

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Phoenix, AZ
January 8-9, 2015**

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Phoenix, Arizona
January 8-9, 2015

1. Welcome and Opening Remarks

- **Welcome and opening remarks by Hon. Jeffrey S. Sutton**
- **Report on September 2014 Judicial Conference session**
- **Report on transmission of Judicial Conference-approved proposed rules amendments to the Supreme Court**
 - Bankruptcy Rule 1007 (approved in March 2014)
 - Civil Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 37, and 55, and proposed abrogation of Rule 84 and the Appendix of Forms (approved in September 2014)
- **Report on rules amendments and Official Bankruptcy Forms effective December 1, 2014**
 - Appellate Rule 6
 - Bankruptcy Rules 1014, 7004, 7008, 7054, 8001–8028, 9023, and 9024; and Official Bankruptcy Forms 3A, 3B, 6 Summary, 17A, 17B, 17C, 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1 and 22C-2
 - Civil Rule 77
 - Criminal Rules 5, 6, 12, 34, and 58
 - Evidence Rules 801(d)(1)(B) and 803(6)–(8)

2. ACTION: Approving Minutes of May 2014 Committee Meeting

3. Report of the Advisory Committee on Appellate Rules – Hon. Steven M. Colloton

- **Rules and Forms published for public comment:** Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and New Form 7
- **Minutes and other informational items**

4. Report of the Advisory Committee on Bankruptcy Rules – Hon. Sandra Segal Ikuta

- **ACTION:** Approving publishing for public comment proposed amendment to Rule 1001

- **Rules and Official Forms published for public comment:** Bankruptcy Rules 1010, 1011, 2002, 3002, 3002.1, 3007, 3012, 3015, 4003, 5009, 7001, 9006, and 9009, and New Rule 1012, and Official Forms 11A, 11B, 106J, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions, and new Official Forms 106J-2 and 113
 - **Minutes and other informational items**
- 5. Report of the Advisory Committee on Civil Rules – Hon. David G. Campbell**
- **Rules published for public comment:** Civil Rules 4, 6, and 82
 - **Minutes and other informational items**
- 6. Report of the Advisory Committee on Criminal Rules – Hon. Reena Raggi**
- **Rules published for public comment and report on November 5, 2014 public hearing:** Criminal Rules 4, 41, and 45
 - **Minutes and other informational items**
- 7. Report of the Advisory Committee on Evidence Rules – Hon. William K. Sessions III**
- **Minutes and other informational items**
- 8. Report of the Inter-Committee CM/ECF Subcommittee – Hon. Michael A. Chagares**
- 9. Panel Discussion: *Creation of Pilot Projects in Conjunction with the Federal Judicial Center to Facilitate Discovery Reform Efforts***
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- Legislative report
 - Request for proposed changes to the *Strategic Plan for the Federal Judiciary*
 - Educational efforts concerning new rules amendments
- 11. Next meeting in Washington, D.C. on May 28-29, 2015**

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

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Brent E. Dickson	CJUST	Indiana	2014	2017
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
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Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
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Liaison for the Advisory Committee on Evidence Rules	Judge Paul S. Diamond <i>(Civil)</i>
Liaison for the Advisory Committee on Evidence Rules	Judge James C. Dever III <i>(Criminal)</i>
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TAB 1

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.
Draft Minutes as of September 22, 2014

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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 engaged in discussion on 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 the advisory committee had also published an amendment to Rule 6(d) 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 only a final default judgment could be set aside under Rule 60(b).

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,

Andrea L. Kuperman
Chief Counsel

Jonathan C. Rose
Secretary

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TAB 2A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

DATE: December 15, 2014

I. Introduction

The Advisory Committee on Appellate Rules met on October 20, 2014 in Washington, D.C. The Committee discussed four projects, removed one of those projects from its study agenda, and discussed (but did not add to its agenda) an additional proposal.

The Committee has scheduled its next meeting for April 23 and 24, 2015, in Philadelphia.

Part II of this report provides an overview of the Committee's projects. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting and in the Committee's study agenda, both of which are attached to this report.

II. Information Items

The Committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c). A number of circuits have local provisions that require such additional disclosures, and the question is whether such disclosures elicit information that may affect a judge's analysis of his or her recusal obligations. Topics on which the Committee is focusing include disclosures in bankruptcy matters; disclosures concerning victims in criminal cases; disclosures by intervenors and amici; and disclosures by non-governmental, non-human entities other than corporations. The Committee is working in close coordination with the Committee on Codes of Conduct and will likely seek additional guidance from that Committee as the project progresses.

The Committee is also considering the possibility of amending Rule 41 to address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction. Rule 41 provides in relevant part as follows:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * *

(b) **WHEN ISSUED.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

* * *

(d) **STAYING THE MANDATE.**

* * *

(2) *Pending Petition for Certiorari.*

* * *

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

The Supreme Court twice has reserved judgment on whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the Supreme Court files an order denying a petition for certiorari, or whether Rule 41(b) allows a court of appeals to "extend the time" for

issuing a mandate even after certiorari is denied. The Court also has noted an open question whether Rule 41(b) allows a court of appeals to “extend the time” for issuing its mandate by mere inaction, or whether an order is required.

A number of Committee members have expressed support for adopting language that would require that stays be effected “by order.” As to the authority of the court of appeals to stay the mandate after denial of certiorari, the Supreme Court, in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), held that if such authority exists it can be exercised only in extraordinary circumstances. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court opined that the courts of appeals are recognized to have an inherent power to recall their mandates, in extraordinary circumstances, subject to review for an abuse of discretion.

The Committee is considering whether to propose incorporating the extraordinary-circumstances requirement into Rule 41; whether to propose instead amending Rule 41 to ban stays of the mandate after the denial of certiorari; or whether to propose no amendment addressing the court’s authority to stay the mandate after the denial of certiorari. The opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), illustrate the continuing salience of these issues.

The Committee, like the other advisory committees, has been considering the possibility of amendments that would take account of the shift to electronic filing and service. Committee members have expressed interest in adopting the first part of the template rule prepared by the Case Management / Electronic Case Filing (“CM/ECF”) Subcommittee; such a rule would define “information in written form” to include electronic materials. Committee members have also expressed interest in considering the possibility of amending the Appellate Rules to mandate electronic filing and authorize electronic service, subject to an exception based on good cause and an additional exception based on local rules that permit or require paper filing or service. The Committee will also consider whether to amend Appellate Rule 25(d) so that it would no longer require a proof of service in instances when service was effected by means of the notice of docket activity generated by CM/ECF.

The Committee looks forward to working with the Civil Rules Committee on matters of mutual interest. The Civil / Appellate Subcommittee has been reconstituted and will consider two projects in the near future. One of those projects concerns the doctrine of “manufactured finality” – i.e., the doctrine that addresses instances when a would-be appellant seeks to manufacture appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Subcommittee will also consider possible amendments to Civil Rule 62’s treatment of supersedeas bonds. Meanwhile, the Committee anticipates that the mini-conferences currently being planned by the Civil Rules Committee’s Rule 23 Subcommittee will provide an opportunity to gather further information concerning appeals by class action objectors.

The Committee removed from its agenda an item relating to appeals from orders concerning attorney-client privilege. In the wake of the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), the Committee received a suggestion that it draft a rule that would authorize permissive interlocutory appeals from attorney-client privilege rulings. The Committee gave this proposal serious consideration and noted the difficulty that a litigant can face in seeking immediate appellate review of such rulings. However, members foresaw challenges in drafting appropriately tailored language. And some members questioned the need for rulemaking on this topic, particularly in light of the possibility of mandamus review.

The Committee discussed, but decided not to add to its agenda, a suggestion that the Appellate Rules be amended to state that Appellate Rule 29 furnishes the sole means by which a non-litigant may communicate with the court about a pending case. The suggestion arose after an incident in which such communications had been made directly to judges of a court of appeals. Participants in the Committee's discussion felt that there exist other, less formal means for channeling such communications to the clerk's office, and participants also questioned whether the conduct of non-party non-lawyers is an appropriate topic for treatment in the Appellate Rules.

TAB 2B

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Advisory Committee on Appellate Rules Table of Agenda Items — December 2014

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
08-AP-H	Consider issues of “manufactured finality” and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of “state”	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14
14-AP-C	Address issues of appellate procedure identified in the certiorari petition in Morris v. Atchity (No. 13-1266)	Margaret Morris	Awaiting initial discussion
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion

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TAB 2C

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Minutes of Fall 2014 Meeting of Advisory Committee on Appellate Rules October 20, 2014 Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, October 20, 2014, at 9:00 a.m. at the Mechem Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice (“DOJ”), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee’s Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office (“AO”); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center (“FJC”) were also present. Mr. Robert Deyling, Counsel to the Committee on Codes of Conduct and Assistant General Counsel at the AO, attended part of the meeting, as did Mr. Joe S. Cecil and Ms. Catherine R. Borden of the FJC.

II. Approval of Minutes of April 2014 Meeting

A motion was made and seconded to approve the minutes of the Committee’s April 2014 meeting. The motion passed by voice vote without dissent.

III. Report on June 2014 Meeting of Standing Committee

Judge Colloton noted that the Standing Committee had approved for publication the Advisory Committee’s proposals concerning inmate-filing provisions, length limits, and amicus filings in connection with rehearing. The Standing Committee, he observed, had made a few changes to the proposals prior to publication, and the Appellate Rules Committee had ratified those changes by email after the meeting.

