total uniformity (concerning service and filing) would be imposed as between the Civil and Criminal Rules. Professor Struve assured her that the project was not intended to achieve total uniformity among the service and filing provisions in the Civil, Criminal, and Appellate Rules; differences already exist among those provisions, and this project does not seek to eliminate them. Rather, the goal in preparing for the spring advisory committee meetings will be to transpose the key features shown in the Civil Rule 5 sketch into the relevant Appellate and Criminal Rules. Professor Marcus highlighted the question of how to treat appeals from a bankruptcy court. Professor Struve observed that appeals from bankruptcy courts to district courts are currently addressed by Bankruptcy Rule 8011, and she also noted that technical amendments to the Bankruptcy Rules will be required if the draft Civil Rule 5 is approved.

*Joint Subcommittee on Attorney Admission*

Professor Struve reported on this item, the report for which begins on page 113 of the agenda book. Professor Struve recalled that this item originated from an observation by Dean Alan Morrison and others that the district courts have varying approaches to attorney admission. To be admitted to the district court, some districts require attorneys to be admitted to the bar of the state that encompasses the district, and some of those states require attorneys to take their bar exam in order to be admitted to the state bar. The Subcommittee has been discussing possible ways to address this issue. One possible solution would be to follow the approach in Appellate Rule 46, which does not require admission to the bar of a state within the relevant circuit.

The Subcommittee has also heard a number of concerns from the Standing Committee and advisory committees. District courts regulate admission to protect the quality of practice in their districts, which is linked to concerns about protecting the interests of clients. State bar authorities and state courts might also have concerns with a national rule along these lines. In addition, the Subcommittee has discussed how a rule might interact with local counsel requirements.

Professor Struve thanked Professor Coquillette and Dr. Reagan for their research and expertise. She noted that a survey of circuit clerks was recently completed, which found that the clerks generally feel that Appellate Rule 46 works well for the courts of appeals. Professor Struve recognized, however, that practice before the courts of appeals differs from practice before the district courts. A request for input was posted on the website of the National Organization of Bar Counsel, but the Subcommittee did not receive any responses.

Professor Struve said that the Subcommittee was proposing a research program based on what Subcommittee members said would be helpful going forward, including consultation with chief district judges in select districts. One type of district on which these inquiries would focus would be districts that require admission to the bar of the encompassing state. Possible questions may include: why do you have this approach? How would you react to a national rule setting a more permissive standard for admission? And are there other measures that could address barriers to access? Inquiries to district courts that do not require in-state bar admission might ask whether their approach to attorney admission has caused any problems. Dean Morrison suggested also inquiring of judges who have handled multidistrict litigation (MDL) proceedings. Outreach to state bar authorities and practitioners could also be helpful.

Professor Coquillette recalled the history of the Standing Committee's study of a DOJ proposal for national rules governing attorney conduct in federal courts. After a question was raised about whether such a project would exceed the existing rulemaking authority under the Rules Enabling Act, Senator Leahy proposed a bill to give the Standing Committee the authority to promulgate rules of attorney conduct. State bar authorities opposed the idea of such national rules, and the Standing Committee decided not to promulgate rules of attorney conduct (other than rules like Civil Rule 11). Judge Bates commented that, consistent with Professor Coquillette's observations, the Committee likely will need to research its authority to regulate attorney admission.

A practitioner member recommended speaking to districts that require attorneys (even some attorneys who are admitted to the district court's bar) to associate with local counsel; such requirements, this member observed, may undermine a national admission rule. The member also recommended researching the Committee's authority to craft a rule regarding local counsel requirements. Professor Struve responded that the Subcommittee shared this concern and would continue to consider whether it could draft an effective admission rule without also addressing local counsel requirements.

A judge member commented that a Military Spouse J.D. Network analysis found that state bar rule changes have made it somewhat easier for military spouses to become state bar members. But the member cautioned that the provisions for military spouses vary widely among states and some rules are difficult to navigate. The member also identified fees as a barrier to access for military spouses because they relocate and join bar associations at a higher rate than other lawyers. The member wondered whether the Committee could make suggestions or provide guidance concerning measures such as fee waivers if it determines that it does not have authority to regulate attorney admission.

Judge Bates responded that the judiciary could offer suggestions, but the Judicial Conference would be better equipped and able to provide suggestions or guidance to district courts generally. The district courts may then adopt or not adopt a suggestion offered. Professor Struve observed that informal suggestions historically have varied by committee. For example, the chair of the Appellate Rules Committee has sent letters to chief circuit judges with some success. However, Professor Struve noted that this would likely be more difficult at the district level.

A judge member questioned whether the Committee should proceed any further on this item without first determining the Committee's rulemaking authority. Judge Bates responded that

the initial suggestion that gave rise to this item sketched multiple approaches, some broad and some narrow. Because a narrow approach might raise fewer rulemaking questions, the thinking was first to determine which approaches were potentially desirable before considering the question of authority to adopt those approaches. Professor Struve agreed that if the Subcommittee were to decide not to recommend rulemaking, it would obviate the need to delve into the question of the Committee's rulemaking authority.

Professor Coquillette noted that almost all district courts have already adopted rules governing attorney conduct (often by incorporating by reference the attorney conduct rules of the state in which the district court is located). Professor Struve observed that while Civil Rule 83 *cabins* local rulemaking authority, the local rules are adopted pursuant to a separate statutory provision (28 U.S.C. § 2071), such that an analysis of the authority for making national rules under 28 U.S.C. § 2072 would not necessarily call into question local rules regulating attorney conduct. Professor Coquillette agreed. Professor Bradt commented that research on the question of rulemaking authority is ongoing.

A judge member thought that the considerations differ depending on the area of law. For example, an attorney handling a federal criminal case need not know state law. In contrast, a civil attorney admitted to a federal district court but not the state encompassing that district court might have an incentive to steer the case toward federal court. He also raised concern about situations where a state-law claim is asserted in federal court (for example, in supplemental jurisdiction) but then dismissed (for instance, if the federal claim that supported subject-matter jurisdiction was dismissed); if the claimant's lawyer is not admitted to practice in the relevant state, then the federal-court dismissal leaves the client without a lawyer. Lastly, the member pointed out that the states fund their bar regulators by means of fees paid by the lawyers who are admitted to the state bar. Admitting out-of-state lawyers to practice in federal district courts within the state could increase the workload of state regulators without providing the funding to sustain that work. The member recommended reaching out to the Conference of Chief Justices or a similar body to receive the views of state regulatory authorities.

A practitioner member asked if input has been sought from MDL transferee judges, whose perspective could be beneficial because they frequently see lawyers from elsewhere who are not required to have local counsel and often are not admitted pro hac vice. Judge Bates agreed that the Subcommittee should consider making inquiries to MDL transferee judges; he observed that issues of attorney admission may differ as between leadership counsel and non-leadership counsel.

A judge member observed that federal district courts regularly refer attorney discipline issues to state bar authorities, and it would be important to receive the views of chief judges about this relationship.

Professor Marcus pointed out that the motivation and effect of the proposals currently under consideration differed in an important way from the ill-fated project on national rules of attorney conduct. In the national rules on attorney conduct project, the DOJ was seeking adoption of national rules that would override particular state attorney-conduct obligations in criminal cases that the DOJ did not like. The proposals currently being considered would not do that, and this distinction sheds important light on the question of rulemaking authority and illustrates the types of things that the rulemakers should stay away from. Professor Coquillette agreed.

Judge Bates thanked the Subcommittee and reporters for their work.

*Potential Issues Related to the Privacy Rules*

Mr. Byron reported on several privacy issues, the materials for which begin on page 150 in the agenda book. The project began in 2022 following a suggestion by Senator Ron Wyden to require the redaction of the complete social security number in public filings rather than only the redaction of the first five digits. A sketch of a proposed amendment (to Civil Rule 5.2) implementing this suggestion appears on page 155 of the agenda book. That potential amendment has been held pending consideration of additional privacy-related suggestions pending before the advisory committees.

Mr. Byron, working with the reporters, had also discussed other possible privacy-related issues (which had been identified based on a review of the history and functioning of the privacy rules). These issues included possible ambiguity and overlap in exemptions, the scope of waivers by self-represented litigants who fail to comply with redaction requirements, additional categories of protected information that could be subjected to redaction, and possible protection of other sensitive information. The working group's recommendation—that no rule amendments were warranted with respect to these other topics—was discussed at the fall 2024 meetings of the Bankruptcy, Civil, Criminal, and Appellate Rules Committees. The advisory committees generally thought that the issues did not raise a real-world problem demanding a rule amendment. Accordingly, the advisory committees determined not to add any of these issues to their agendas. In the fall 2024 Appellate Rules Committee meeting, however, the question was raised whether rulemaking should always be reactive or whether it should sometimes be preventive—that is, whether rulemaking is sometimes warranted to prevent real-world harm from ever occurring, in instances where the harm in question would be sufficiently serious to warrant the preventive approach.

