

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.

Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Stuart Delery, Esq., Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., Allison Stanton, Esq., Rachel Hines, Esq., and J. Christopher Kohn, Esq., represented the Department of Justice at various times throughout the meeting.

Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated. Judge Michael A. Chagares, member of the Appellate Rules Committee and chair of the CM/ECF Subcommittee, also participated. Judge John G. Koeltl, member of the Civil Rules Committee and chair of that committee's Duke Subcommittee, participated in part of the meeting by telephone.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center
Catherine Borden	Research Associate, Federal Judicial Center
Scott Myers	Attorney in the Bankruptcy Judges Division
Bridget M. Healy	Attorney in the Bankruptcy Judges Division
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

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

Advisory Committee on Bankruptcy Rules —
 Judge Eugene R. Wedoff, Chair
 Professor S. Elizabeth Gibson, Reporter
 Professor Troy A. McKenzie, Associate Reporter

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

Advisory Committee on Criminal Rules —
 Judge Reena Raggi, Chair
 Professor Sara Sun Beale, Reporter

Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was unable to attend.

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting and the committee dinner. Judge Sutton reported that all of the rules proposals that were before the Supreme Court were approved in April, including the proposed amendment to Criminal Rule 12, which had been modified as agreed at the January Standing Committee meeting. The proposals to amend the Bankruptcy Rules to respond to *Stern v. Marshall* were withdrawn for the time being, while the committee waits to see what the Supreme Court does in *Executive Benefits Insurance Agency v. Arkison*, which may address an issue involved in the *Stern* proposals.

Judge Sutton also noted that the term of Chief Justice Wallace Jefferson, the committee's state court representative, was coming to a close. He said that Chief Justice Brent Dickson, of the Indiana Supreme Court, would succeed Chief Justice Jefferson as the state court representative. Judge Sutton thanked Chief Justice Jefferson for his wonderful service to the committee, described some of Justice Jefferson's outstanding contributions to the committee's work and some of his accomplishments outside the committee, and presented him with a plaque signed by Judge John Bates, Director of the Administrative Office, and by Chief Justice John G. Roberts. Chief Justice Jefferson expressed his thanks to the committee for a terrific experience and for doing such good work for the nation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of the last meeting, held on January 9–10, 2014.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set out in Judge Campbell's memorandum and attachments of May 2, 2014 (Agenda Item 2).

*Amendments for Final Approval*DUKE RULES PACKAGE
(FED. R. CIV. P. 1, 4, 16, 26, 30, 31, 33, 34, AND 37)

Judge Campbell reported that the Civil Rules Committee had a final proposed package of amendments to implement the ideas from the Civil Litigation Conference held at Duke Law School in May 2010 (“Duke Conference”). He noted that the Duke Conference was intended to look at the Civil Rules generally and whether they are working and what needs to be improved. The conclusion from that Conference, he said, was that the rules generally work well, but that improvement was needed in three areas: (1) proportionality; (2) cooperation among counsel; and (3) early, active judicial case management. The advisory committee had eventually narrowed the list of possible amendments to address these areas and had published its proposals for public comment in August 2013. Judge Campbell reported that there was great public interest in the proposals, with the public comment period generating over 2,300 comments and over 40 witnesses at each of three public hearings. Judge Campbell believed that the response of the bar and the public demonstrated the continuing vitality of the Rules Enabling Act process, and he stated that the comments the committee received were very helpful in refining the proposals. He also expressed gratitude to the reporters for their excellent work in reviewing and summarizing all of the testimony and comments.

Judge Campbell next explained that the advisory committee had made a number of changes to the published proposals to address issues raised during the public comment period. In addition, the advisory committee had decided not to recommend for final adoption the published proposals to place presumptive limits on certain types of discovery devices.

Judge Campbell and Professor Cooper reported that the advisory committee proposed a few changes to some committee note language that appeared in the Standing Committee agenda materials. First, the advisory committee proposed to take out some language in the committee note for Rule 26. The proposed revised committee note would remove the language in the committee note appearing in the agenda book at page 85, lines 277 to 289. The deleted matter provided additional background on the 2000 amendment to Rule 26 that had moved subject-matter discovery from party-controlled discovery to court-managed discovery. Professor Cooper explained that the deleted language was unnecessary. Second, a paragraph was added after line 262 on page 84 of the agenda materials, to encourage courts and parties to consider computer-assisted searches as a means of reducing the cost of producing electronically stored information, thereby addressing possible proportionality concerns that might arise in ESI-intensive cases.¹ Third, Judge Campbell reported

¹ The added language stated:

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored

that the proposal to amend Rule 1, which will emphasize that the court and the parties bear responsibility for securing the just, speedy, and inexpensive resolution of the case, now includes some added committee note language that was not in the agenda materials. The added language would make it clear that the change was not intended to create a new source for sanctions motions. The proposed added language would state: “This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.”