The Reporter noted that Standing Committee members had provided additional guidance on aspects of the proposals. Two of those suggestions concern the inmate-filing provisions. The

published proposal would amend Rules 4(c)(1) and 25(a)(2)(C) to make clear that a document filed by an inmate is timely if it is accompanied by evidence showing that the document was deposited in the institution's internal mail system on or before the due date and that postage was prepaid. If such evidence does not accompany the filing, proposed Rules 4(c)(1)(B) and 25(a)(2)(C)(ii) provide that the filing is nonetheless timely if the court of appeals "exercises its discretion to permit" the later filing of an appropriate declaration or notarized statement establishing timely deposit and prepayment of postage. A member suggested that "exercises its discretion to permit" be shortened to "permits"; one question for the Committee will be whether the longer phrase is worth retaining in order to emphasize the court of appeals' discretion whether to permit the later filing of the declaration or statement. A member also suggested that the rules be revised to omit any reference to notarized statements; the question here is whether there is any reason to include notarized statements as an alternative, given that executing a declaration in compliance with 28 U.S.C. § 1746 presumably is easier for inmates than finding a notary.

Other suggestions concerned the proposed revisions to Rule 29. Proposed Rule 29(b) addresses amicus filings in connection with rehearing. Proposed Rule 29(b)(2) provides that non-governmental amici must obtain court leave to make such amicus filings; the prior draft's provision permitting non-governmental amicus filings based on party consent was deleted during the Standing Committee meeting in response to members' concerns about the possibility of strategic use of amicus filings to prompt recusal of particular judges. The discussion of such efforts to cause recusals through amicus filings also prompted a suggestion that the Committee consider whether the current Rule 29 – which authorizes amicus filings at the merits stage based on party consent – should be revised.

Another suggestion concerned the proposal to amend the length limits in the Appellate Rules. The proposal would set type-volume limits for filings prepared using a computer; as with Rule 32's current type-volume limits, the new type-volume limits would state alternatives in terms of line limits and word limits. A Standing Committee member asked whether it is necessary to retain line limits in addition to word limits. Mr. Gans noted that line limits would make type-volume limits a viable alternative for those who prepare their briefs using a typewriter.

Judge Colloton observed that, with respect to length limits, one important question is whether the proposals would permit a circuit to enlarge the length limits for briefs. The Reporter responded that Rule 32(e) explicitly permits the adoption of local rules that enlarge the length limits for briefs. However, Rule 28.1 – which applies to cross-appeals – does not include a provision similar to Rule 32(e); it might be worthwhile, the Reporter suggested, for the Committee to consider adding such a provision to Rule 28.1. The Reporter surmised that such an addition would not require re-publication of the proposals. A judge member of the Appellate Rules Committee observed that, in voting on the proposal at the Committee's spring 2014 meeting, he had relied on the idea that circuits could choose to authorize longer length limits for briefs.

Judge Colloton pointed out that the fall 2014 agenda materials included a memo describing the deliberations that led to the adoption of the 1998 amendments to Rule 32. The Committee's records, the Reporter observed, indicated that the 1998 amendments were supported repeatedly by the assertion that, for briefs prepared on a computer, 50 pages was roughly equivalent to 14,000 words.

IV. Discussion Items

A. Item No. 08-AP-R (disclosure requirements)

Judge Colloton introduced this item, which concerns local circuit provisions that impose disclosure requirements beyond those set by the Appellate Rules. Judge Colloton noted that Judge Chagares, Professor Katyal, and Mr. Newsom had agreed to form a subcommittee on this topic, and he thanked them for their research. He thanked Mr. Deyling for attending the meeting in order to share the perspective of the Committee on Codes of Conduct. A central question, Judge Colloton noted, is whether there is information currently elicited by local circuit provisions but not required by the Appellate Rules that would be relevant to a judge's determination whether to recuse from a matter. A related question is whether, as to some types of information, the Appellate Rules Committee needs further guidance in order to assess the implications of such information for recusal determinations. Judge Colloton reported that the Chair of the Committee on Codes of Conduct had designated Judge Paul Kelly of the Tenth Circuit, a member of the Codes of Conduct Committee, to serve as a liaison to the Appellate Rules Committee in connection with this project.

Judge Colloton invited Judge Chagares, Professor Katyal, and Mr. Newsom to summarize the results of their research. Judge Chagares observed that recusal issues present a minefield for judges; despite judges' best efforts, it is possible that something relevant to recusal might be overlooked. He stated that, of the topics on which he had focused, the two key sets of issues concerned criminal appeals and bankruptcy appeals. Appellate Rule 26.1, Judge Chagares noted, applies to all types of appeals. However, some attorneys assert that Rule 26.1 does not apply to criminal appeals. The Third Circuit Clerk, at Judge Chagares's request, surveyed the other Circuit Clerks concerning corporate disclosures in criminal cases. The responses reported some resistance by attorneys to the application of Rule 26.1 in criminal cases, as well as a few instances in which a circuit had not been enforcing the rule in criminal cases. A benefit of the survey, Judge Chagares noted, was that it had sensitized the Circuit Clerks to the issue, which should improve enforcement of the Rule. Because appeals involving corporate criminal defendants are very rare, Judge Chagares suggested, it should not be necessary to consider amending Rule 26.1 to address this issue. Judge Chagares pointed out that, unlike Criminal Rule 12.4, Appellate Rule 26.1 does not require disclosures concerning crime victims. As to local provisions on this topic, the Third Circuit requires disclosures concerning organizational victims, while the Eleventh Circuit requires disclosures concerning all victims.

Judge Chagares noted the distinct challenges posed by bankruptcy appeals. Not everyone

involved in the bankruptcy proceeding below is a party for purposes of analyzing recusal issues. An Advisory Opinion on this topic (Advisory Opinion No. 100), Judge Chagares observed, provided helpful guidance. The opinion states that parties, for this purpose, include the debtor, members of the creditors' committee, the trustee, parties to an adversary proceeding, and participants in a contested matter. The Third Circuit's local provision on point roughly tracks this guidance; so does the Eleventh Circuit's provision, but that provision also requires disclosure of entities whose value may be substantially affected by the outcome.

Judge Colloton invited Judge Chagares to summarize his findings on the third topic that he had investigated – namely, a judge's connection with participants in the litigation. Judge Chagares noted that instances may arise when a judge on an appellate panel previously participated in the litigation. For example, Judge Chagares recalled an instance when a then-recently-elevated appellate judge discovered that an appeal involved a defendant whom he had arraigned while serving as a trial judge.

The Reporter noted that Criminal Rule 12.4 requires the government to make disclosures concerning organizational victims. In 2009, the Criminal Rules Committee – at the suggestion of the Codes of Conduct Committee – considered whether to expand Rule 12.4 to require disclosures concerning individual victims and to require disclosures by the organizational victims themselves. The Committee ultimately decided not to propose amendments making such changes; participants in the Committee discussions noted that requiring disclosures concerning individual victims would raise privacy concerns.

Professor Coquillette reminded the Committee that, under Appellate Rule 47, local circuit rules must be consistent with federal statutes and with the Appellate Rules. He observed that the requirement of "consistency" raises interesting questions: For instance, if the Appellate Rules impose a limited set of requirements concerning a given topic, can circuits impose additional local requirements concerning that same topic? The Reporter observed that, when Rule 26.1 was initially adopted, the drafters saw the Rule as setting minimum requirements to which a particular circuit was free to add.

An appellate judge member asked what disclosure requirements apply in proceedings under 28 U.S.C. §§ 2254 and 2255. The Reporter undertook to research this question. The member also asked whether Criminal Rule 12.4 defines the term "victim." The Reporter responded that Criminal Rule 1(b)(12) defines "victim" to mean a "crime victim" as defined in the Crime Victims' Rights Act.

Mr. Deyling stated that the topics discussed thus far seemed to him like topics worth exploring. He explained that the Codes of Conduct Committee's 2009 suggestion concerning crime victims arose from the Committee's desire to ensure that the courts' electronic conflicts screening program was picking up all the relevant conflicts. The Codes of Conduct Committee has altered its view, over time, concerning the significance of a judge's interest in a crime victim. The Committee's current view – which accords with the view found in relevant caselaw – is that

recusal is necessary only if a judge has a substantial interest in a victim.

Judge Colloton, summarizing the Committee's discussion up to this point, suggested that the Appellate Rules Committee might consider whether to adopt a provision reflecting Advisory Opinion No. 100's guidance concerning bankruptcy matters. The Committee could also consider adopting a provision requiring some disclosures concerning victims. On the other hand, he suggested, perhaps some caution is warranted because a provision requiring broad disclosure might suggest that certain interests require recusal when in fact they do not. It was noted that, in some instances, the recusal standard presents a judgment call that the judge must make based upon adequate information.

Judge Colloton invited Mr. Newsom to present his findings concerning the topics that he researched. Mr. Newsom turned first to disclosures by intervenors. It is rare, he observed, for intervention to occur in the first instance on appeal. But when such intervention does occur, the intervenor should be required to make the same disclosures as any party. Indeed, Mr. Newsom noted, some circuits have local provisions requiring intervenors to make the same types of disclosures as named parties.

Mr. Newsom next discussed local provisions requiring disclosures by amici. Local provisions take varying approaches concerning which amici must make disclosures and what those amici must disclose. As to the nature of the disclosure, a few circuits require amici to identify parent corporations (or, in one rule, parent companies); some other circuits require disclosure of any entities with a financial interest in the amicus brief. The subcommittee did not feel that it would be necessary for a national rule to require the latter sort of disclosure.