A practitioner member observed that filings by self-represented litigants often include information that should not be on a public docket, such as their own social security numbers. This member suggested that there should be coordination between broadening access to electronic filing systems for self-represented litigants and protecting the privacy of personal information because self-represented litigants may unintentionally disclose their own personal information. Professor Struve asked if, currently, court staff screen paper filings submitted by self-represented litigants before the court staff uploads the filings into the electronic system. The member did not know whether court staff screen paper filings, but has seen filings several times this year that include personal information.

Returning to the question that had been voiced in the Appellate Rules Committee, Professor Hartnett noted that most rules concern the processing of cases and so the focus is on how the rules affect litigation itself. In these circumstances, it makes sense to be generally reluctant to amend the rules if courts and parties are able to resolve issues under the current rules. But the privacy rules are about avoiding collateral harm from the litigation system. For that reason, perhaps the mindset should be different regarding the need to identify a demonstrated harm.

A judge member agreed with the practitioner member's comments that allowing self-represented litigants greater access to electronic filing systems could lead to greater privacy



concerns. He also noted that this is an area where artificial intelligence could be helpful, yet privacy concerns are difficult to fully resolve post-filing because some entities review filings minutes after they are made public. This member also mentioned a different issue concerning filings under seal. Local circuit practices concerning sealed filings vary widely. The member thought that privacy concerns are most acute in criminal matters, particularly when the case involves cooperating defendants. If the district court accepts a guilty plea from a cooperating defendant and this is reflected in a sealed filing, it could be catastrophic for a local practice (for instance, of automatically unsealing a filing after a certain time period) to divulge that document.

Mr. Byron responded that the member highlighted an example of a concern that would be included in the fourth category of other sensitive information beyond the current scope of the privacy rules. The current privacy requirements are fairly targeted to narrow redaction requirements for information like home addresses. He emphasized that he was not discouraging discussion of protecting other information. Rather, those ideas are simply in a separate category.

Professor Beale noted that redactions for social security numbers and privacy protections for minors were on the Committee's agenda for discussion later in the meeting.

## **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Furman and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on November 8, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 160.

### *Information Items*

**Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay).** Judge Furman noted a proposed amendment to Rule 801(d)(1)(A) was out for public comment. The proposed amendment would provide that all prior inconsistent statements by a testifying witness are admissible over a hearsay objection. Two comments had been submitted thus far, including a comment by the Federal Magistrate Judges Association that supports the proposed amendment. The FMJA supported the proposal on the grounds that it would make the rule consistent with Rule 801(d)(1)(B) and would reduce confusion.

**Rule 609 (Impeachment by Evidence of a Criminal Conviction).** Judge Furman reported that the Advisory Committee continues to consider a proposal to amend Rule 609(a)(1)(B). Rule 609(a)(1) addresses the impeachment use of evidence of a witness's prior felony conviction. Rule 609(a)(1)(A) addresses cases in which the witness is not a criminal defendant. Rule 609(a)(1)(B) addresses criminal cases in which the witness is a defendant and allows admission of the evidence if its probative value outweighs its prejudicial effect. The Advisory Committee previously rejected a proposal to abrogate Rule 609(a)(1) altogether. In the wake of that decision, the Advisory Committee agreed to consider a more modest amendment that would alter Rule 609(a)(1)(B)'s balancing test to make it less likely that courts would admit highly prejudicial and minimally probative evidence of convictions against criminal defendants.

Specifically, the proposal being discussed would add the word "substantially" before the word "outweighs" in Rule 609(a)(1)(B). The Advisory Committee members who were present at

the November meeting were evenly divided on whether to further consider the proposal. One member was absent. The proposal was supported by the federal public defender representative and opposed by the DOJ. There was a general acknowledgement that some courts are admitting highly inflammatory prior convictions similar to the charged crime, contrary to what was intended by the rule, but there was disagreement about the magnitude of that problem. The magnitude of the problem could be difficult to identify because this often does not get further than a district court ruling, which may not be in writing or reported. There is also some evidence that decisions in this area deter defendants from taking the stand.

The FJC identified research approaches to further examine this question but concluded that the only fruitful approach may be sending a nationwide questionnaire to defense counsel. The Advisory Committee agreed unanimously not to use that approach given the low probability that it would yield useful data.

The Advisory Committee agreed to discuss the proposed amendment again at its Spring meeting. The member who was absent at the Fall meeting had previously voted in favor of abrogating Rule 609(a)(1) altogether and supported proceeding with the Rule 609(a)(1)(B) amendment.

***Artificial Intelligence (AI) and Deepfakes.*** In the fall of 2023, the Advisory Committee began considering challenges posed by the development of AI, and the Advisory Committee is focusing on two issues. The first issue is authenticity and the problem of deepfakes. The second issue is reliability when machine learning evidence is admitted without supporting expert testimony.

At the November meeting, informed by an excellent memorandum by Professor Capra, the Advisory Committee considered whether and how to proceed with potential rulemaking to address these concerns. There was a consensus that AI presents real issues of concern for the Rules of Evidence and that there are strong arguments for taking a hard look at the rules. At the same time, there was concern that the development of AI could outpace the rulemaking process. It was also noted that the rules have already shown the flexibility to meet the challenges of evolving technology in other instances, for example with respect to social media.

The Advisory Committee discussed a number of proposals and agreed that two paths warrant further consideration. First, regarding reliability, the Advisory Committee tentatively agreed on a proposed amendment that would create a new rule, Rule 707, that would essentially apply the Rule 702 standard to evidence that is the product of machine learning. The proposal is set out on page 162 of the agenda book. The rule would exempt the output of basic scientific instruments or routinely relied upon commercial software. The Advisory Committee is considering whether to further explain the scope of the exemptions. The Advisory Committee rejected proposals to instead address the reliability issue in Chapter 9 of the rules, which concern authentication.

A judge member expressed support for taking up the topic of machine-generated evidence and agreed that the key admissibility question is reliability. He stressed the need for careful attention to the exemptions in the proposed draft rule. He queried whether DNA and blood testing would fall under an exemption and asked if Professor Roth was assisting the Advisory Committee

because she authored an excellent article about safeguards in this area. Professor Capra and Judge Furman said that she was. Professor Capra noted that Professor Roth had made a presentation on AI to the Committee and assisted in drafting the sketch of Rule 707 and its accompanying committee note. Professor Capra said that he and Professor Roth agreed that the commercial software exception may be too broad, and they are working on language that the Advisory Committee can consider at its next meeting. He also questioned whether an exception in the text is necessary to prevent courts from holding hearings on evidence related to common instruments such as thermometers.

Judge Bates noted the statement in the agenda book that disclosure issues relating to machine learning were better addressed in either the Civil or Criminal Rules, not the Evidence Rules, and that the issue should be brought to the attention of those respective Advisory Committees for their parallel consideration. He asked about the plan moving forward and any coordination among the committees.

Professor Capra said that he and Professor Beale had discussed the topic; the major issue concerns disclosure of source codes and trade secrets. These, he and Judge Furman said, are disclosure questions rather than evidence questions. But, Professor Capra reported, the discussions are at the preliminary stage.

Judge Bates noted that if coordination is important, then the discussions should progress beyond the preliminary stage. Professor Capra and Judge Furman agreed. Professor Beale said that the Criminal Rules Committee has not yet considered the issue.

Professor Marcus observed that the Civil Rules Committee, likewise, has not yet considered the issue. He noted the practice of using technology-assisted review when responding to discovery requests under Civil Rule 34. There has been a debate about whether a responding party must disclose the details of such technology-assisted review.

Judge Furman said that the Advisory Committee intends to come back to the Standing Committee seeking permission to publish the proposed new Rule 707 for public comment.

Second, regarding deepfakes, the Advisory Committee agreed that this is an important issue but is not sure that it requires a rule amendment at this time. At bottom, deepfakes are a sophisticated form of video or audio generated by AI. So they are a form of forgery, and forgery is a problem that courts have long had to confront—even if the means of creating the forgery and the sophistication of the forged evidence are now different. The Advisory Committee thus generally thought that courts have the tools to address the problem, as courts demonstrated when first confronting the authenticity of social media posts.