A member commented that the Duke package is “awesome” and that the advisory committee had done a marvelous job. He added that the problems being addressed are intractable, difficult problems, complicated by the commitment to transsubstantivity. He said that the advisory committee had invited as much participation as possible and he believed the proposals could make a real difference in meeting the goals of Rule 1. He added that the committee would need to continue to evaluate the rules to make sure the system is working well. He congratulated Judge Koeltl (the chair of the Duke Subcommittee), Judge Campbell, Judge Sutton, and the reporters for putting together a great package. Other members added their gratitude and commended the good work and extraordinary effort.

A member asked whether a portion of the proposal to amend Rule 34(b)(2)(B)—that “The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response”—would allow a responding party to simply state that it would produce documents at a reasonable time without providing a specific date. Another member suggested a friendly amendment that would revise the proposal to state: “If production is not to be completed by the time for inspection stated in the request, then the response must identify another date by which production will occur.” After conferring with the reporters, Judge Campbell reported that the idea was to make the provision in Rule 34(b)(2)(B) parallel Rule 34(b)(1)(B), which states that a request “must specify a reasonable *time* . . . for the inspection . . .” (emphasis added). For that reason, it was necessary to retain “time” in the proposed revision to Rule 34(b)(2)(B), instead of substituting “date.” However, the advisory committee changed its proposal to refer to “specified” instead of “stated,” to emphasize that it would not be sufficient to generally state that the production would occur at a reasonable time. He noted that the proposed advisory committee note already stated that “[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production.” A motion was made to change “stated” to “specified” in the proposal, so that it would read: “The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.” The motion passed unanimously.

The Duke package of proposed amendments passed by a unanimous vote. Judge Sutton thanked Judge Koeltl for his tireless work on the Duke Conference and on this very promising set of proposed amendments, as well as Judge Campbell and the rest of his team.

The committee unanimously approved the Duke package of proposed amendments to

information become available.

the Civil Rules, revised as stated above, to be submitted for final approval by the Judicial Conference.

FED. R. CIV. P. 37(e)

Judge Campbell reported on the proposed amendment to Rule 37(e), which is intended to give better guidance to courts and litigants on the consequences of failing to preserve information for use in litigation. He said that comments on the version that was published for public comment were extensive, and the advisory committee had substantially revised the rule to address issues raised by the comments. The subcommittee and the advisory committee decided that the following guiding principles should be implemented in the revised proposal: (1) It should resolve the circuit split on the culpability standard for imposing certain severe sanctions; (2) It should preserve ample trial court discretion to deal with the loss of information; (3) It should be limited to electronically stored information; and (4) It should not be a strict liability rule that would automatically impose serious sanctions if information is lost. Judge Campbell explained that the rule text and committee note had been revised after publication in line with these principles.²

² Judge Campbell also noted that the advisory committee's final proposal revised the committee note that was included in the agenda materials for the Standing Committee's meeting. Specifically, the paragraphs on pages 322–23, lines 170–91 were revised as follows:

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

~~Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss.~~

The committee discussed the proposal. After considering some suggestions and discussing them with the reporters, the advisory committee agreed to make a suggested change to delete “may” in line 9 on page 318 of the agenda materials, and to add “may” on line 10 before “order,” and on line 13 after “litigation.” Judge Campbell stated that he and the reporters agreed that this change adds more emphasis to the word “only” on line 12, underscoring the intent that (e)(2) measures are not available under (e)(1).

A member commented that, in looking at this proposal from multiple perspectives, it is going to be very helpful and is clearly needed. He added his congratulations to the advisory committee for their terrific work.

The committee unanimously approved the proposed amendment to Rule 37(e), revised as stated above, to be submitted for final approval by the Judicial Conference.