Mr. Newsom also noted local provisions that require disclosure of the identity and nature of parties to the litigation – such as the identity of pseudonymous parties, or the members of a trade association. The idea behind such provisions, he observed, is to require disclosure concerning interested persons whose identity is not otherwise ascertainable from the filings on appeal.

Judge Colloton invited Mr. Deyling to comment on recusal issues that might be raised by amicus participation. Mr. Deyling conceded that the Codes of Conduct Committee had not provided comprehensive guidance on that topic, even in the Committee's unpublished compendium of summaries of its unpublished opinions. (That compendium, he explained, contains responses to specific requests for advice.) For the most part, Mr. Deyling noted, the Committee had not required recusal because of the participation of an organizational amicus, except in rare situations – for example, where a judge's spouse was involved in the affairs of an amicus. Advisory Opinion No. 63 states that the participation of an amicus that is a corporation does not require recusal if the judge's interest in the amicus would not be substantially affected by the outcome of the litigation and if the judge's impartiality could not reasonably be questioned. Judge Colloton noted that the Appellate Rules Committee might seek further guidance from the Codes of Conduct Committee concerning recusal issues raised by amicus

filings.

A member asked whether there might be a concern that parties might engineer the participation of a particular amicus in an effort to generate a recusal. Another member agreed that this could be a concern; he noted that when he is considering whether to file an amicus brief, he tries to avoid doing so in situations where the filing might trigger a recusal.

Mr. Deyling expressed agreement with Mr. Newsom's suggestion that an intervenor should be treated like any other party for purposes of disclosures. He noted as well that if an intervenor's participation raises a recusal issue, that issue will arise – even before intervention is granted – in connection with the *request* to intervene.

Judge Colloton observed that, when a judge owns shares in a member of a trade association and the trade association is a party to a lawsuit, the recusal issue will focus on whether the judge's interest in the member would be substantially affected by the outcome of the proceeding. Disclosure of the trade association's members would permit the judge to assess this question. Mr. Deyling noted that the question is who has the burden of discerning and disclosing such information.

Mr. Newsom pointed out that questions concerning real parties in interest can arise in a variety of situations. Mr. Byron noted that the Appellate Rules do not define who is a "party" or who counts as an "appellee"; what about those who do not actually participate in the litigation but who may benefit from it? Mr. Letter recalled that the Committee had previously considered defining "appellee" in the Appellate Rules, but the Committee had decided not to do so.

Summarizing this portion of the discussion, Judge Colloton noted that the Committee would further investigate questions relating to intervenors and amici, and that the Committee might seek further guidance concerning recusal obligations triggered by an amicus's participation.

Judge Colloton invited Professor Katyal to report on the results of his research. Professor Katyal noted that he had focused on disclosures concerning corporate relationships. The bottom line, he suggested, is that there is no need to change the disclosure requirements to address these topics. However, if the Committee is considering other possible amendments concerning disclosure requirements, then it might consider what parties other than corporations should be required to make disclosures under Rule 26.1. The D.C. Circuit's local provision, he observed, requires all nongovernmental, non-individual entities to make disclosures under Rule 26.1; this requirement encompasses, for example, joint ventures and partnerships. A prudent attorney representing such an entity would likely comply with existing Rule 26.1, but the Rule could be amended to cover such entities explicitly. The Reporter noted that Judge Easterbrook's comment – which initially provided one of the sources for this agenda item – had pointed out that Rule 26.1 is underinclusive because it covers only corporations and not other types of business entities.

The Committee might also consider what types of ownership interests might be encompassed within an amended disclosure rule. The D.C. Circuit's local provision requires disclosure of any ownership interest – not merely stock ownership – that is greater than 10 percent. Professor Katyal noted that if the Committee were inclined to expand Rule 26.1 in this respect, it could propose amending the Rule to refer to “any publicly held entity that owns 10 percent or more of an ownership interest in the party.” Such an amendment, he suggested, could be modestly helpful.

By contrast, Professor Katyal said, some other local requirements – such as the Eleventh Circuit's requirement that corporate parties disclose their full corporate title and stock ticker symbol – do not seem worthwhile candidates for inclusion in the national Rule. An appellate judge noted that the Eleventh Circuit had adopted its local disclosure requirements in an effort to avoid recusal problems. Mr. Gans reported that the Circuit Clerks face a complex task when assessing corporate disclosures; sometimes he finds that it is necessary to call counsel to obtain further information (including both some information currently required by Rule 26.1 and some additional information). Mr. Deyling noted that a judge's interest in a party's *subsidiary* would not trigger a recusal obligation.

By consensus, the Committee retained this item on its agenda. Judge Colloton noted that the Committee might seek further guidance from the Codes of Conduct Committee on particular issues.

B. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)

Judge Colloton noted that, over the summer, he and the Reporter had worked with Judge Fay, Mr. Katsas, and Mr. Letter to consider whether it would be advisable to pursue an amendment that would address the appealability of orders concerning attorney-client privilege. He invited the Reporter to introduce the topic. The Reporter noted that it is difficult for a party aggrieved by a trial court's denial of a claim of attorney-client privilege to obtain review of that ruling. Mandamus review is relatively narrow. Disobeying a disclosure order in the hopes of generating a criminal contempt sanction is a problematic strategy, both because it requires a party to violate a court order and because there is no guarantee that the resulting sanction would fit within the category of *criminal* contempt sanctions (which are immediately appealable) rather than *civil* contempt sanctions (which typically are not). To obtain review under 28 U.S.C. § 1292(b), the would-be appellant not only must meet the criteria stated in that statute but also must obtain permission from both the district court and the court of appeals.

These difficulties, the Reporter noted, have generated proposals – such as that by Ms. Amy Smith – to grant the court of appeals discretion to hear interlocutory appeals from attorney-client privilege rulings. The subcommittee had taken seriously the possibility of creating such an avenue. But such a project would present drafting challenges. Which sorts of attorney-client privilege rulings should be encompassed within the provision? Should the provision also encompass work-product-protection rulings? Rulings concerning other types of privilege?

The Reporter noted that one relevant consideration is the degree to which such a new provision would burden the courts of appeals. This question had been the subject of some debate in the *Mohawk Industries* case itself. The petitioner in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and the Chamber of Commerce of the United States of America as an amicus in that case, had attempted to assess the experience of the Third, Ninth, and D.C. Circuits – each of which permitted collateral-order appeals from privilege rulings at the time that the Court decided *Mohawk Industries*. They found that on average only one such appeal per year had occurred in the three circuits combined. This finding accorded with Justice Alito’s observation, during oral argument in *Mohawk Industries*, that he did not recall such appeals presenting problems in the Third Circuit while he was serving as a judge of that court. On the other hand, the Reporter pointed out, the one-appeal-per-year figure might be unduly low, because during the early part of the twelve-year period that was studied the availability of collateral-order review for privilege orders may not have been clear in all three circuits. And most of the appeals that occurred were taken by sophisticated litigators; if a Rule were adopted to create an avenue for interlocutory appeal, the greater visibility of such a provision might raise awareness and, thus, increase the number of attempted appeals. The Reporter pointed out that the pool of attorney-client privilege rulings is a large one. A search on WestlawNext for one year’s worth of district-court opinions that used the term “attorney client privilege” pulled up over 1,000 decisions (mostly unreported).

During discussions held in summer 2014, members of the subcommittee had expressed interest in knowing the extent to which parties, post-*Mohawk Industries*, were able to obtain mandamus review of attorney-client privilege rulings. The Reporter had performed a non-exhaustive search for cases on point. She noted that, in order to obtain a writ of mandamus, the applicant must show that there is no other adequate means of relief, that the applicant has a clear and indisputable right to the writ, and that issuance of the writ is appropriate under the circumstances. The courts of appeals have considerable flexibility in deciding whether to employ mandamus review. While circuits vary in their willingness to employ mandamus review of privilege rulings, it seems plain that mandamus provides a tool with which a court of appeals, if it chooses, can address lower-court confusion or remedy severe adverse effects that would otherwise result from a disclosure order. Sometimes a court of appeals will deny redress on the ground that relief will later be available on review of the final judgment. But a strong showing of harm increases the chances of mandamus review, especially if an amicus filing or other information indicates that the ruling is also adversely affecting third parties. Novel and important questions are more likely to trigger mandamus review, but review can also occur where the lower court badly misapplied established law, where the ruling is especially harmful, or where federalism or separation-of-powers concerns are present.

Because issuance of the writ requires an elevated showing of error on the lower court’s part, some have noted that there is a stigma attached to having entered an order that triggers issuance of the writ. But, the Reporter noted, it is possible that a petitioner might achieve its goal even if the court of appeals decides not to issue the writ. The order of decision sketched by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (“*KBR*”), is

interesting in this regard. In *KBR*, the court of appeals granted a writ of mandamus and vacated a district court order that, the court found, had created a lot of uncertainty about the scope of the attorney-client privilege in business settings. The *KBR* court stated that the first question, in reviewing a request for such a writ, is whether the district court's privilege ruling was erroneous; if the ruling was erroneous, then the remaining question is whether the error is of a kind that would warrant issuance of the writ. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), also illustrates the potential for a party to secure a desired ruling even if it does not actually secure issuance of the writ. The Federal Circuit had found no error and denied a writ of mandamus; the Supreme Court reversed. The Court left it for the Federal Circuit to determine on remand whether to issue the writ in the light of the Court's opinion – but the Court also stated its assumption that, even if the writ did not issue, the Court of Federal Claims would follow the Court's holding on the relevant attorney-client privilege question.