That said, the Advisory Committee also thought that it should take steps to develop an amendment it could consider in the event that courts are suddenly confronted with significant deepfake problems that the existing tools cannot adequately address. Accordingly, the Advisory Committee intends further work on the proposed rule found in the agenda book at page 163. This proposed Rule 901(c) would place the burden on the opponent of evidence to make an initial showing that a reasonable person could find that the evidence is fabricated. After such an initial

showing, the burden would shift to the proponent to show by a preponderance of the evidence that the evidence was not fabricated.

The Advisory Committee will continue to monitor developments to assess the need for rulemaking and think about definitional issues, such as what would be subject to the rule. Some proposals submitted would apply this kind of rule to all visual evidence whether or not it was generated by AI, but the Advisory Committee generally agreed that such proposals were too broad.

Judge Bates asked for confirmation that the Advisory Committee’s plan is to consider an approach similar to the draft Rule 901(c) but not yet seek the Standing Committee’s approval for publication. Judge Furman said that was correct.

Judge Furman said that the Advisory Committee also discussed the “liar’s dividend” – that is, a situation where counsel objects to genuine evidence, attempting to create a reasonable doubt in a criminal case and arguing that the evidence may have been faked. Ultimately, the Advisory Committee thought that this was not an issue for the Rules of Evidence.

A judge member commented that the memorandum (in discussing the sketch of the possible Rule 901(c)) first mentions that the opponent of AI evidence must make an initial showing that there is something suspicious about the item, which seems like a reasonable suspicion or probable cause standard; but then the memo goes on to say the showing must be enough for a reasonable person to find that the evidence is fabricated, which sounds instead like a preponderance standard. The member stated that these two formulations are in tension and questioned whether it would be possible for someone to meet the preponderance test without more information or discovery. Judge Furman said that the Advisory Committee will take the member’s comment under advisement.

***False Accusations.*** Judge Furman reported that, prompted by a suggestion, the Advisory Committee considered whether to propose a rule amendment to address false accusations of sexual misconduct, either by an amendment to Evidence Rule 412 or a new Rule 416. As between these alternatives, the Advisory Committee agreed that a new rule would be preferable, but the Advisory Committee ultimately decided not to pursue an amendment and to take the issue off its agenda. These issues more often occur in state and military courts—which would be unlikely to adopt a federal model and which have existing tools adequate to address the issue.

***Rule 404 (Character Evidence; Other Crimes, Wrongs, or Acts).*** Judge Furman reported that this item was prompted by a suggestion asserting that courts are admitting evidence of uncharged acts of misconduct even where the probative value of the act depends on a propensity inference. The Advisory Committee considered amending Rule 404(b) to require the government to show that the probative value of the other act evidence does not depend on such an inference. Over the objection of the federal public defender representative, the Advisory Committee decided not to pursue an amendment and to remove this item from its agenda.

Members noted that Rule 404(b)’s notice requirement was amended in 2020 to require the government to articulate a non-propensity purpose for bad act evidence, and the Advisory Committee thought that it should wait to see how courts apply the new amendment. Some Advisory Committee members also thought that some examples cited by the suggestion were

proper applications of Rule 404(b). In addition, the DOJ strongly opposed an amendment because, it argued, the 2020 amendment was the product of substantial work and compromise.

Judge Furman said that the Advisory Committee will continue to monitor developments in this area.

**Rule 702 and Peer Review.** Judge Furman reported that the Advisory Committee considered a suggestion to amend Rule 702 to address the role of peer review as set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Rule 702’s 2000 committee note. Under *Daubert* and the committee note, the existence of peer-review is relevant to a court’s determination of the reliability of an expert’s methodology, and thus the admissibility of expert testimony. The attorneys argued that this is problematic because many studies cannot be replicated.

The Advisory Committee decided not to pursue an amendment and to remove the item from the agenda. The consensus of committee members was that Rule 702 is general: it does not mention particular factors. The Advisory Committee thought that singling out a particular factor in the text would be awkward and potentially problematic. Moreover, courts have exercised appropriate discretion in connection with the peer review factor and there is not a problem warranting an amendment.

**The Supreme Court’s Decisions in *Diaz v. United States* and *Smith v. Arizona*.** Judge Furman stated that the Advisory Committee discussed two recent Supreme Court decisions pertaining to the Rules of Evidence. First, in *Diaz v. United States*, 602 U.S. 526 (2024), the Court addressed whether Rule 704(b) prohibited expert testimony in a drug smuggling case that “most people” who transport drugs across the border do so knowingly. The Court found no error because the expert’s testimony was based on probability and not certainty. The Advisory Committee determined that the case did not warrant an amendment to the rule and that the Court’s result was consistent with the language and intent of the rule.

Second, in *Smith v. Arizona*, 602 U.S. 779 (2024), a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst, and the other analyst’s findings were disclosed to the jury. The Court held that the expert’s disclosure to the jury of testimonial hearsay violated the defendant’s right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert’s opinion. Here, too, the Advisory Committee determined that an amendment is not presently necessary. There was some concern about whether the case could be construed to apply to reliance in addition to disclosure. If there were a constitutional bar on an expert’s reliance on other experts’ findings, an amendment to Rule 703 to prohibit reliance on testimonial hearsay in a criminal case would likely be necessary. Judge Furman said that the Advisory Committee will continue to monitor developments and how the case is applied in the lower courts.

**Rule 902 and Tribal Certificates.** Judge Furman reported that the Advisory Committee received a suggestion to consider adding federally recognized Indian tribes to the list of entities in Evidence Rule 902(1), which provides that domestic public records that are sealed and signed are self-authenticating. The list does not include Indian tribes, which means that a party who seeks to offer a record from a federally recognized Indian tribe must use another route to authenticate such evidence.

The Advisory Committee previously considered the issue and did not take action, but recent developments have arguably made this a live issue again, most notably, the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). In addition, at least two recent decisions by courts of appeals held that the prosecution unsuccessfully attempted to establish Indian status through the business records exception.

At the fall 2024 Advisory Committee meeting, some members thought that this is not a problem with the rules but rather a failure by prosecutors to do what they must to authenticate the documents under existing rules, such as properly lay a foundation for the business records exception. In addition, there was a concern about whether all federally recognized tribes have resources and recordkeeping akin to those of the entities currently encompassed in Rule 902(1). The Advisory Committee will discuss these issues at its Spring meeting with further input from the DOJ.

Judge Bates thanked Judge Furman and Professor Capra for their report.

### **REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

Judge Eid and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 9, 2024, in Washington, DC. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 193.

#### *Information Items*

Proposed amendments to Rule 29, dealing with amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and proposed amendments to Form 4, the form used for applications to proceed in forma pauperis (IFP), were published for public comment in August 2024. The public comment period closes February 17. The Advisory Committee will be holding a hearing on the issues on February 14, where 16 witnesses are expected to testify.

***Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal IFP)***. Judge Eid commented that the amended Form 4 is similar to, but less intrusive than, the existing form. She observed that only one comment had been submitted on the proposal (that comment is favorable), and five people are expected to testify about the proposal at the hearing. After considering comments and testimony and making any necessary changes, the Advisory Committee expects to present the proposed amended Form 4 for final approval in June.

***Proposed Amendment to Rule 29 (Brief of an Amicus Curiae)***. Judge Eid reported that the Advisory Committee had received over a dozen comments on the Rule 29 proposal and at least 11 people are expected to testify about the proposal at the February hearing. Judge Eid explained that the proposal makes two main changes.

The first change relates to disclosures. Under the proposal, an amicus would have to disclose whether a party to the case provides it with 25% or more of the amicus's annual revenue. In addition, the current rule requires an amicus to disclose whether a nonmember made

contributions earmarked for a that brief. The proposal would extend this requirement to someone who recently became a member.

The second change relates to a motion requirement. The current rule permits an amicus to file a brief at the initial stage either by consent or by motion. The Advisory Committee's proposal would remove the consent option. Judge Eid noted that, at the Standing Committee's June 2024 meeting, members expressed concern that this proposal would create more work for judges by generating unnecessary motions. Judge Eid and Professor Hartnett reported these concerns to the Advisory Committee at its fall 2024 meeting; at that meeting, the Advisory Committee also heard that the Second, Ninth, and Tenth Circuits supported requiring a motion.