FORMS
(FED. R. CIV. P. 84 AND 4 AND APPENDIX OF FORMS)

Judge Campbell reported on the proposal to abrogate Rule 84 and the Appendix of Forms. He said that there were relatively few comments on this proposal and that the advisory committee remained persuaded after reading the comments that the forms are rarely used and that the best course is abrogation. Professor Cooper added that Forms 5 and 6 on waiver of service would be incorporated into Rule 4.

A member suggested that he thought the sense of the committee was that forms can be and are extremely important in helping lawyers and pro se litigants, but that the advisory committee should no longer bear responsibility for them. He added that he favored abrogation, but the advisory committee should continue to have a role in shaping the forms, perhaps by participating in a group at the Administrative Office (AO) that can handle the forms, helping to draft model forms, and/or having a right of first refusal on forms drafted by the AO. Judge Sutton agreed that forms are very useful and that this proposal is simply about getting them out of the Rules Enabling Act process. He added that there are many options in terms of how civil forms are handled if the abrogation goes into effect and suggested that the advisory committee consider what it thinks its role should be in shaping the forms going forward. He suggested that the advisory committee present its suggestion in that regard for discussion at the next Standing Committee meeting in January.

The committee unanimously approved the proposed amendments to abrogate Rule 84 and the Appendix of Forms, and to amend Rule 4 to incorporate Forms 5 and 6, to be submitted for final approval by the Judicial Conference.

~~In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).~~

Judge Sutton congratulated and praised Judge Campbell, the reporters, and the subcommittee chairs for all their hard work and terrific leadership and insight in bringing the Duke proposals, the Rule 37(e) amendments, and the Rule 84 amendment to the Standing Committee. He added that all three sets of proposals were done through consensus, which is a credit to the chairs of the subcommittees and the chair of the advisory committee. He also said that many of these proposals started with former Civil Rules Committee and Standing Committee chairs Judge Lee H. Rosenthal and Judge Mark R. Kravitz. This package of amendments, he said, was a wonderful tribute to Judge Kravitz's memory. Judge Sutton added that the way to thank the chairs and reporters for all of their work on these proposals is to make sure they make a difference in practice. He said that in the near future, the Standing Committee should discuss these amendments in terms of broader reform, including pilot projects and judicial education efforts, to make sure that they are making a difference on the ground. Judge Campbell expressed his thanks to Judge Grimm, for his tireless efforts on Rule 37, and to Judge Sutton for all of his insight and time in overseeing the work on these proposals.

FED. R. CIV. P. 6(d)

Professor Cooper reported that an amendment to Rule 6(d) was published that would revise the rule to provide that the three added days provided for actions taken after certain types of service apply only after being served, not after "service" more generally. Few comments were received and no changes were made after publication. Judge Campbell said that the advisory committee recommended approving this proposal, but not sending it on to the Judicial Conference yet, so that it can be presented together with another proposed amendment to Rule 6(d), which would remove the three added days for electronic service and which was being proposed for publication.

The committee unanimously approved the proposed amendment to Rule 6(d), to be submitted for final approval by the Judicial Conference at the appropriate time.

FED. R. CIV. P. 55(c)

Professor Cooper reported that the final proposal that was published for public comment in 2013 was a proposal to amend Rule 55(c) to make explicit that a motion under Rule 60(b) is needed only to set aside a final default judgment.

The committee unanimously approved the proposed amendment to Rule 55(c) to be submitted for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that at its January 2014 meeting, the Standing Committee had approved for publication at a suitable time an amendment to Rule 82 to reflect enactment of a new venue statute for civil actions in admiralty. Since January, further reflection had led the advisory

committee to believe that a cross-reference in the rule to 28 U.S.C. § 1391 should be deleted and that the text should be further revised to reflect the language of new § 1390. The advisory committee renewed its recommendation to publish the proposal, as revised.

The committee unanimously approved publication of the proposed amendment to Rule 82.

FED. R. CIV. P. 4(m)

Professor Cooper reported on the recommendation to publish a clarifying amendment to Rule 4(m) to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m).

The committee unanimously approved publication of the proposed amendment to Rule 4(m).

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the report of the CM/ECF Subcommittee, as set out in his memorandum of May 5, 2014 (Agenda Item 3).

Amendments for Publication

FED. R. APP. P. 26(c), FED. R. BANKR. P. 9006, FED. R. CIV. P. 6, FED. R. CRIM. P. 45

Judge Chagares reported that the subcommittee had been working with the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules on proposals to remove the provisions in each set of rules that currently provide three extra days for acting after electronic service. Each advisory committee recommended an amendment to its set of rules for publication. The subcommittee had unanimously supported the recommendation of the advisory committees to publish these amendments for public comment. The amendments to eliminate the “three-day rule” as applied to electronic service would be to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45.