Judge Colloton invited members of the subcommittee to share their thoughts on the matter. An attorney member stated that, with reluctance, he had concluded that it would not make sense to proceed with an amendment on this topic. The difficulty of obtaining interlocutory review is troubling, he noted, because while review of a final judgment can redress the erroneous *use* in a lawsuit of privileged information, such review cannot remedy the actual *disclosure* of that information. If mandamus review were unavailable for privilege rulings, he would be concerned; and even though such review does appear to be available, he is concerned that courts will not employ mandamus where the challenged ruling presents a close question. However, it would be an ambitious undertaking to draft a rule similar to Civil Rule 23(f) (which authorizes the courts of appeals to permit appeals from class certification orders). And, at present, there is not a great deal of evidence that key rulings are slipping through the cracks.

Mr. Letter expressed agreement with this analysis. An appellate judge member stated that it would be undesirable to create an avenue for permissive appeals from privilege rulings, because there would be a large number of requests for permission to take such appeals.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without opposition.

C. Item No. 13-AP-H (Ryan v. Schad and Bell v. Thompson / FRAP 41)

Judge Colloton introduced this item, which encompasses two principal questions: whether a court of appeals has discretion to stay its mandate following a denial of certiorari, and whether such a stay can result from mere inaction (i.e., from the court's failure to issue the mandate). Judge Colloton noted that a group composed of Justice Eid, Judge Taranto, and Professor Barrett had worked over the summer to consider possible amendments addressing these questions. Judge Colloton invited the Reporter to provide an overview of those discussions.

The Reporter first discussed the proposal to amend Rule 41(b) to require that stays of the mandate be effected by order rather than by inaction. Original Rule 41(b) had referred to the

court's ability to enlarge "by order" the time before the mandate would issue. The words "by order" were deleted during the 1998 restyling of the Appellate Rules. The Eleventh Circuit has adopted a local rule that helps to address the problem of stays through inaction, but most circuits do not have local provisions addressing this issue. And the opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), illustrate that this issue will continue to arise periodically.

On the question of the court of appeals' authority (if any) to stay the mandate after the denial of certiorari, the Reporter observed that the subcommittee had considered three options: Rule 41 could be amended to state explicitly that there is no such authority; or the Rule could be amended to provide for such stays in extraordinary circumstances; or the Committee could decide not to amend the Rule. Existing caselaw suggests that the authority to stay the mandate may arise not only from Rule 41 but also partly from the courts' inherent authority and partly from statutory authority. Caselaw suggests, for instance, that courts have inherent authority to stay the mandate in order to investigate whether a party committed a fraud on the court of appeals (caselaw recognizes power to recall the mandate in such circumstances, and logically, that caselaw should also support the authority to stay the mandate before it issues). 28 U.S.C. § 2106, which authorizes an appellate court to "require such further proceedings to be had as may be just under the circumstances," may also authorize stays of the mandate. The Reporter suggested that a Rule amendment could validly channel the courts' inherent authority in this area – for example, by banning stays of the mandate after denial of certiorari but leaving in place the courts of appeals' authority to *recall* the mandate in extraordinary circumstances.

An appellate judge member of the subcommittee stated that he was on the fence about the choices to be made here. He wondered whether the Rule could be amended to refer to the Supreme Court's discussion of the power to recall the mandate in "grave, unforeseen contingencies." This member expressed concern about the idea of amending the Rule in a way that relies (as a safety valve) on a power (to recall the mandate) that the Rules do not mention. If the Committee simply left the Rule untouched, this member said, he would worry less about the possibility that a court would conclude that the Rule displaces the inherent power to recall the mandate.

Another appellate judge member of the subcommittee stated that she favored the option (shown on pages 204-05 of the agenda materials) that would amend Rule 41(d)(2)(D) to state that "[u]nless it finds that extraordinary circumstances justify it in ordering a further stay, the court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." The third member of the subcommittee stated that she did not think the amendments that were under consideration would transgress the limits set by the Rules Enabling Act. This member expressed support for amending Rule 41 to require that any stays be accomplished "by order." She was torn about whether to amend the Rule to address the question of the court's power to stay the mandate; if such an amendment were to be pursued, she too would favor the option shown on pages 204-05 of the agenda materials.

Judge Colloton observed that Judge Fletcher, concurring in the grant of rehearing en banc in *Henry v. Ryan*, argued that the “extraordinary circumstances” test discussed in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari – not when there were other reasons for the stay.

An appellate judge member stated that he did not like the way that the current Rule is written. He suggested that the Rule should permit the court of appeals to issue a further stay “if it finds that extraordinary circumstances exist,” and he stated that the Rule should require that the court explain those findings in the order. Another appellate judge suggested that the Committee consider whether there is a phrase, other than “extraordinary circumstances,” that better captures the very narrow set of circumstances that the *Schad* and *Bell* Courts envisioned as potential bases for a further stay of the mandate.

The Reporter asked whether an amendment inserting the extraordinary-circumstances test into Rule 41(d)(2)(D) should be accompanied by an amendment to Appellate Rule 2. Rule 2 states that “a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).” Would the availability of authority to suspend the rules under Rule 2 frustrate the purpose of amending Rule 41? The Reporter suggested that it would not be necessary to amend Rule 2; it seems unlikely that a court would, in a given case, find that no extraordinary circumstances warranted a stay under Rule 41, but that there was good cause under Rule 2 to suspend the requirements of Rule 41. Committee members indicated agreement with the view that no amendment to Rule 2 was needed.

A member asked whether it would be worthwhile to hold off on any amendment to Rule 41 in order to see whether the Supreme Court grants review on the question of the stay of the mandate in *Henry v. Ryan*. An appellate judge asked, though, whether there would be any harm in proceeding with a proposed amendment in the meantime. The member responded that it might be better to hold off on the amendment if the Committee believes that the circumstance addressed by the amendment occur only rarely. And, this member suggested, there is always some risk of unintended consequences any time that a rule is amended.

An attorney member asked whether the Committee could publish for comment the proposal to amend Rule 41 to require that stays be effected “by order,” and simultaneously solicit comment on whether the Rule should be amended to address the question of the court of appeals’ authority to stay the mandate after denial of certiorari. Professor Coquillette responded that the typical way to solicit such comment would be to publish a proposed amendment addressing the authority question and also to highlight the issue in the memo that accompanies the published proposals. The attorney member observed that, if the Committee were to commence the process for adopting an amendment addressing the authority question, the Committee could withdraw the proposal if subsequent developments rendered it moot. Mr. Letter expressed agreement with this point. An appellate judge member noted that the Ninth Circuit’s en banc decision in *Henry v.*

Ryan would be informative.

Turning back to the language of the option favored by some Committee members – which would amend Rule 41(d)(2)(D) to forbid a court of appeals to order a further stay “[u]nless it finds that extraordinary circumstances justify” such a stay – an appellate judge member asked whether it is necessary to include the reference to a finding, or whether instead “it finds that” could be deleted. Another appellate judge member noted that if the propriety of such a stay is challenged in the Supreme Court, the party defending the stay will articulate the basis for the stay. Mr. Letter suggested, though, that including the requirement of a finding might help to ensure that the court of appeals carefully considers the basis for the stay before entering the stay order.

By consensus, the Committee retained this item on the agenda, with the expectation of discussing it further at the Committee’s spring 2015 meeting.

D. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (changes to FRAP in light of CM/ECF)

Judge Colloton invited the Reporter to introduce these items, which concern matters relating to the shift to electronic filing and service. The Standing Committee's Case Management / Electronic Case Filing (“CM/ECF”) Subcommittee, with Judge Chagares as its Chair and Professor Capra as its Reporter, has been leading a discussion among the advisory committees concerning possible amendments that would take account of the shift to electronic transmission and storage of documents and information. The Appellate Rules Committee has published for comment an amendment to Appellate Rule 26 that would abrogate the “three-day rule” as it applies to electronic service; similar proposals concerning the relevant Civil, Criminal, and Bankruptcy Rules have also been published for comment.

The Subcommittee has also discussed the possibility of drafting amendments that would adopt global definitions to adjust the Rules to the world of electronic filing and case management. The first portion of the Subcommittee’s proposed template rule on this subject (set out at page 226 of the agenda book) would define “information in written form” to include electronic materials. This provision, the Reporter noted, seems both unproblematic and useful. The second portion of the template would define various actions that can be done with paper documents to include the analogous action performed electronically.

Adopting that second part of the template in the Appellate Rules would, the Reporter suggested, be more complicated. Such a rule should not pose problems for the operation of the starting points and end points of time periods under the Appellate Rules. The proposed template rule allows action to be taken electronically but does not address the ancillary effects of an actor’s choice of electronic or other means of taking the action; thus, provisions addressing whether a filing is timely by reference to the filing method should be unaffected by the adoption of the template. It is more important, the Reporter argued, to focus on rules that discuss actions

that might be taken electronically, rather than on Rules that address the ancillary timing effects of choices among different methods of filing or service.

One key topic concerns the filing of a notice of appeal as of right from a judgment of a district court, a bankruptcy appellate panel (“BAP”), or the United States Tax Court. The Appellate Rules set the time period for filing the notice of appeal, and they specify that the notice must be filed in the relevant lower court. As to notices of appeal filed in the Tax Court, the Appellate Rules specify the manner of filing the notice and they also specify how to determine the timeliness of the notice. The Appellate Rules also set special timeliness rules that can be employed by an inmate who files a notice of appeal. And the Appellate Rules (like the other sets of national Rules) include a time-computation provision that says how to determine when the “last day” of a period ends. But the Appellate Rules do not specify how to file a notice of appeal in a district court or with a BAP. Rather, Appellate Rule 1(a)(2) directs litigants who file a document in a district court to comply with the district court’s practices. The template rule says that it governs actions discussed “[i]n these rules,” so adopting that template as part of the Appellate Rules would not affect the manner of filing a notice of appeal in a district court or with a BAP. However, the template would affect the operation of Appellate Rule 13(a)(2), which specifies how to file the notice of appeal in the Tax Court; when read together with Rule 13(a)(2), the template would authorize electronic filing in the Tax Court. That would countermand the current practice of the Tax Court, which does not permit notices of appeal to be filed electronically (though it does have an electronic filing system for other types of filings). If the Appellate Rules Committee were to propose adopting the second part of the template, it would seem advisable to make an exception for notices of appeal from the Tax Court.