Judge Eid explained the second change's interaction with recusals. She explained that, in some circuits, filing an amicus brief by consent can block a case from being assigned to a judge and that this could occur without any judicial intervention (before the case is assigned to a panel). In such circuits, imposing a motion requirement would provide the opportunity for a judge to decide whether to disallow the brief because it would cause a recusal. Judge Eid noted that there is a tradeoff: imposing a motion requirement creates extra work but it creates the opportunity for judicial intervention. The Advisory Committee has asked its Clerk representative to survey the circuit clerks about their circuits' practices. The Advisory Committee is likely to consider proposing a rule that would eliminate the consent option unless a circuit opts to permit filings on consent.

A judge member asked Judge Bates whether the rules can allow circuits to opt out. Judge Bates, Judge Eid, and Professor Struve responded that it is not always an option but that in appropriate circumstances the rules can allow circuits to opt out.

Judge Bates noted that the question of changing this feature of the current rule initially arose because the Supreme Court changed its practice. The Supreme Court, though, accepts amicus briefs without any requirement. He observed that the proposed change to Rule 29 goes in the opposite direction.

A practitioner member supported setting a rule with which all circuits would be comfortable. He suggested a default rule requiring a motion but allowing circuits to permit filing by consent. Judge Eid responded that the Advisory Committee will consider that approach.

Professor Hartnett asked a judge member if she would be comfortable with a rule that includes an opt-out provision for circuits, given her concerns expressed at the last meeting. The judge member responded that an opt out would be a reasonable approach because courts may have different issues with the proposed rule and some courts receive more amicus briefs than others.

***Rule 15 and the "Incurably Premature" Doctrine.*** Judge Eid reported that this item stems from a suggestion to fix a potential trap for the unwary. Under the incurably premature doctrine, if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Rather, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider. Judge Eid observed that Appellate Rule 4 used to work in a similar fashion, but it was

amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided.

Judge Eid reported that the Advisory Committee is considering whether to make a similar amendment to Rule 15. She noted that the Advisory Committee had previously studied such a proposal but that the earlier proposal had been opposed by the D.C. Circuit. Judge Eid predicted that the Advisory Committee might seek permission, at the Standing Committee's June meeting, to publish such a proposal for comment.

A judge member noted that a difference between Rule 4 and Rule 15 is that statutory jurisdictional provisions govern court review of the decisions of some agencies. She wondered whether a court could defer consideration of a petition that the court had no jurisdiction to decide when the petition was filed. In addition, based on the volume of petitions her court receives, this could be a burden on the clerk's office. She offered to raise the issue with her colleagues. Judge Eid thanked the member and invited her to ask her colleagues about the topic.

***Intervention on Appeal.*** Judge Eid noted that the discussion of this item appears in the agenda book beginning on page 196. She observed that members of the Advisory Committee thought it would be helpful to have a rule addressing intervention on appeal, but that they also had concerns that adopting such a rule might increase the volume of requests to intervene on appeal. Judge Eid suggested that intervention does not typically pose difficult issues in connection with petitions in the court of appeals for review of agency determinations. Instead, problems have manifested in some cases where a plaintiff sues to challenge a government policy and then there is a subsequent change in administration of the government whose policy is under challenge. Problems have also arisen in some cases where a plaintiff seeks a "universal" remedy, that is, one that would benefit nonparties as well as parties. She said that the Advisory Committee continues to monitor developments and that the FJC is conducting research to help inform the Advisory Committee.

Judge Eid commented that the Advisory Committee thought it might be able to craft a rule that would structure the analysis, provide guidance, and limit the range of debates on the issue. Ultimately, a rule could make clear that intervention on appeal should be rare. The Advisory Committee is waiting for the FJC's research and may take up this item next year. A judge member noted the current lack of guidance for attorneys; this member suggested that a rule could usefully say: "intervention on appeal should be rare, requests must be timely, and intervening on appeal is not a substitute for amicus participation."

A member stated that he did not like the idea of avoiding rulemaking on a topic merely to discourage the practice that the potential rule would address. He suggested that it would be better to adopt a rule that would provide more guidance on the issue while including the caveat that intervention on appeal should be rarely used.

***Rule 4 and Reopening Time to Appeal.*** Judge Eid reported that the Advisory Committee has begun considering a suggestion to address various issues involving reopening the time to appeal under Rule 4(a)(6). The suggestion seeks to clarify whether a single document can serve as a motion to reopen the time to appeal and then (once the motion is granted) as the notice of appeal. Relatedly, the suggestion seeks to clarify whether a notice of appeal must be filed after a motion



to reopen the time to appeal has been granted. Judge Eid said that the Advisory Committee has just begun to look at this issue.

**Rule 8 and Administrative Stays.** Judge Eid reported that the Advisory Committee is in the preliminary stages of considering a suggestion to amend Rule 8. A proposed rule could make clear the purpose and proper duration of an administrative stay.

A judge member recommended receiving input from chief circuit judges on the topic. He commented that Professor Rachel Bayefsky authored a superb article on administrative stays.

**Other Items.** Judge Eid reported that the Advisory Committee decided to remove several items from its agenda, including a suggestion to prohibit the use of all capital letters for the names of persons, a suggestion to move common local rules to national rules, a suggestion to create a set of common national rules that would collect the provisions that are the same across the different sets of national rules, a suggestion to standardize page equivalents for word limits, and a suggestion regarding standards of review.

Judge Bates thanked Judge Eid and Professor Hartnett for their report.

## **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 12, 2024, in Washington, DC. The Advisory Committee presented action items for publication of one rule and one official form, as well as four information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 223.

### *Action Items*

**Publication of Proposed Amendment to Rule 2002 (Notices).** Judge Connelly reported on this item. The text of the proposed amendment begins on page 229 of the agenda book, and the written report begins on page 224. Rule 2002 requires the clerk to provide notice of an extensive list of items or actions that occur in every bankruptcy case. Rule 2002(o) provides that the caption of the notices under this rule shall comply with Rule 1005, which governs the caption of the petition that initiates a bankruptcy case. Rule 1005 requires the petition's caption to include information such as the debtor's name, other names the debtor has used, and the last four digits of the debtor's social security number or taxpayer-identification number. By incorporating Rule 1005's requirements, Rule 2002(o) requires that Rule 2002 notices include this information also. Judge Connelly stated that including this information in such notices is onerous and exposes sensitive information.

The proposed amendment would change Rule 2002(o) to eliminate the cross-reference to Rule 1005 and instead require that the caption comply with Official Form 416B. The result would be to require an ordinary short title caption consisting of the name, case number, chapter of bankruptcy, and the title of item being noticed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 2002 for public comment.**

***Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy).*** Judge Connelly reported on this item. The text of the proposed amendment begins on page 231 of the agenda book, and the written report begins on page 225. Form 101 is the initial form for filing a bankruptcy case. The form currently has a field for disclosing the debtor's employer identification number, requesting "Your Employer Identification Number (EIN), if any." Commonly, pro se filers are mistakenly providing the EIN of their employers. When multiple debtors file petitions listing the same EIN, the system erroneously flags them as repeat filers.

The proposed amendment would change the language in Form 101 to say: "EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 101 for public comment.**

#### *Information Items*

Judge Connelly reported on four topics being considered by the Advisory Committee. The written report begins on page 225 of the agenda book.

***Suggestion to Require Full Redaction of Social Security Numbers in Court Filings.*** Judge Connelly reported that the Advisory Committee has been studying whether the Bankruptcy Rules should continue to provide for disclosure of the last four digits of social security numbers in bankruptcy filings but has decided not to take action at this time. Judge Connelly noted the invaluable work of the FJC, which conducted an extensive study on the disclosure of social security numbers in federal court filings.

The Advisory Committee also conducted its own study by identifying the official bankruptcy forms that disclose the last four digits of social security numbers. Currently, several official forms require the disclosure of these last four digits. The FJC surveyed stakeholders, asking for input about the possible impact of eliminating the last four digits on the forms. Judge Connelly said that it may be critical to obtain this information to precisely determine the individuals who are or have been in bankruptcy because this allows creditors to accurately file claims, know to take no action on debts due to the automatic stay, or know that a debt has been discharged. Indeed, the stakeholders surveyed said that the last four digits on the official forms are essential. The numbers on some forms were essential to all stakeholders, and the numbers on all forms were essential to some stakeholders. Judge Connelly observed that there does not appear to be an effective means for identifying individuals without the last four digits of social security numbers, since it is not uncommon for multiple individuals with the same name to file for bankruptcy.