Judge Sutton noted that a Standing Committee member had asked at the last Standing Committee meeting whether other types of service should be removed from the three-day rule. Judge Chagares said that question would take some study and for the time being the only recommendation of the subcommittee was to take electronic service out of the three-day rule. Judge Sutton added that the advisory committees would each study that question separately.

A member suggested removing “in” before “widespread skill” in the last sentence of the second paragraph of each of the draft committee notes. The reporters all agreed to make that change.

The committee unanimously approved publication of the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, with the change to the committee notes described above.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set out in Judge Raggi's memorandum and attachments of May 5, 2014 (Agenda Item 4).

Amendments for Publication

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee recommended publication of an amendment to Rule 4 to address service of summons on organizational defendants who are abroad. The proposed amendment would: (1) specify that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule; (2) for service of a summons on an organization within the United States, eliminate the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but require mailing when delivery has been made on an agent authorized by statute, if the statute requires mailing to the organization; and (3) authorize service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

A member suggested making it clearer in the proposed additional sentence in Rule 4(c)(2) that the reference to the summons under Rule 41(c)(3)(D) is to summons to an organization. Judge Raggi agreed to change the sentence to: "A summons to an organization under Rule 41(c)(3)(D) may also be served at a place not within a judicial district of the United States."

Another member asked about the phrase "authorized by law" in the proposed amendment to Rule 4(a), asking whether it clarifies what actions a judge can take if an organizational defendant fails to appear in response to a summons. The committee discussed whether to add "United States" before "law," and decided to include that addition in the version published for public comment, noting that including it would be more likely to elicit comments on whether it was helpful.

Another member suggested that, in the illustrative list of means of giving notice in proposed Rule 4(c)(3)(D)(ii), "stipulated by the parties" be changed to "agreement of the organization" or that the list add "agreed to by the party." Judge Raggi explained that a stipulation implied a certain level of formality and that the list was merely illustrative. She said she could not agree to this change without going back to the advisory committee. The member stated that his suggestion could just be considered the first comment of the public comment period.

The member also suggested that on page 492, line 58, in proposed Rule 4(c)(3)(D)(i),

“another agent” be changed to “an agent” to avoid implying that foreign law always authorizes officers and managing or general agents to receive notice. Judge Raggi agreed to accept that suggestion, noting that it reflected the advisory committee’s intent.

The committee unanimously approved publication of the proposed amendment to Rule 4, revised as noted above.

FED. R. CRIM. P. 41

Judge Raggi reported that the advisory committee recommended publishing an amendment to Rule 41, to provide that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when the media or information is or may be located outside of the district. Judge Raggi explained that this proposal came about because the Department of Justice had encountered special difficulties with Rule 41’s territorial venue provisions—which generally limit searches to locations within a district—as applied to investigating crimes involving electronic information.

The current limits on where a warrant application must be made make it difficult to secure a search warrant in two specific situations: First, when the location of the storage media or electronic information to be searched, copied, or seized is not known because the location has been disguised through the use of anonymizing software, and second, when a criminal scheme involves multiple computers located in many different districts, such as a “botnet” in which perpetrators obtain control over numerous computers of unsuspecting victims. Judge Raggi explained that proposed new subparagraph (b)(6)(A) addresses the first scenario. It would provide authority to issue a warrant to use remote electronic access to search electronic storage media and to seize or copy electronically stored information within or outside the district when the district in which the media or information is located has been concealed through technological means. Proposed (b)(6)(B) addresses the second scenario. It would eliminate the burden of attempting to secure multiple warrants in numerous districts and allow a single judge to issue a warrant to search, seize, or copy electronically stored information by remotely accessing multiple affected computers within or outside a district, but only in investigations of violations of 18 U.S.C. § 1030(a)(5), where the media to be searched are “protected computers” that have been “damaged without authorization” (terms defined in 18 U.S.C. § 1030(e)(2) & (8)) and are located in at least five different districts. Judge Raggi added that the proposed amendments affect only the district in which a warrant may be obtained and would not alter the requirements of the Fourth Amendment for obtaining warrants, including particularity and probable cause showings.