To get a sense of other types of actions on which the Committee might wish to focus when considering the operation of the second part of the template rule, the Reporter reviewed local circuit provisions relating to electronic filing and service. Some local circuit provisions state that certain actions may be taken electronically; other such provisions state that certain actions may *not* be taken electronically. Using those sets of provisions as a starting point, it is possible to see that there are some types of actions for which the application of the template rule would be harmless and even beneficial. Thus, for example, it may be useful to provide that actions such as the entry of judgments, or service by the clerk on a CM/ECF user, or non-case-initiating filings by a CM/ECF user, or service between parties who are CM/ECF users, can be done electronically. But there might be problems with a national rule that permits electronic completion of some other types of actions – such as filing case-initiating documents, or filing documents prior to a matter’s docketing in the court of appeals, or filings under seal. It might not be easy, the Reporter suggested, to draft exemptions that would cover all of these areas.

Instead, the Reporter proposed that the Committee consider the possibility of adopting provisions that would mandate electronic filing and authorize electronic service, subject to certain exceptions. Currently, Appellate Rule 25(a)(2)(D) authorizes local rules to mandate electronic filing (subject to reasonable exceptions). The Appellate Rules do not currently authorize local rules to require electronic service; rather, the Appellate Rules allow electronic

service only with the litigant's written consent. However, all of the circuits have local provisions specifying that registration to use CM/ECF constitutes consent to electronic service (which typically would mean service by means of the notice of docket activity generated by CM/ECF). The circuits all presumptively require attorneys to file electronically, though they permit exemptions on a showing of sufficient cause. The circuits vary in whether and when they permit pro se litigants to file electronically.

The Reporter noted that the Civil Rules Committee, at its fall meeting, would be considering a proposal for a national rule that would make electronic filing mandatory (subject to exceptions based on good cause or on local rules). The proposal would also authorize electronic service (other than for initial process) irrespective of party consent (also subject to the good-cause and local-rule exceptions). The Reporter suggested that the Appellate Rules Committee might wish to consider amending the Appellate Rules to require CM/ECF filing (unless good cause is shown for, or a local rule permits or requires, paper or another non-CM/ECF mode of filing) and authorize service by means of the CM/ECF system's notice of docket activity (unless good cause is shown for exempting, or a local rule exempts, the person to be served from using CM/ECF). Judge Colloton noted that the Reporter's suggested language would authorize local rules to "permit or require" paper filings, whereas the language to be considered by the Civil Rules Committee referred only to local rules that "allow" paper filings. The Reporter argued that it would be desirable to authorize local rules to require paper filings, given the range of circumstances in which local circuit provisions currently evince a preference for paper filings.

Professor Coquillette noted that the importance of paper filings for certain purposes had also been a topic of discussion in the Bankruptcy Rules Committee. In particular, he observed, the Bankruptcy Rules Committee had discussed in some detail the topic of "wet" versus electronic signatures. Mr. Letter noted that the question of signatures has not seemed to present problems outside of the bankruptcy context. Professor Coquillette asked whether the e-filing and e-service provisions would be affected by the adoption of the next generation (NextGen) version of CM/ECF. Mr. Gans noted that the NextGen system is already being tested in the Second Circuit. One relevant change, he reported, would concern payment for filing case-initiating documents. Currently, the need to pay the filing fee presents a barrier to electronic filing of some case-initiating documents. The NextGen system will enable filers to make such payments via pay.gov.

Judge Colloton, summarizing the discussion thus far, noted that the Reporter was proposing that the Committee consider adopting part (a) of the Subcommittee's template rule (the portion stating that "[i]n these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information") and that the Committee consider adopting national rules presumptively requiring electronic filing and presumptively authorizing electronic service (subject to the noted exceptions). He suggested that the Reporter convey to the Civil Rules Committee's Reporter the Appellate Rules Committee's discussion about the desirability of authorizing local rules to require, as well as to allow, paper filings. The Reporter

undertook to draft proposed amendments to Appellate Rule 25 (concerning electronic filing and service) for consideration at the Committee's spring meeting.

The Reporter turned next to the proposal to amend Appellate Rule 25(d) so that it no longer requires a proof of service in instances when service is accomplished by means of the notice of docket activity generated by CM/ECF. Because twelve of the thirteen circuits have local provisions that make clear that the notice of docket activity does not replace the certificate of service, the Chair and Reporter had asked Mr. Gans to survey his colleagues to ascertain their views on this topic.

Mr. Gans reported that the local circuit provisions likely reflected the view that it would be improper to dispense with the certificate of service so long as Rule 25(d) seemed to require one. A majority of the Circuit Clerks favor amending Rule 25(d) to remove the certificate-of-service requirement in cases where all the litigants participate in CM/ECF – though they think that Rule 25(d) should continue to require the certificate of service when any of the parties is served by a means other than CM/ECF. But a substantial minority of the Circuit Clerks favor retaining the certificate-of-service requirement across the board. Sometimes attorneys may err in thinking that a particular litigant can be served through CM/ECF when that is not in fact the case (for instance, when a party who was filing electronically in the district court has not yet registered to file electronically in the appellate court). And when the clerk's office is checking to ensure that proper service occurred, the certificate of service can provide a starting point. But, Mr. Gans noted, the existence of a certificate of service does not remove the need for the clerk's office to check each filing against the service list to make sure that proper service occurred. It is time, he suggested, to eliminate the certificate-of-service requirement for cases where all filers are CM/ECF participants.

Judge Colloton directed the Committee's attention to the sketch on pages 242-43 of the agenda materials, which illustrated a possible amendment to Rule 25(d). An appellate judge member questioned the sketch's reference to "a notice of docket activity generated by CM/ECF." The Rules, he noted, do not usually use acronyms such as "CM/ECF," and it would be better to refer instead to the "official electronic filing system." The Reporter promised to revise the wording of the sketch in preparation for the Committee's spring meeting.

V. New Business

Judge Colloton noted that a federal appellate judge had suggested that the Committee consider amending the Appellate Rules to state that Appellate Rule 29 establishes the exclusive means by which a non-litigant may communicate with the court about a pending case, and that non-litigants must not contact judges of the court directly. Judge Colloton invited the Reporter to discuss this suggestion.

The Reporter noted that, in certain rare emergencies, it may be necessary for a litigant's counsel to make direct contact with a judge of the court of appeals – for example, to make an

emergency request for a stay of execution. But it is difficult to imagine circumstances that would justify a non-litigant in making a direct contact with an appellate judge about a pending case. Indeed, if a judge received such a communication, Canon 3(A)(4) of the Code of Conduct for United States Judges would direct the judge to notify the parties about the communication and allow them an opportunity to respond. However, most circuits do not have local provisions specifying that such communications are inappropriate. The only pertinent provision (encompassing non-party communications) that the Reporter was able to find was Federal Circuit Rule 45(d), which provides that all correspondence and calls concerning cases “must be directed to the clerk.” Other circuits may use less formal means to make the same point; for example, the Seventh Circuit’s web page on “Contact Information” makes clear that all inquiries and contacts should be directed to the Clerk’s Office.

An initial question for the Committee, the Reporter suggested, is whether national rulemaking on this topic is warranted. Mr. Letter noted that care would be required in drafting rules concerning non-party communications to the court. In cases involving national security issues, the government – as a non-party – might engage in *ex parte*, in camera communications with a district judge. Thus, any rule limiting *ex parte* communications by non-parties might require a carve-out for situations implicating national security. An attorney member noted as well that if such a rule were adopted, it might be implicated by casual mentions of a case at a cocktail party.

An appellate judge member suggested that this issue is likely to arise only very rarely and that there is no need for a national rule on the subject. Two other appellate judge members expressed agreement with this suggestion. Judge Colloton asked Mr. Gans what would happen if the Judge received an unsolicited letter from a non-party and forwarded it to the Clerk’s Office. Mr. Gans stated that he would send the non-party a generic response; the Clerk’s Office, he noted, often receives communications forwarded to the Office by the Chief Judge. Mr. Gans expressed doubt about the need for rulemaking on this topic.

Judge Colloton wondered if the reason for the rulemaking suggestion is that a judge might wish to have a provision in the Rules that can be cited to a lay person. Professor Coquillette suggested, however, that if the goal is to educate non-lawyers, a statement on the court’s website is likely to be more effective than a provision in the Rules. Mr. Byron questioned whether it would be appropriate for the Appellate Rules to attempt to regulate the conduct of non-lawyers who are not parties to a proceeding in the court of appeals.

A motion was made that this item not be added to the Committee’s study agenda. The motion was seconded and passed by voice vote without opposition.

VI. Other information items

Judge Colloton noted that the Civil / Appellate Subcommittee has been re-convened. Judge Scott Matheson will chair the Subcommittee. Judge Fay, Mr. Newsom, and Mr. Letter

have agreed to serve as the Appellate Rules Committee’s representatives on the Subcommittee. The Subcommittee will focus its efforts on two items. One is the topic of “manufactured finality” – i.e., the doctrine that addresses efforts by a would-be appellant to “manufacture” appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The second item concerns the operation of Civil Rule 62, which addresses supersedeas bonds.