The Advisory Committee thus decided not to take action because it did not identify a real-world harm from disclosure of the last four digits in bankruptcy cases but did identify a harm in not disclosing this information. Although the FJC study did find disclosures of some full social security numbers in bankruptcy cases, those disclosures occurred despite the current rules, so rule amendments would not address that issue. Judge Connelly commented that the Advisory Committee will monitor developments in the other advisory committees and may revisit the issue if a time comes when stakeholders can effectively identify debtors without the need for the last four social security number digits.

***Suggestion to Propose a Rule Requiring Random Assignment of Mega Bankruptcy Cases Within a District.*** Judge Connelly reported that the Advisory Committee received suggestions for a rule to require random assignment of bankruptcy cases designated as mega bankruptcy cases. She noted that the Committee on the Administration of the Bankruptcy System and the Committee on Court Administration and Case Management are considering similar issues. Accordingly, the Advisory Committee will defer any action on this item until it receives guidance from the other committees.

***Suggestions to Allow Appointment of Masters in Bankruptcy Cases and Proceedings.*** Judge Connelly observed that under Bankruptcy Rule 9031, special masters cannot be appointed by a bankruptcy court. Two suggestions propose an amendment to Rule 9031 to allow for the appointment of masters in bankruptcy cases. She recalled that the Advisory Committee has considered, and rejected, many similar suggestions in previous decades. The Advisory Committee continues to consider the issue with this history in mind. Judge Connelly also noted that the FJC will survey bankruptcy judges to help identify the need and potential use for masters. The Advisory Committee should have the survey results by the June meeting.

Judge Connelly said that one issue raised was whether bankruptcy judges, being non-Article-III judges, would have the authority to appoint masters.

***Recommendation Concerning Proposed Amendment to Official Form 318 (Discharge of Debtor in a Chapter 7 Case) and Director's Forms 3180W (Chapter 13 Discharge) and 3180WH (Chapter 13 Hardship Discharge).*** Judge Connelly reported that the Advisory Committee received a suggestion for an amendment to the bankruptcy form Order of Discharge. The form establishes that a debtor has been discharged of its debts. The suggestion proposes adding language to the form that would notify the recipient that there may be unclaimed funds and that they can check the Unclaimed Funds Locator to ascertain whether they are entitled to any.

Currently, unclaimed funds are paid into the Treasury and kept until the claimant retrieves the funds. Judge Connelly acknowledged that this is a problem that needs to be addressed, but that the Advisory Committee decided to take no action on this particular suggestion. The Advisory Committee had several reasons, one of which is a timing issue. A bankruptcy discharge order is issued once the debtor is eligible for a discharge, but the unclaimed funds are not paid into the Treasury until a trustee's disbursements have gone stale. In a Chapter 7 case, this could be years after the debtor receives their personal discharge. In a Chapter 13 case, it could still be six months after the debtor's last payment to the trustee. In either event, there likely are not unclaimed funds available when the discharge order is issued. Thus, the proposed notice would be confusing or misleading.

Judge Bates thanked Judge Connelly and the Advisory Committee.

## **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 10, 2024, in Washington, DC. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 268.

Judge Rosenberg reported that the Judicial Conference approved the proposed amendments to Rules 16 and 26 and the proposed new Rule 16.1. The Judicial Conference sent the proposals to the Supreme Court. If the Supreme Court approves the proposals and forwards them to Congress, the proposals will be on track to take effect on December 1, 2025, absent contrary action by Congress.

### *Action Items*

***Publication of Proposed Amendment to Rule 81(c) Concerning Jury-Trial Demands in Removed Actions.*** Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 292 of the agenda book, and the written report begins on page 271. Before 2007, Rule 81(c) said: "If state law does not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." This excused a jury demand only when the case was removed from a state court that never requires a jury demand. But in the 2007 restyling, the verb "does" was changed to "did." This restyling could produce confusion when a case is removed from a state court that has a jury demand requirement but permits that demand later in the litigation. Accordingly, the Advisory Committee considered amendment to remove any uncertainty about whether and when a jury demand must be made after removal.

At the Advisory Committee's October meeting, it recommended a proposed amendment to require a jury demand in all removed cases by the deadline set forth in Rule 38. A point made during that meeting was that even when a party fails to meet the Rule 38 deadline, the court may nevertheless order a jury trial under Rule 39(b).

The Advisory Committee unanimously voted to recommend for publication the draft amendment to Rule 81(c) and its accompanying committee note. The Advisory Committee rejected the alternative proposal to return to the language in place before the 2007 change.

Professor Marcus observed that the existing rule creates uncertainty about when a jury demand is required and said that this proposed amendment removes that uncertainty by requiring a jury demand in accordance with Rule 38. Professor Cooper agreed and clarified that a party need not make a jury demand after removal if the party already made a demand before removal.

A practitioner member asked if the first line in the proposed Rule 81(c)(3)(B) should be in the past tense ("If no demand was made") rather than the current draft language ("If no demand is made"). Professor Garner's initial response was that the phrase should be in the present perfect

tense (“has been made”) because it refers to the present status of something that has occurred. The practitioner member noted that using the present perfect tense would match the following sentence.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 81 for public comment**, with the change on page 292, line 14 in the agenda materials from “is” to “has been.”

***Publication of Proposed Amendment to Rule 41 (Dismissal of Actions).*** Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 288 of the agenda book, and the written report begins on page 274. However, during the meeting a restyled version of the proposed amendment was displayed on the screen, reflecting input of the style consultants subsequent to the publication of the agenda book. Judge Rosenberg reported that courts widely disagreed on the interpretation of Rule 41(a). Although the rule is titled “Dismissal of Actions” and describes when a plaintiff may dismiss an action, many courts use the rule to dismiss less than an entire action. After several years of study, feedback, and deliberation, the Advisory Committee determined that the rule should be amended to permit dismissal of one or more claims in a case rather than permitting the dismissal of only the entire action. The Advisory Committee also concluded that the rule should be clarified to require that only current parties to the litigation must sign a stipulation of dismissal of a claim.

During the Subcommittee’s outreach, there was no opposition to such an amendment, and the proposed change would provide nationwide uniformity and conform to the practice of most courts. Further, the proposed amendment would help simplify complex cases and support judicial case management. Accordingly, the Advisory Committee unanimously recommended for publication the proposed amendment to Rule 41.

Judge Rosenberg said that the proposed rule amendment differs slightly from the draft shown in the agenda book. Where the agenda book draft language refers to “a claim or claims” in lines 7-8, 19, and 41-42 (pages 288-90), the restyled amendment proposal refers instead to “one or more claims.”

Professor Bradt said that a concern was raised regarding the use of the term “opposing party” in Rule 41(a)(1)(A)(i). The concern was that the term could be ambiguous with respect to who would be the party whose service of an answer or a motion for summary judgment would trigger the end of the period in which one could unilaterally dismiss a claim. The Advisory Committee ultimately declined to change this language because of its common use in other rules, all of which have a fairly clear definition of opposing party as being the party against whom the claim is asserted.

Judge Bates asked whether it would be inconsistent to use instead the term “opposing party on the claim.” Professor Bradt recalled that the Advisory Committee discussed similar suggestions at its October meeting. The Advisory Committee agreed that adding such language would not introduce any problems but that the additional language would be redundant. Professor Kimble emphasized the importance of using consistent language in the rules.

Judge Rosenberg asked about adding language in the committee note to make clear that the rule refers to the opposing party to the claim. Professor Kimble responded that he would not have

a similar concern if the additional language were placed in the committee note. Professor Bradt said that the Advisory Committee declined to add the additional language to promote consistent usage in the rules and noted that no responses to the Advisory Committee's outreach expressed any confusion. He said that the Advisory Committee could learn about confusion during the public comment period. Professor Cooper opposed adding the additional language to the rule text but suggested using "party opposing the claim" if the Advisory Committee decides to address the matter in the committee note.

Judge Rosenberg asked Judge Bates if he thought an additional sentence for the committee note should be drafted. Judge Bates saw no reason not to draft the additional language for the committee note if Judge Rosenberg, Professor Marcus, and Professor Bradt thought the addition would be beneficial.

A practitioner member asked about the conforming change in Rule 41(d). He observed that term "action" still appears in the rule. He thought that "of that previous action" in Rule 41(d)(1) was unclear (because it is intended to refer to the initial phrase in Rule 41(d), which as amended would now say "a claim" rather than "an action") and suggested that Rule 41(d) could instead use the phrase "of the previous action where the claim was raised." In addition, he observed that the draft committee note stated that references to action have been replaced and suggested that this language be adjusted if the rule retains some references to actions.