She noted that the proposal also includes a change to Rule 41(f)(1)(C), to ensure that notice that a search has been conducted will be provided for searches by remote access as well as physical searches. The rule now requires that notice of a physical search be provided “to the person from whom, or from whose premises, the property was taken” or left “at the place where the officer took the property.” The proposed addition to the rule would require that when the search is by remote

access, reasonable efforts must be made to provide notice to the person whose information was seized or whose property was searched.

The committee unanimously approved publication of the proposed amendment to Rule 41.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of May 8, 2014 (Agenda Item 5).

Amendments for Publication

Judge Colloton reported that the advisory committee had five proposals it recommended for publication. The first, the proposed amendment to Rule 26(c) to eliminate the three-day rule for electronic service, was already addressed during the CM/ECF Subcommittee's report.

INMATE FILING RULES

(FED. R. APP. P. 4(c)(1) AND 25(a)(2)(C), FORMS 1 AND 5, AND NEW FORM 7)

Judge Colloton reported that the advisory committee recommended publishing a set of amendments designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as a postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the rule. Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting filers to the existence of Form 7.

Professor Struve noted that a few stylistic changes had been made to the proposals in the Standing Committee's agenda materials. First, in Rule 4(c)(1)(B), on page 560, lines 3–4, “meets the requirements of” was changed to “satisfies.” A similar change was made to Rule 25(a)(2)(C)(ii), on page 562, lines 9–10. In Rule 25(a)(2)(C)(i), subdivisions (a) and (b), on pages 561 and 562, would become bullet points. As a result, in Rule 25(a)(2)(C)(ii), the cross-reference to Rule 25(a)(2)(C)(i)(a) would refer only to Rule 25(a)(2)(C)(i).

A member noted that in Rule 4(c)(1)(A)(ii), the “it” on page 559, line 20, referred to the “notice” referenced quite a bit earlier in the rule. Judge Colloton agreed to make revisions to clarify the reference. In Rule 4(c)(1)(A)(ii), “it” was changed to “the notice.” A corresponding change was made to Rule 25(a)(2)(C)(i), changing “it” to “the paper” on page 562, line 5. Finally, the advisory committee agreed to change “and” to “or” in Rule 25(a)(2)(C)(i), on page 562, line 4, and in Rule 4(c)(1)(A)(ii), page 559, line 20, so that evidence such as a postmark or a date stamp would suffice.

Professor Struve said that, at the suggestion of a committee member, the advisory committee would consider whether to change the references in Rule 4(c)(1)(B) and Rule 25(a)(2)(C)(ii) from “exercises its discretion to permit” to simply “permits.” She said that the committee would also consider a member’s suggestion that the rules need not suggest the option of getting a notarized statement when a declaration would suffice. She said these suggestions would be brought to the advisory committee for consideration as it works through the comments on the published draft.

The committee unanimously approved publication of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), revised as noted above, and to Appellate Forms 1 and 5, and proposed new Form 7.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that the advisory committee recommended publishing a proposed amendment to Rule 4(a)(4) to address a circuit split on whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Rule 4(a)(4) if a court has mistakenly ordered an “extension” of the deadline for filing the motion. The proposal is to adopt the majority approach, which is that postjudgment motions made outside the deadlines set by the Civil Rules are not “timely” under Rule 4(a)(4).

The committee unanimously approved publication of the proposed amendment to Rule 4(a)(4).

LENGTH LIMITS

(FED. R. APP. P. 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6)

Judge Colloton reported that the advisory committee recommended publishing a set of proposals to address length limits. The proposed amendments to Rules 5, 21, 27, 35, and 40 would impose type-volume limits for documents prepared using a computer, and would maintain the page limits currently set out in the rules for documents prepared without the aid of a computer. They would also employ a conversion ratio of 250 words per page for these rules. The proposed amendments also shorten Rule 32’s word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words. The word limits set by Rule 28.1 for cross-appeals are correspondingly shortened. Finally, the proposals add a new Rule 32(f), setting out a list of items that can be excluded when computing a document’s length.

A member asked why it was necessary to have line limits in addition to word limits. Judge Colloton agreed that the advisory committee would examine that question in the future, but he said that it would require careful consideration and the advisory committee recommended publishing the current proposals for now.

The committee unanimously approved publication of the proposed amendments to

Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.

FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would renumber the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater presented the report of the advisory committee, as set out in his memorandum and attachment of April 10, 2014 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that, in connection with its spring meeting, the advisory committee had worked with the University of Maine School of Law to host a symposium on the challenges of electronic evidence. He said that no concrete rules proposals came out of the symposium, but that it set the stage for issues that the advisory committee will need to monitor going forward.