Judge Colloton reported that the Criminal Rules Committee had formed a subcommittee to consider a proposal by Judge Jon Newman that Criminal Rule 52(c) be amended to permit appellate review of unraised sentencing error that did not rise to the level of plain error so long as the error was prejudicial and redressing it would not require a new trial. The Appellate Rules Committee’s Reporter had participated in the Subcommittee’s conference calls on this topic. After speaking with Judge Newman by telephone to discuss his proposal, the Subcommittee members had decided not to recommend proceeding with the proposed amendment.

Judge Colloton observed that the Civil Rules Committee’s Rule 23 Subcommittee is planning to convene mini-conferences to obtain the views of knowledgeable participants concerning various aspects of class action practice. Judge Robert Dow, the Chair of the Subcommittee, has agreed that the topics of inquiry will include appeals by class action objectors. Mr. Rose noted that the Subcommittee might hold such an event in connection with the Civil Rules Committee’s April 2015 meeting in Washington, D.C.

VII. Date of spring 2015 meeting

Judge Colloton reminded the Committee members that the Committee’s spring meeting would be held on April 23 and 24, 2015.

VIII. Adjournment

The Committee adjourned at 1:45 p.m. on October 20, 2014.

Respectfully submitted,

Catherine T. Struve
Reporter

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TAB 3A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
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CHAIRS OF ADVISORY COMMITTEES

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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 11, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 29 and 30, 2014, in Charleston, South Carolina. The draft minutes of that meeting appear in Appendix B to this report.

At the meeting the Advisory Committee discussed a number of suggestions for rule and form amendments that were submitted by bankruptcy judges, members of the bar, and bankruptcy organizations. It also received and discussed updates on several ongoing projects.

The Advisory Committee is presenting one action item at this meeting—an amendment to Rule 1001 to bring it into conformity with Civil Rule 1. Part II of this report discusses that amendment. In addition, the report provides information about other rule and form amendments considered at the fall meeting. Part III provides an overview of the comments that have been received to date on the proposed official form for chapter 13 plans and implementing rule amendments, which were republished in August. Part IV reports on the status of the Forms Modernization Project and plans for its implementation. Finally, Part V discusses the

Committee’s consideration of several proposals referred by the Standing Committee’s Subcommittee on CM/ECF.

II. Action Item—Rule 1001 for Approval For Publication

Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 states, “These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding,” while Civil Rule 1 states, “[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

The pending amendment to Rule 1, which is expected to become effective on December 1, 2015, revises the current rule to state, “[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The Committee Note explains that “Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.”

The Advisory Committee concluded that for purposes of consistency, we should revise Rule 1001 to track the language of Rule 1. The amendment to Rule 1 was part of the Duke Rules Package, and the other rule amendments in that group—to Civil Rules 4(m), 16, 26, 30, 31, 33, 34, 36, and 37—will automatically become part of the Bankruptcy Rules because those rules are made applicable in adversary proceedings. Moreover, deviation from the civil rule’s language could give rise to a negative inference that the bankruptcy rule differs in the extent to which it encourages cooperation.

In considering whether to amend Rule 1001 to include the pending amendment to Rule 1, the Committee noted that the bankruptcy rule has never been amended to reflect the 1993 amendment to Rule 1, which added the words “and administered” to the last sentence. The Committee concluded that the language of the 1993 amendment should also be included in Rule 1001 so that the command of the two rules will be the same (“construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding”).

The Advisory Committee unanimously recommends that the proposed amendment to Rule 1001, which is set out in Appendix A, be approved for publication.

III. Comments on the Proposed Chapter 13 Plan Form (Official Form 113) and Related Rule Amendments

The Advisory Committee has been at work for several years on a chapter 13 plan form project. The project has produced a proposed Official Form 113 for chapter 13 plans and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009. The plan form and rule amendments were first published in August 2013 and generated a large number of comments. Based on those comments, many of which were critical, the Advisory Committee made significant changes to the plan form and sought approval to republish it and the rule amendments. The Advisory Committee also received approval to ask for public comment on the question whether the rule amendments should be adopted even if the form is not adopted. The form and rules, together with that request for comment, were published in August 2014.

The plan form and rules have generated fewer comments so far than did the initial round of publication in 2013. To date, only seven comments have been received (compared to approximately two dozen received by the same point last year). We have not yet received any comments addressing the question whether the rule amendments should proceed even if the plan form is not adopted.

With respect to the rule amendments, we have received a number of comments criticizing the proposed amendment to Rule 3002. Under the current rule, creditors must file a proof of claim no later than 90 days after the meeting of creditors under Code § 341. Under the proposed amendment, creditors would have to file their proof of claim 60 days after the order for relief (which means the petition date in the vast majority of bankruptcy cases). Three comments—two of them using substantially similar language—express the view that creditors should be allowed to file their proof of claim 90 days after the order for relief, because a 60-day time frame does not give creditors sufficient time. A chapter 13 trustee in Kansas submitted a comment criticizing a different aspect of the proposed change to Rule 3002. The current rule gives a single time period for filing a proof of claim, with no extra time to file supplemental materials for the claim. The amended rule would give a mortgage creditor 60 days to file its initial proof of claim but allow an additional 60 days to file supporting documents required by Rule 3001(c)(1) and (d) (namely, written mortgage documents and documents evidencing that the creditor's security interest has been perfected). In the commenter's view, giving the mortgage creditor an additional 60-day period to file supporting documents will delay confirmation of many chapter 13 plans.

With respect to the plan form itself, the comments submitted so far are mixed. The trustee in Kansas and a group of trustees in the Central District of California raised specific concerns about various parts of the form. Bankruptcy Judge Robert E. Grant (N.D. Ind.) submitted a comment reiterating the position taken by judges of his district that the Code does not permit a court to mandate the use of a particular form, national or otherwise, for chapter 13 plans. In contrast, Bankruptcy Judge Keith Lundin (M.D. Tenn.) submitted a lengthy comment endorsing the Advisory Committee's proposed plan form. Judge Lundin predicts that there will be opposition to the proposed form and rule amendments based on adherence to "local culture"

in chapter 13 practice. He urges the Advisory Committee to consider the costs of deferring to local preferences, including the inefficiencies produced by wide variations in the way the same information is presented in different courts. In Judge Lundin's estimation, adoption of the plan form and rule amendments is long overdue and "will be a huge improvement in Chapter 13 practice."

The Advisory Committee has also received two requests so far to testify at a public hearing about the plan form and rule amendments. In addition, we understand that different groups of bankruptcy judges are soliciting signatures on two different letters, one supporting the plan form and one opposing it, with the intent of submitting the signed letters as comments.

The Advisory Committee expects to receive many more comments near the close of the public comment period. After the close of the public comment period, we intend to circulate comment summaries to the full Advisory Committee before the spring meeting agenda book is finalized, and make some preliminary decisions, based on the nature and volume of comments received. Among the options we will consider are whether we should recommend: (1) moving forward with final adoption of the plan form and rules, (2) making further significant adjustments to the package to address specific comments, or (3) proceeding in an incremental fashion by first issuing the plan form as a Director's Form, rather than as an Official Form.

IV. Update on the Status of the Forms Modernization Project

The Advisory Committee is approaching the conclusion of its multi-year forms modernization project ("FMP") to revise many of the Official Bankruptcy Forms. The dual goals of the FMP are to improve the bankruptcy forms so that questions are clearer and answers more accurate, and to improve the interface between the forms and available technology. Among other things, the Judiciary's CM/ECF system ("NextGen") should be able to extract data from the modernized forms so that each clerk's office or chambers could produce customized reports containing the desired data in any desired format.

The Advisory Committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. The first group of forms was published for comment in August 2012, and four of those forms (fee waiver and fee installment forms, and income and expenses schedules) went into effect on December 1, 2013.

In August 2013, appellate forms and most of the modernized forms for individual debtor cases were published, and revised means test forms were republished. The Standing Committee gave its final approval to this second group of forms at the May 2014 meeting. On December 1, 2014, the appellate forms and the means test forms went into effect. The Standing Committee held the other individual debtor forms in abeyance to allow them to go into effect simultaneously with the modernized forms for non-individual debtor cases.

The third group of modernized forms, including the ones for non-individual debtor cases, was published in August 2014. So far no comments have been submitted in response to this publication. The Advisory Committee will review any comments that are submitted at its spring meeting. If the Advisory Committee approves the forms, it will seek the Standing Committee's final approval of the third group at the May 2015 meeting. At that point, if approved, we will be ready to send the non-individual debtor forms as well as the previously approved individual debtor forms to the Judicial Conference for approval, which would give the forms a December 1, 2015, effective date.

At our September meeting, we learned that there might be delays in upgrading the NextGen system to allow the bankruptcy courts to use the data in these bankruptcy forms to prepare customized reports. We also heard concerns that the issuance of the modernized forms could impact a pilot project that allows pro se debtors to input bankruptcy information directly into the court system (eSR/Pathfinder), which is in use at three bankruptcy courts. Based on recent discussions with the Case Management Systems Office of the Administrative Office, we are cautiously optimistic about both issues. The chief of the Case Management Systems Office has indicated that the technology necessary for the bankruptcy courts to extract data from the modernized forms and write customizable reports should be ready by December 2015. The chief also indicated his intent to support the eSR/Pathfinder project in a timely manner.