Professor Bradt responded that it was intentional to retain "action" in Rule 41(d) to make clear that the rule refers to a new case being filed. He said that the member's suggested additional language would not cause harm and offered instead "of that previous action in which one or more claims was voluntarily dismissed." Professor Bradt asked the member if this would clarify the rule. The member said that he was not devoted to any specific language but thought some clarification would be helpful and added that "the previous action" may be preferable to "that previous action."

Professor Kimble suggested "that previous action in which the claim was voluntarily dismissed." Professor Bradt and the member agreed. Professor Garner asked if the party would become responsible for all the costs of the action if one claim were dropped. Professor Bradt responded that ordinarily the party would only be responsible for the cost associated with the dismissed claim, but the court would retain the ability to impose the costs of the entire action. Professor Garner said that, as a style matter, "the" is preferable to "that." This would yield the phrase "of the previous action in which a claim was voluntarily dismissed."

Judge Bates questioned whether "voluntarily" would be appropriate to use in Rule 41(d). Professor Bradt responded that Rule 41(d) applies to voluntary dismissals but not involuntary dismissals and said that the proposed amendment does not seek to change that feature of Rule 41(d). Professor Cooper agreed that Rule 41(d) covers all dismissals under Rule 41(a), even if the plaintiff needs a court order, but Rule 41(d) does not include involuntary dismissals under Rule 41(b). Judge Bates observed that the headings of Rule 41(a)(1) and (2) distinguish between voluntary dismissals "By the Plaintiff" (Rule 41(a)(1)) and voluntary dismissals "By Court Order" (Rule 41(a)(2)).

Professors Cooper and Kimble commented that "previous" is unnecessary. To clarify the committee note, Professor Bradt suggested one additional word: adding "some" before "references

to ‘action.’” He asked if this would clarify that the proposed change does not eliminate all references to action. Professor Capra disagreed with adding “some” to the committee note and suggested that it refer to the provisions actually changed.

Professor King suggested working on the proposal further and seeking publication at the Standing Committee’s June meeting. Professor Capra agreed with Professor King. Professor Kimble also agreed and said that the style consultants would like to take more time to consider the proposed language. Judge Bates observed that the Standing Committee could consider the proposal with updated language at its June meeting for publication in August. Judge Rosenberg and Professor Bradt agreed with this plan.

Professor Bradt summarized the items that the Advisory Committee will work on. First, revising the committee note to clarify that some but not all references to “action” are being replaced. Second, considering the addition of rule text or a sentence in the committee note to clarify what is meant by “opposing party” in Rule 41(a)(1)(A)(i). Third, revising the proposed amendment to Rule 41(d)(1) to clarify its application to voluntary dismissals with or without court orders and to make clear the court’s authority in the subsequent action to require the plaintiff to pay all or part of the costs related to the prior action in which they voluntarily dismissed the claim.

Professor Hartnett wondered how “and remain in the action” in the proposed Rule 41(a)(1)(A)(ii) interacts with Rule 54(b). For example, consider a situation where a plaintiff sues two defendants, and the court grants one defendant’s motion to dismiss the claims against it. Absent a Rule 54(b) certification, that defendant remains in the action – for purposes of the application of the final-judgment requirement for taking an appeal – until the disposition of the claims against the remaining defendant. However, Professor Hartnett thought, the Advisory Committee appears to intend “remain in the action” to mean something different in Rule 41. Professor Hartnett expressed concern that this could cause confusion.

Professor Bradt asked if Professor Harnett had a proposal to solve this issue. Professor Hartnett said his initial reaction was to drop the proposed additional language. Professor Marcus explained that the proposal was in response to cases where parties no longer involved in the case refused to stipulate to a dismissal. Professor Bradt added that a problem also arises where a party no longer involved in the case cannot be found to obtain their signature for a dismissal.

Professor Bradt said that the Advisory Committee will continue to work on the proposed amendment and will present a revised proposal at the Standing Committee’s June meeting. Judge Rosenberg agreed.

### *Information Items*

Judge Rosenberg reported on the work of the Advisory Committee’s subcommittees as well as a few other information items. These items are described in the written report beginning on page 276 of the agenda book.

***Rule 45(b) and the Manner of Service of Subpoenas.*** Judge Rosenberg reported that the Discovery Subcommittee continues to consider the problems that can result from Rule 45(b)(1)’s directive that service of a subpoena depends on “delivering a copy to the named person.” As to

potential alternative methods of service, the Subcommittee determined to leave the decision of what to employ for a given witness to the presiding judge.

The Subcommittee is also considering the requirement that when a subpoena requires attendance by the person served, the witness fees and mileage be “tendered” to the witness. The Subcommittee is studying two options. The first option is retaining the obligation to tender fees but not as part of service. The second option is eliminating the obligation to tender the fees.

Judge Rosenberg invited feedback on the issues of tendering fees at time of service and also whether the rule should be amended to require that the subpoena be served at least 14 days before the date on which the person is commanded to attend. Professor Marcus noted that the Subcommittee will also be looking at filing under seal.

Professor King observed that Rule 45(b) is similar to Criminal Rule 17(d) (on service of subpoenas in criminal cases). She suggested that the committees coordinate during the drafting process. However, she acknowledged that different considerations may affect the criminal and civil service rules.

***Rule 45(c) and Subpoenas for Remote Testimony.*** Judge Rosenberg reported that the Advisory Committee received a suggestion to relax the constraints on the use of remote testimony. The Advisory Committee will monitor comments submitted on the proposed bankruptcy rule amendments that would permit the use of remote testimony for contested matters in bankruptcy court.

Judge Rosenberg said that the Advisory Committee will continue to consider an amendment to Rule 45(c) to clarify that a court can use its subpoena power to require a distant witness to provide testimony once it determines that remote testimony is justified under the rules. This issue came to the Advisory Committee’s attention because of a Ninth Circuit ruling, *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), holding that current Rule 45 does not permit a court that finds remote testimony justified under Rule 43 to compel a distant witness to provide that testimony by subpoena. The Subcommittee is inclined to recommend an amendment that would provide that when a witness is directed to provide remote testimony, the place of attendance is the place the witness must go to provide that testimony.

Judge Bates observed that no public comments had been submitted so far on the bankruptcy rule amendment relating to remote testimony in contested matters.

A judge member said that he disagreed with the Ninth Circuit’s decision but that given the ruling, he thought an amendment to the rule is necessary. He asked how an amendment might affect the definition of unavailability in Rule 32 (concerning use of depositions). Professor Marcus responded that the Committee is discussing the issue of unavailability under Rule 32 as well as under Evidence Rule 804 (concerning the hearsay exception for unavailability). He explained that the Committee did not intend the change to Rule 45 to affect the interpretation of unavailability under Rules 32 or 804 and suggested that the committee note could make that clear.

Another judge member commented that even if no comments are received on the bankruptcy rule, many others are experimenting with remote proceedings, such as state courts and immigration courts. He suggested that there was no good reason to delay in moving ahead with



remote proceedings. Judge Rosenberg responded that the Subcommittee initially considered proposing changes to Rule 45 and Rule 43 together but now thinks it will take more time to discuss changes to Rule 43 because a proposed change to Rule 43 would be more controversial. The Advisory Committee was in the process of gathering other perspectives on remote testimony, like those from the American Association for Justice and the Lawyers for Civil Justice. Professor Marcus emphasized that the Committee is not delaying consideration of remote testimony but rather the Committee feels urgency to move forward with an amendment to address *In re Kirkland*.

A member cautioned against overreading the lack of comments received so far for the bankruptcy rule amendment, since the amendment relates only to contested matters and not adversary proceedings. Further, bankruptcy courts have comfortably used remote technology for a long time. The bankruptcy responses therefore provide little guidance on a possible reaction to remote proceedings in non-bankruptcy civil cases. Professor Marcus agreed. Judge Connelly said that although no comments had been submitted yet, the Bankruptcy Rules Committee expects comments before the end of the notice period. Judge Connelly also noted that the bankruptcy rule amendments may have limited impact because contested matters are often akin to motion practice in district court.

Judge Bates observed that the Advisory Committee was considering issues across Rules 43 and 45. And because remote testimony is a broader issue than the issue regarding subpoenas, he urged the Advisory Committee to be cognizant of that and not let the subpoena consideration drive the analysis.