Judge Fitzwater said that the advisory committee is examining a possible amendment to Rule

803(16), the hearsay exception for “ancient documents,” and that it will discuss the matter further at its fall meeting.

The Standing Committee’s liaison to the Evidence Rules Committee commented that Judge Fitzwater’s term as chair was drawing to a close and that he had greatly admired Judge Fitzwater’s leadership. He expressed his personal gratitude for Judge Fitzwater’s exceptional leadership and reported that Judge Bill Sessions would serve as the next chair. Judge Sutton echoed the praise and gratitude.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff’s memorandum and attachments of May 6, 2014 (Agenda Item 7).

Amendments for Final Approval

OFFICIAL FORMS 17A, 17B, AND 17C

Professor Gibson reported that an amendment to Form 17A and new Forms 17B and 17C had been published for comment in connection with the revision of the bankruptcy appellate rules. Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text. Professor Gibson reported that no comments had been received, that the advisory committee had unanimously approved the proposals, and that the advisory committee recommended them to be approved and take effect in December of this year. Professor Gibson noted that there was a typographical error on page 702 of the agenda materials, and that the reference to “U.S.C. § 158(c)(1)” should say “28 U.S.C. § 158(c)(1).”

The committee unanimously approved the proposed amendments to Form 17A and new Forms 17B and 17C, with the revision stated above, for submission to the Judicial Conference for final approval.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff reported that the advisory committee recommended amending Forms 3A and 3B to eliminate references to filing fees, because those amounts are subject to periodic changes by the Judicial Conference that can render the forms inaccurate. Judge Wedoff said that since the amendments were technical in nature, publication was not needed.

The committee unanimously approved the proposed amendments to Forms 3A and 3B for submission to the Judicial Conference for final approval without publication.

OFFICIAL FORMS 22A-1, 22A-1 SUPP, 22A-2, 22B, 22C-1, AND 22C-2

Judge Wedoff reported that the advisory committee recommended approval of the amendments to the modernized “means test” forms that were originally published in 2012 and then republished in 2013. Judge Wedoff said that the comments on the republished drafts were generally favorable, but that the advisory committee had made several changes after publication to take account of some of the suggestions made during the public comment period.

The committee unanimously approved the proposed amendments to Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, and 22C-2 for submission to the Judicial Conference for final approval.

MODERNIZED INDIVIDUAL FORMS

(OFFICIAL FORMS 101, 101A, 101B, 104, 105, 106SUM, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106DEC, 107, 112, 119, 121, 318, 423, AND 427)

Professor Gibson reported that the advisory committee recommended approving the modernized forms for individual-debtor cases that were published in 2013. She explained the process used by the subcommittee and the advisory committee to carefully review the comments and make changes as needed. She added that some of the comments had made suggestions outside the scope of the modernization project, and that the advisory committee had noted those for consideration at a later date. Professor Gibson said that the advisory committee recommended approving the forms, but making their effective date correspond with the non-individual modernized forms recommended for publication this summer, making the earliest possible effective date December 1, 2015.

The committee unanimously approved the proposed amendments to the modernized forms for individual-debtor cases for submission to the Judicial Conference for final approval at the appropriate time, likely in 2015.

Amendments for Publication

MODERNIZED FORMS FOR NON-INDIVIDUALS

(OFFICIAL FORMS 11A, 11B, 106J, 106J-2, 201, 202, 204, 205, 206SUM, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E)

Professor Gibson reported that the nearly final installment of the Forms Modernization Project consisted primarily of case-opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. The advisory committee also sought to publish two revised individual debtor forms and the

abrogation of two official forms.

At the suggestion of a committee member, Judge Wedoff agreed to revise the instructions at the top of Form 106J-2 to make it clear that the form requests only expenses personally incurred, not those that overlap with the expenses reported on Form 106J.

The committee unanimously approved publication of the modernized forms for non-individuals, described above and with the revision described above.