Even if our optimism turns out to be unwarranted, the Advisory Committee anticipates that it will ask the Standing Committee in May to approve the release of the individual and non-individual modernized forms on schedule. The modernized forms are far superior to the existing ones for both bankruptcy practitioners and pro se debtors, and we expect only a brief delay (if any) for the technology to catch up. Because the Advisory Committee has been preparing the bankruptcy community and software vendors for the release of the new forms for several years, there seems to be no reason to delay implementation even though the full benefit of the new forms may not be immediately achievable.

There remains one small group of modernized forms (Official Forms 25A, 25B, 25C, and 26) that has not yet been published. The Advisory Committee intends to seek the publication of this last group at the May 2015 Standing Committee meeting.

V. Consideration of Proposals Referred by the Subcommittee on CM/ECF

At the fall meeting, the Advisory Committee considered three matters referred by the Standing Committee's Subcommittee on CM/ECF.

(1) One issue, prompted by possible action by the Civil Rules Committee, is whether there should be a national rule mandating the use of electronic filing, subject to certain exceptions.

(2) A second set of issues is whether to have a national rule allowing electronic service of documents after the summons and complaint without obtaining the consent of the person served and whether to allow a notice of electronic filing to replace a certificate of service.

(3) The third issue the Advisory Committee considered is whether the Bankruptcy Rules should contain a rule that would provide that references to paper documents and to physical transmission include electronically stored information and electronic transmission.

Required Electronic Filing. Bankruptcy Rule 5005(a)(2) provides that local rules may “permit or require” electronic filing, whereas Civil Rule 5(d)(3) provides that local rules may “allow” electronic filing. Both rules, however, go on to provide that a “local rule may require electronic filing only if reasonable exceptions are allowed.” The Advisory Committee understands that the Civil Committee intends to consider a possible amendment to Rule 5(d)(3) to create a national requirement for electronic filing, subject to an exception for good cause and ones imposed by local rule. The Advisory Committee voted to wait to see what action the Civil Committee takes before considering whether Rule 5005(a)(2) should be similarly amended.

Electronic Service Without Consent. The Advisory Committee also discussed other possible amendments to Rule 5 under consideration by the Civil Rules Committee. We understand the Civil Rules Committee is considering the following amendments: (i) amending Rule 5(b)(2)(E) to eliminate the consent requirement for the use of electronic service and (ii) amending Rule 5(d)(1) to allow a notice of electronic filing to take the place of a certificate of service. Bankruptcy Rule 7005 adopts Civil Rule 5 for adversary proceedings, and there is not a separate bankruptcy rule that addresses these service issues. Therefore any amendment to Rule 5 would become applicable in bankruptcy adversary proceedings unless the bankruptcy rule were amended to deviate from the civil rule. The Advisory Committee voted to defer further consideration of the matter until the Civil Committee decides whether to propose any amendments.

Amendment of Rules to Accommodate Electronic Filing and Information. The final issue referred by the CM/ECF Subcommittee was whether the various federal rules should be amended to have them more fully reflect the ubiquity of electronic filing and transmission of court documents. The CM/ECF Subcommittee asked each of the Advisory Committees (other than Evidence) to consider the following template for a rule that would expand the meaning of various terms to include electronically stored information and electronic transmission:

Rule ____. **Information in Electronic Form and Action by Electronic Means**

a) Information in Electronic Form: In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

b) Action by Electronic Means: In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

The Advisory Committee noted that, if such a rule were proposed, we would need to consider whether to make exceptions to either provision in order to require some documents to be in written form or some actions to be accomplished by physical delivery and whether we should add terms in addition to “filing” and “sending” in subdivision (b). Bankruptcy Rule 5005(a)(2) currently states that a “document filed by electronic means in compliance with a local rule constitutes a written paper for the purposes of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.” The Advisory Committee referred the CM/ECF Subcommittee’s template to its Subcommittee on Technology and Cross Border Insolvency for consideration of whether the current provision in Rule 5005(a)(2) is sufficient, whether it should be expanded to cover documents that are not filed (as in subdivision (a) of the template) and to cover actions referred to in the rules (as in subdivision (b) of the template), and whether we should add exceptions to either provision.

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APPENDIX

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**PROPOSED AMENDMENT TO THE FEDERAL RULES OF BANKRUPTCY
PROCEDURE***

For Publication for Public Comment

1 **Rule 1001. Scope of Rules and Forms; Short Title**

2 The Bankruptcy Rules and Forms govern procedure in
3 cases under title 11 of the United States Code. The rules shall be
4 cited as the Federal Rules of Bankruptcy Procedure and the forms
5 as the Official Bankruptcy Forms. These rules shall be construed,
6 administered, and employed by the court and the parties to secure
7 the just, speedy, and inexpensive determination of every case and
8 proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R. Civ. P. made in 1993 and 2015.

The word “administered” is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

The addition of the phrase “employed by the court and the parties” emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

* New material is underlined; matter to be omitted is lined through.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

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TAB 3B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 29-30, 2014
Charleston, S.C.

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert J. Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Stuart M. Bernstein
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
Matthew Troy, Esquire
David A. Lander, Esquire
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and
Procedure (Standing Committee)
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Professor Daniel Coquillette, reporter for the Standing Committee
Jonathan Rose, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S.
Trustees
Bankruptcy Judge John E. Waites, liaison from the Committee on the
Administration of the Bankruptcy System
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Scott Myers, Esq., Administrative Office
Bridget Healy, Esq., Administrative Office
Molly Johnson, Senior Research Associate, Federal Judicial Center
Michael T. Bates, Senior Company Counsel, Wells Fargo
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Raymond J. Obuchowski, National Association of Bankruptcy Trustees
Patricia Ketchum, consultant to the Committee

James Wannamaker, consultant to the Committee
Michael McCormick, McCalla Raymer LLC, Atlanta, GA

Introductory Items

1. Greetings and expression of appreciation

Judge Eugene Wedoff opened the meeting and expressed his appreciation to those members leaving the Committee, including Judge Elizabeth Perris, Michael St. Patrick Baxter, and David Lander. Judge Sandra Ikuta thanked Judge Wedoff for his service to the Committee, and Judge Wedoff thanked the group for their work, specifically noting the work by Judge Perris on the Forms Modernization Project (FMP).

Judge Wedoff welcomed new members Judge Stuart Bernstein, Judge Dennis Dow, Judge A. Benjamin Goldgar, Jeffery Hartley, and Thomas Mayer. Finally, he noted that Judge John Waites was attending the meeting in place of Judge Erithe Smith to report on the work of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

2. Approval of minutes of Austin meeting of April 22-23, 2014.

The minutes of the meeting of April 22-23, 2014 were approved.

3. Oral reports on meetings of other committees:

(A) May 2014 meeting of the Committee on Rules of Practice and Procedure

Judge Wedoff noted that the draft minutes from the May 2014 Standing Committee meeting were included in the agenda materials at Tab 3A. All of the recommendations from this Committee were approved by the Standing Committee. The non-individual forms were approved for publication, along with the revised version of the chapter 13 plan form and related rules, the chapter 15 petition and related rules, Official Form 410A (attachment to the proof of claim form), and amended Bankruptcy Rule 9006(f) to eliminate the three-day extension of service for electronic service. These were published in August 2014.

(B) Intercommittee - CM/ECF Subcommittee.

The Reporter updated the Committee on the work on the subcommittee. The subcommittee is reviewing whether the national rules should be amended to make electronic filing mandatory, rather than leaving the decision up to local rules. She advised that Bankruptcy Rule 5005 authorizes local rules to require electronic filing and all districts have exercised this authority, but because Bankruptcy Rule 7005 refers to

Civil Rule 5, the Committee should review Bankruptcy Rule 7005 if Civil Rule 5 is amended to mandate electronic filing subject to local rules exceptions. The subcommittee is also looking at whether the requirement of consent should be eliminated from rules allowing electronic service; however, such a change is likely to have little practical impact on bankruptcy practice since registration with the CM/ECF system is deemed to constitute consent to electronic service.

The Reporter stated that the Committee on Court Administration and Case Management (CACM) asked the subcommittee to look at the issue of whether a notice of electronic filing (NEF) can be considered the equivalent of a certificate of service. If this change is made, the Committee should consider whether there are any amendments required to the bankruptcy rules as a result. Judge Elizabeth Perris noted a caveat with allowing the NEF as proof of service, stating that it would increase the work for bankruptcy courts because it would require judges to check various places to determine if service was properly completed.

The Reporter concluded that the final issue being considered by the subcommittee is whether electronic alternatives should be added to any definitions in the rules regarding transmitting or filing documents. The Committee discussed the specific issues that could impact bankruptcy courts if this change was adopted. The Chair referred the matter to the Subcommittee on Technology and Cross Border Insolvency for further consideration.

(C) June 2014 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Waites reported on the June 2014 Bankruptcy Committee meeting. He stated that the Bankruptcy Committee determined to support converting temporary judgeships to permanent judgeship positions and creating new permanent judgeships. In connection with this issue, Judge Waites advised that the bankruptcy case weights formula was changed for evaluating the need for new judgeships. To assist with current judgeship needs, the Bankruptcy Committee recommended that districts with open judgeship positions “lend” the judgeships to districts with a need for judgeships. The new judge would be appointed for a 14 year term but would spend approximately five years in the district with the need for a new judgeship. This recommendation was approved by the Judicial Conference. Currently, this impacts the District of South Dakota, the Middle District of Florida, the District of Iowa, and the Eastern District of Michigan.