***Rule 55 and the Use of the Verb “Must” with Regard to Action by Clerk.*** Judge Rosenberg reported that Rule 55(a) says that if the plaintiff can show that the defendant has failed to plead or otherwise defend, “the clerk must enter the party’s default.” Rule 55(b)(1) says that if “the plaintiff’s claim is for a sum certain or a sum that can be made certain by computation, the clerk ... must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing.” The Advisory Committee had found that the command in Rule 55(a) does not correspond to what is happening in many districts. FJC research shows wide variations among district courts in how they handle applications for entry of default or default judgment.

The Advisory Committee discussed whether to amend Rule 55. Some members favored changing “must” to “may” to protect clerks from pressure when there are serious questions about whether entry is appropriate. However, some members thought that “may” would create ambiguity. Judge Rosenberg said that the Advisory Committee is in the early stages of discussing this issue. Professor Marcus added that this command that some clerks find unnerving has been in the rule since 1938.

A judge member thought that there are two separate issues: the pressure on clerks to make a decision they feel uncomfortable making and whether entry should be mandatory. Professor Marcus responded that a number of districts have provisions allowing the clerk to act or refer the matter to the court.

At this point in the Civil Rules Committee’s report, the discussion was paused in order to allow the Criminal Rules Committee to make its report (described below). The Civil Rules Committee’s presentation resumed thereafter with the discussion of third party litigation funding.

***Third Party Litigation Funding.*** Judge Rosenberg reported that a subcommittee was recently appointed to study the topic. Third party litigation funding first appeared on the Advisory Committee's agenda in 2014, primarily in the context of multidistrict litigation. Since then, litigation funding activity has increased and evolved. The Subcommittee has met once so far to plan its examination of the topic. It will examine, among other things, the model in place in the District of New Jersey, which adopted a local rule calling for disclosure. The Wisconsin legislature included a disclosure rule in its tort reform discovery package. The Subcommittee is only studying and monitoring the issue and does not anticipate making any proposals in the near future.

A practitioner member noted that disclosures have been required by some judge-made rules in Delaware courts, and also suggested that it may be helpful to examine arbitration practices, where mandatory disclosure of third-party litigation funding is the norm. Judge Rosenberg asked if discovery ensues after such disclosures and whether the disclosures are ex parte. The member replied that he did not know about discovery, but he thought that the disclosures are not ex parte because they are designed to provide information for conflict-of-interest purposes.

Another practitioner member observed that in his practice, he often wonders if there is a funder involved and it is very difficult to get discovery about that information. He commented that there may be reasons why information on funding should never be disclosed to a jury, but he expressed concern that funders exercise control over claims. The attorney may even be associated with the funder before the attorney is associated with their client. The member said that funders can make resolving a case more difficult. He recounted a case where a funder loaned a company a large sum of money secured by existing and future claims, caused the company to file claims, and then prevented the company from settling their claims. He thought that some sort of discovery into the funder relationship should be permitted.

Judge Rosenberg invited the member to share persons or organizations with whom it would be helpful to speak. She said that the Subcommittee is eager to learn how pervasive funding is, what constitutes litigation funding, how it could be defined, and what, if anything, the rulemakers should do about it. The Subcommittee knows that funding can be problematic from a recusal standpoint and a control standpoint, but it needs to understand the breadth and pervasiveness of the problem.

Professor Marcus observed that a court presumably could order discovery on funding even without a new rule on point and he asked why they do not always do so. As to recusal, Professor Marcus recalled a judge during a prior discussion stating that not very many judges invest in hedge funds. He asked what a judge is supposed to do upon learning of funding. A practitioner member replied that the Subcommittee should look into the breadth of litigation funders because he suspected that litigation funders include not only hedge funds, but also other entities such as insurance companies. Thus, the member said, funding does pose potential recusal issues. He also said that in his experience the trend is generally not to allow discovery on the issue unless a party can come forward with some specific reason to believe that something untoward is going on.

Another practitioner member agreed. He said that an objection is often made arguing that funding arrangements are matters between the funder and client, and the opposing party should not receive the information even if it is needed to determine whether the court should recuse. The member framed this as a chicken and egg problem: the opposing party may be able to articulate a

basis for funding concerns only after receiving information about the funding arrangement. He repeated that most courts do not allow discovery into the issue because it is seen as a fishing expedition.

Professor Hartnett commented on the disclosure rule in the District of New Jersey. He said that he is a member of the Lawyers' Advisory Committee that developed and drafted the rule ultimately promulgated by the district. He offered to facilitate a meeting with the Lawyers' Advisory Committee. Judge Rosenberg said that the FJC has been in touch with the district's Clerk of Court to learn the types of disclosures being made under the local rule and how judges use the information disclosed.

Professor Coquillette observed that this is another area where a rules committee's work overlaps with another rulemaking system because this issue is covered by state disciplinary rules, particularly when lawyers and their clients have differing interests.

A member cautioned that the term third party litigation funding captures a broad and varied set of arrangements. It may be on the plaintiff or defense side, it may be framed as insurance, and parties offering funding can include hedge funds and private equity firms. To craft a rule, even if it relates only to disclosures, one must determine what the funding device is and what type of concern it raises. If the concern is about control, the member agreed with Professor Coquillette that there could be other ways of addressing that concern or that any rulemaking could be narrow and targeted. But he thought that unless a disclosure rule was limited to seeking a very narrow set of information about control, it could be difficult to craft a rule that would be both meaningful and long-lasting. Judge Bates recalled that the scope of third-party litigation funding was an initial question that the Advisory Committee confronted many years ago. The member also noted that some states have abolished champerty as an operative doctrine, while other states still enforce champerty restrictions.

***Cross-Border Discovery Subcommittee.*** Judge Rosenberg reported that the Subcommittee was formed in response to a proposal urging study of cross-border discovery with an eye toward possible rule changes to improve the process. The Subcommittee is focused on foreign discovery under 28 U.S.C. § 1781 and the Hague Convention from litigants that are parties to U.S. litigation. The Subcommittee has met with bar groups, and Subcommittee members will attend the Sedona Conference Working Group 6, which focuses on cross-border discovery issues. The Subcommittee will continue to reach out to groups and participate in relevant meetings, though it does not anticipate making any proposals in the near future. Professor Marcus confirmed that he will attend the Sedona Conference meeting and said that it is not clear whether there is widespread support for rulemaking in this area.

***Rule 7.1 Subcommittee.*** Judge Rosenberg reported that the Subcommittee is considering whether to expand the disclosures required of nongovernmental corporations. She said that the current rule, which requires that nongovernmental corporations disclose any parent corporation and any publicly held corporation owning 10% or more of its stock, does not provide enough information for judges to evaluate their statutory obligations in all cases. The Subcommittee seeks to ensure that any proposed rule helps judges evaluate their obligations and is consistent with recently issued Codes of Conduct Committee guidance. The guidance indicates that a judge has a

financial interest requiring recusal if the judge has a financial interest in a parent that “controls” a party. The current rule likely requires disclosure of most such circumstances but not all.

Judge Rosenberg said that the Subcommittee is considering an amendment requiring disclosure based on a financial interest. In addition to the current disclosure requirements, the amendment would also require corporate parties to disclose any publicly held business organization that directly or indirectly controls the party. The Subcommittee hopes to present a proposed amendment and committee note for Advisory Committee consideration at the Advisory Committee’s April meeting. Professor Bradt added that the Subcommittee continues outreach to likely affected parties, including organizations of general counsel.

***Use of the Term “Master” in the Rules.*** Judge Rosenberg reported that the American Bar Association had submitted a suggestion to remove the word “master” from Rule 53 and other places. The Academy of Court-Appointed Neutrals and the American Association for Justice submitted supporting suggestions. At its October meeting, the Advisory Committee decided to keep the matter on its agenda for monitoring, but it does not anticipate making any proposals in the near future.

Professor Marcus noted that “master” appears in many rules. It appears in Rule 53, at least six other Civil Rules, the Supreme Court’s rules, and several federal statutes. Professor Marcus asked whether the term should be removed from the Civil Rules, and if so, what should replace it. The Academy of Court-Appointed Neutrals suggested “court-appointed neutral,” but this does not seem to describe persons who can do the many things that Rule 53 masters can do, such as make rulings.

Professor Garner commented that there are about 12 or 13 different contexts in which master historically has been used. He thought that the suggestions may be focusing on one historical use of the term. Professor Garner authored an article on the topic and offered to share it with the Advisory Committee.