CHAPTER 13 PLAN FORM AND RELATED AMENDMENTS
(OFFICIAL FORM 113 AND FED. R. BANKR. P. 2002, 3002,
3007, 3012, 3015, 4003, 5009, 7001, AND 9009)

Judge Wedoff reported that the chapter 13 plan form had been published for comment in August 2013, that the advisory committee had revised the form in response to public comments, and that it now recommended republication in August 2014. Judge Wedoff noted that one improvement in the revised form is that it adds an instruction that clarifies that the form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in all circumstances or that it is permissible in all judicial districts. A member asked whether that should be done on all of the forms to avoid needing to tweak forms every time a decision changes the applicability of some aspect of a form. Judge Wedoff said that the advisory committee would consider whether it might be appropriate to amend Rule 9009 to state that the presence of an option on a form does not mean that it is always applicable. But he said that such an amendment should be pursued separately from the current proposal to amend the chapter 13 plan form.

Judge Wedoff explained that because of the significant changes to the proposed form, the advisory committee recommended republication. As to the related rule amendments that were published in 2013, Judge Wedoff said that republication was probably not necessary, but that the advisory committee recommended republication of the rule amendments so that they could remain part of the same package as the plan form. He said that republication of the rules would delay the package by a year because, under the Rules Enabling Act, the rules would not go into effect until at least 2016 if they are republished this year. But, he said, the advisory committee did not think it wise to put the rule amendments into effect without the related form that was the driving force behind the amendments. Professor McKenzie described the proposed rule amendments and the changes made after publication, most of which were minor. He said the request for comment would seek input as to whether the rule amendments should go into effect even if the advisory committee were to decide not to proceed with the plan form.

The committee unanimously approved publication of the revised chapter 13 plan form and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.

FED. R. BANKR. P. 3002.1

Judge Wedoff reported that the advisory committee recommended proposed amendments to Rule 3002.1, which applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. The proposed amendments would clarify when the rule applies and when its requirements cease.

The committee unanimously approved publication of the proposed amendment to Rule 3002.1.

OFFICIAL FORM 410A

Judge Wedoff reported that the advisory committee recommended publication of amendments to Official Form 410A (currently Form 10A), the Mortgage Proof of Claim Attachment that is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The advisory committee recommended publication of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Judge Wedoff noted that there was one typographical error in the draft in the Standing Committee's agenda materials. On page 1103, the reference to Rule 3001(c)(2)(A) should be to the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure.

The committee unanimously approved publication of the proposed amendments to Official Form 410A, with the revision noted above.

CHAPTER 15 FORM AND RULES AMENDMENTS
(OFFICIAL FORM 401 AND FED. R. BANK. P. 1010, 1011, 1012, AND 2002)

Professor McKenzie reported that the advisory committee recommended publication of an official form for petitions under chapter 15, which covers cross-border insolvencies. The proposed form grew out of the work of the Forms Modernization Project. Professor McKenzie said that the advisory committee also recommended publishing amendments to the Bankruptcy Rules to improve procedures for international bankruptcy cases. The proposals would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The committee unanimously approved publication of proposed Official Form 401, the proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012.

Informational Items

Professor Gibson reported that the advisory committee had withdrawn its proposed amendment to Rule 5005, which was published in 2013 and which would have replaced local rules on electronic signatures and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. The amendment would have allowed the scanned signature to have the same force and effect as the original signature and would have removed any requirement of retaining the original document with the wet signature. Professor Gibson said that the advisory committee had been persuaded by the public comments that the amendment was not needed and could be problematic.

Judge Wedoff said that his term as chair of the advisory committee was coming to a close and that Judge Sandra Ikuta would be taking over as chair. He added that he had very much appreciated the opportunity to serve as chair.

Judge Sutton said that Judge Wedoff had done amazing work, together with the reporters and the subcommittees. He added that Judge Wedoff's enthusiasm was infectious and that he was a national treasure for the Bankruptcy Rules. Judge Sutton said the committee was grateful for Judge Wedoff's service and his leadership.

REPORT OF THE ADMINISTRATIVE OFFICE

Julie Wilson and Ben Robinson provided the report of the Administrative Office. Ms. Wilson said that the Rules Office had been watching legislation that would attempt to address issues related to patent assertion entities. She said that a bill did pass in the House in December, but that recent developments indicated that the legislation was not moving forward in the Senate for now. She said that the Rules Office would continue to monitor the legislation.

Judge Sutton thanked the Rules Office for all its great work on the preparations for the committee's meeting.

NEXT COMMITTEE MEETING

The committee will hold its next meeting on January 8–9, 2014, in Phoenix, Arizona.

Respectfully submitted,

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Chief Counsel

Jonathan C. Rose
Secretary