A judge member commented that the issue is whether the term should be used or not. This member thought that if there are many appropriate uses of the term, then that would be a reason not to make a change. But if the term has become offensive, then the Advisory Committee should amend the rules. A practitioner member agreed that this should be the focus. This member stressed that it is important to look for a replacement term that would have the same utility: the term “master” has become a term of art with a particular meaning in litigation that terms like “neutral” do not capture. The member said that the term “master” is obsolete but that it is difficult to think of a replacement.

Another judge member asked whether states continue to use the term and, if not, what terms they have replaced it with. Professor Marcus recalled that a submission referred to recent changes elsewhere and noted that the Academy of Court-Appointed Neutrals was previously called the Academy of Court-Appointed Masters. He also said that the AAJ suggestion did not suggest a proposed substitute term. Professor Marcus suggested one possibility is waiting to see what term becomes familiar and recognized in litigation.

Professor Coquillette noted that treatises exist in online databases that use Boolean search operators. Changing key terms will complicate the use of these word retrieval systems.

A judge member also noted that the Supreme Court uses the term, and the Court’s usage would not be altered by changes to the national rules for the lower federal courts.

Professor Capra said that recent changes include New Jersey now using the term “special adjudicator,” and New York using “referee.”

***Random Case Assignment.*** Judge Rosenberg reported that the Advisory Committee has received several proposals to require random district judge assignment in certain types of cases. In March 2024, the Judicial Conference issued guidance to all districts concerning civil actions that seek to bar or mandate statewide enforcement of a state law or nationwide enforcement of a federal law, whether by declaratory judgment or injunctive relief. In such cases, judges would be assigned by a district-wide random selection. Judge Rosenberg stated that the Advisory Committee is monitoring the implementation of the guidance, but that it is premature to make any rule proposals in the near future.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

## **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on November 6-7, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee’s report and the draft minutes of its last meeting are included in the agenda book beginning at page 320.

### *Information Items*

***Rule 53 and Broadcasting Criminal Proceedings.*** Judge Dever noted that Rule 53 provides that “[e]xcept as otherwise provided by a statute or these rules, the court must not permit ... the broadcasting of judicial proceedings from the courtroom.” The Rule 53 Subcommittee previously considered but did not act on a suggestion from some members of Congress suggesting that a clause be added excluding from the rule any trial involving Donald J. Trump. Subsequently, a consortium of media organizations proposed that Rule 53 be revised to permit the broadcasting of criminal proceedings, or to at least create an “extraordinary case” exception to the prohibition on broadcasting. A subcommittee was formed to consider that suggestion.

The Subcommittee met a number of times and gathered information about Judicial Conference Policy § 420(b), which permits the court to permit broadcasting of civil and bankruptcy non-trial proceedings in which no testimony will be taken. The Subcommittee also received an excellent FJC survey on state practices related to broadcasting and attempted to find empirical studies on the effect of broadcasting on criminal proceedings. Ultimately, the Subcommittee unanimously recommended no change to Rule 53, citing concerns about due process, fairness, privacy, and security. With one dissenting vote, the Advisory Committee decided not to propose amending Rule 53.

Professor King noted that, after the agenda book for the Advisory Committee's fall meeting was published, the Advisory Committee received an additional two submissions related to broadcasting. Professor Beale noted that one of those submissions was from the proponent of the original Rule 53 proposal. She noted that the Advisory Committee welcomed comments on the topic.

A judge member expressed interest in the FJC's research on remote public access to court proceedings. This judge member expressed skepticism about the assertion that the risks of broadcasting are somehow greater in federal court proceedings than in state court proceedings (where the risks seem to have been overcome). The member also wondered why the DOJ had abstained from voting on whether to remove the Rule 53 proposal from the Committee's study agenda.

***Rule 17 Subpoena Authority.*** Judge Dever reported that the Advisory Committee was continuing to consider a proposal from the New York City Bar Association to amend Rule 17. The Rule 17 Subcommittee has learned of a wide range of practices under Rule 17 and associated caselaw. The Subcommittee will continue to meet and will present further information at the Advisory Committee's April meeting.

***References to Minors by Pseudonyms and Full Redaction of Social Security Numbers.*** Judge Dever noted that Rule 49.1(a)(3) currently requires filings referring to a minor to include only that minor's initials unless the court orders otherwise. Rule 49.1(a) also provides that only the last four digits of a social security number may appear in public filings. The DOJ and two bar groups have proposed amending the rule to require that minors be referred to by a pseudonym rather than initials in order to provide greater protection of their privacy. Meanwhile, Senator Wyden has suggested amending the rule with respect to social security numbers. The relevant Subcommittee expects to present a proposal to the Advisory Committee at its April meeting.

Professor Beale noted that if Rule 49.1 is amended to require use of pseudonyms for minors, this would create disuniformity unless the other privacy rules are similarly amended. She noted that DOJ policy is to use pseudonyms, and federal defenders said they mostly use pseudonyms already as well. Professor Beale thought that the rules should reflect this practice. Given that the Criminal Rules Committee would consider this proposal at its Spring meeting, she expressed a hope that the other advisory committees would do so as well.

As to Senator Wyden's concern about the inclusion of the last four digits of social security numbers in court filings, Judge Dever stated that disclosure of the last four digits can impact a person's privacy interests. He recognized that different issues arise with respect to the Bankruptcy Rules; but the Criminal Rules Committee thought that, outside that context, removing the last four digits from public filings makes sense.

Professor Beale said that the Advisory Committee received feedback from federal defenders, the DOJ, and the Clerk of Court liaison, none of whom see a need for the last four digits in public filings. Where reference to a social security number is actually necessary (for example, in a fraud case), it can be filed under seal. Professor Beale acknowledged that references to social security numbers can be necessary in bankruptcy cases. But for the other rule sets, she suggested,

the time has come to re-examine the risks of disclosing the last four digits of the social security number.

Summing up, Judge Bates noted that the Criminal Rules Committee will be considering the privacy issues related to pseudonyms for minors and full redaction of social security numbers and encouraged the Appellate and Civil Rules Committees to consider the issues as well.

Professor Marcus noted that in civil proceedings permitting a party to proceed anonymously is controversial. He wondered whether the considerations are different for minors. Judge Bates clarified that the issue before the Criminal Rules Committee is not as to a party; it would be very rare for a minor to be a defendant in a federal prosecution.

***Ambiguities and Gaps in Rule 40.*** Judge Dever reported that a Subcommittee was established to address possible ambiguities in Rule 40, which relates to arrests for violating conditions of release set in another district. Magistrate Judge Bolitho raised this issue, and the Magistrate Judges Advisory Group submitted a detailed letter expressing its concerns. Judge Harvey was appointed to chair the Subcommittee.

***Rule 43 and Extending the Authority to Use Videoconferencing.*** Judge Dever recalled that, over the years, the Advisory Committee has considered many suggestions submitted by district judges concerning the use of videoconference technology in Rule 11 proceedings, sentencing, and hearings on revocation of probation or supervised release. By contrast, neither the National Association of Criminal Defense Lawyers nor the DOJ had submitted such suggestions.

During the discussion at the Advisory Committee's last meeting, the members generally did not support changing the rules for Rule 11 or sentencing proceedings, although one member noted the long distances that participants must travel in some districts.

A Subcommittee has been appointed to study the topic. The Subcommittee intends to explore the universe of proceedings that the rules do not already cover, since the rules already permit videoconferencing for some proceedings, like initial appearances, arraignments, and Rule 40 hearings.

A judge member supported considerably relaxing Rule 43. He thought that videoconferencing should be available for noncritical proceedings if the defendant consents but not for trials, guilty pleas, or sentencing. Judge Dever responded that Rule 43(b)(3) already permits hearings involving only a question of law to proceed without the defendant present. The Subcommittee will discuss other types of proceedings.

***Contempt proceedings.*** Judge Dever reported that the Advisory Committee received a proposal to substantially change Criminal Rule 42 concerning contempt proceedings. The proposal also advocated revisions to various federal statutes. The Advisory Committee removed the proposal from its agenda.

Judge Bates thanked Judge Dever for the report.

### **OTHER COMMITTEE BUSINESS**

The legislation tracking chart begins on page 378 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the 118th legislative session ended shortly before the Standing Committee's meeting.

#### *Action Item*

***Judiciary Strategic Planning.*** As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding strategic planning on behalf of the Standing Committee.

### **CONCLUDING REMARKS**

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 10, 2025, in Washington, DC.