Judge Waites noted several other issues under consideration by the Bankruptcy Committee, including its oversight of the Bankruptcy Administrator program. In addition, the Bankruptcy Committee is reviewing a pilot program run by the Third Circuit in which funds obtained through savings in chambers costs remain within the circuit.

Finally, Judge Waites stated that the Judicial Resources Committee raised several issues for consideration by the Bankruptcy Committee: the administration of smaller courts; the desirability of the continuation of the Bankruptcy Administrator program, and the operation of bankruptcy clerks' offices. The Bankruptcy Committee is reviewing these issues and will respond in due course.

- (D) Spring 2014 meeting of the Advisory Committee on Civil Rules and hearing on rules published for comment.

Judge Arthur Harris reported that the proposed amended civil rules, including a package of proposed amendments focusing on changes to discovery rules, frequently referred to as the "Duke Rules Package," which was published in August 2014, and the new electronic discovery sanctions, were approved by the Standing Committee and the Judicial Conference.

- (E) April 2014 meeting of the Advisory Committee on Appellate Rules.

Judge Adalberto Jordan reported that the Advisory Committee on Appellate Rules considered three main issues. First, the time at which a mailing is effective if filed from prison by an inmate. Second, the change from page count to word count for appellate briefs. Third, whether amicus briefs can be permitted at the rehearing stage. The Appellate Committee considered a few other items, but none of them impacts bankruptcy practice.

- (F) Bankruptcy Next Generation of CM/ECF Working Group.

This report was provided as part of the Forms Modernization Project report.

At the conclusion of the reports from other committees, Judge Wedoff noted that the Committee will no longer maintain liaisons to the Appellate and Evidence Committees.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

- (A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Judge Arthur Harris provided a brief overview of the issue, referring to the memo at Tab 4A. The Judicial Conference adopted a policy that a case does not need to be reopened to redact a previously filed document. CACM has suggested that Rule 5010 be amended to reflect this policy. The subcommittee preliminarily concluded that such an

amendment should be made to Rule 9037 instead, along with the inclusion of procedures for redacting previously filed documents. There was no recommendation for specific language from the Consumer Subcommittee, but it will present language at the spring 2015 meeting. Judge Harris explained that Bankruptcy Rule 9037 prohibits the inclusion of certain information on filed documents and there were several cases involving large creditors redacting large numbers of previously filed documents. The method of redaction varies among districts, including how notice is provided. The subcommittee will consider several issues related to redaction, including when and how notice of a request for redaction should be provided to affected persons.

- (B) Report concerning Suggestion 12-BK-I by Judge John Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Bankruptcy Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris explained that this issue has been under consideration for several years and that a report on the topic was completed by the Federal Judicial Center (FJC). Professor Gibson's memo on the topic was included at Tab 4B, and Molly Johnson's memo and research were included at Tab 4B.1. As background, Judge Harris stated that a debtor may seek to pay filing fees in installments. Often debtors do not complete the installment payments if a case is dismissed prior to completion of payment. Some courts instituted required minimum payments with applications to pay in installments. The subcommittee determined that minimum payments are permissible under the current rules with the limitations that (1) Rule 1017 does not permit a case to be summarily dismissed for lack of payment of the minimum fee and (2) a clerk cannot refuse to accept a petition if the upfront installment payment is not provided. Judge Harris concluded that the subcommittee does not believe any change to the current rules is required to permit upfront installment payments, so long as petitions are not refused or summarily dismissed for failure to make upfront installment payments.

Judge Harris advised that the research regarding upfront minimum payments showed a very small percentage difference in the number of fee waiver requests for courts that require an upfront payment for applications to pay in installments. Molly Johnson provided further detail about her report, stating that there was a very low rate of fee waiver filings, making it difficult to draw any conclusions about the potential impact on the level of fee waiver filings in courts that require upfront installment payments.

Judge Wedoff summarized that the subcommittee determined that the underlying Bankruptcy Code and rule provisions permit the practice of requiring upfront minimum payments with applications to pay in installments and that making a rule governing judges' discretion would be inappropriate. Several members commented that the FJC research includes evidence that some courts are rejecting filings when debtors do not have the upfront payments. Judge Wedoff responded that the legal requirements will be

communicated to judges through the minutes of this Committee, the response to the Bankruptcy Judges Advisory Group, and the educational programs of the FJC. A separate but related question was raised regarding the proper procedure in a case in which a debtor has unpaid fees from a prior case and requests to pay the filing fee for a subsequent case in installment payments. Judge Wedoff referred this matter as well as the issue of dismissing or rejecting petitions for failure to pay upfront minimum installment payments to the Consumer Subcommittee. For this reason, any communication to the Bankruptcy Judges Advisory Group will be delayed until after the spring 2015 meeting.

- (C) Report concerning Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim.

Judge Harris reported that the subcommittee suggested setting up a working group to consider whether an overall review of noticing in the Bankruptcy Code and Bankruptcy Rules is necessary, and if so, the process for doing so. He advised that there were several suggestions for revising noticing procedures, and that each of the suggestions could be reviewed by the working group. These suggestions are outlined in memos at Tabs 4C and 7C.

Judge Stuart Bernstein spoke about the second suggestion (Item 7C), which was considered by the Business Subcommittee and stated that subcommittee supports the suggestion to create a working group.

- (D) Oral report concerning suggestion 11-BK-N by David Yen regarding fee waiver forms to implement 28 U.S.C. § 1930(f)(3).

Judge Harris explained that the suggestion had been under consideration for some time. Given that there is no current guidance from the Judicial Conference to assist with consideration of the issue, the subcommittee recommended that the suggestion no longer remain under consideration. If the Conference does issue guidance, the suggestion can be revisited. For this reason, the subcommittee recommended taking no action on this suggestion, and the Committee agreed.

- (E) Oral report concerning suggestion 13-BK-G that Rule 1015(b) be changed to use the word “spouse.”

Judge Harris reminded the group that the suggestion was discussed at the spring 2014 meeting and the Committee recommended waiting for further legal developments before making any changes to the rule given that this issue will likely be before the Supreme Court in the future. He further explained in response to a question that even if a change is made to the rule, a change is also required to the Bankruptcy Code; therefore it

makes sense to wait for further guidance from the Supreme Court. Several members noted that this issue exists in many federal statutes and Supreme Court precedent may make the wording of a rule or statute irrelevant.

Judge Sutton noted that the Committee could, but did not have to, make a conditional recommendation to the Standing Committee, one that would be dependent on the Supreme Court's resolution of the constitutional status of same-sex marriages. Judge Wedoff reminded the group that if the Committee makes a recommendation at either the winter or summer meeting of the Standing Committee, the timing for publication would be the same.

5. Joint Report by the Subcommittees on Consumer Issues and Forms.

- (A) Issues Related to Home Equity Loans and Lines of Credit: (1) Suggestion 14-BK-A by Michael Bates, Senior Company Counsel, Wells Fargo, to amend Bankruptcy Rule 3002.1 to address notices related to home equity loans and lines of credit, and (2) additional proposed amendments to Bankruptcy Rule 3002.1: (i) suggestion to add procedures for objecting to notice of payment changes; (ii) suggestion for declaring mortgage current when no arrearage is provide for in the chapter 13 plan; (iii) suggestion to clarify whether court approved charges must be reported; and (iv) whether the claims docket should continue to be used for filing notices of fees and expenses.

The Reporter explained the history of the mortgage forms revisions and the differences between traditional mortgage loans and home equity loans and lines of credit (HELOCs). The differences between the types of loans were discussed at the mini-conference held in the fall of 2012 and it was agreed that HELOCs should be treated differently than other mortgage loans for the reporting of payment changes during the course of a chapter 13 plan. The suggestion from Mr. Bates would retain a notice requirement for HELOC payment changes but would reduce the burden on servicers by limiting who must receive notice in some situations and by making easier the means of providing notice. The notice procedure would vary depending on whether the debtor makes the HELOC payments directly (non-conduit) or the trustee makes them (conduit). If the debtor is making payments directly, the mortgage servicer would provide notice of the change to the debtor only through a regular monthly statement. If the trustee is making the payments, the servicer would provide an electronic file to the trustee with the old payment amount and the new payment amount. If the change in payment amount is less than \$25, the servicer would provide also provide notice to the debtor in the same manner as it provides notice of payment changes outside of bankruptcy. For changes exceeding \$25, the servicer would have to comply with the current notice requirements of Bankruptcy Rule 3002.1(b) in addition to providing the electronic file to the trustee. A memo on the topic was included in the materials at Tab 5A.

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The subcommittees concluded that the suggestion was too complex, and they recommended a simpler solution of adding a sentence that the notice requirements for payment changes for HELOCs could be modified by court order. In addition, the subcommittee recommended a Committee Note explaining the reasoning behind the added language and suggesting that local rules could be adopted or that procedures could be adopted in each case. The subcommittees asked that the Committee approve the language but not send it to the Standing Committee pending other changes that are in progress. A motion was made to approve the language, and the motion was approved.

Professor Edward Morrison asked about current practice. Judge Harris stated that Bankruptcy Rule 9006 can be used to modify the time requirements of Bankruptcy Rule 3002.1 in cases involving HELOCs, and he has not seen opposition to these types of requests by creditors. Professor Coquillette noted his continued concern regarding straying from uniformity in national practice.

Michael Bates provided some background regarding changes in payment amounts for HELOCs, stating that most changes are the result of a variable interest rate or because of the number of days in a month and are generally *de minimis*. The monthly statements debtors receive comply with other legal requirements such as the Truth in Lending Act.

A motion was made to hold the recommendation rather than to send it to the Standing Committee and the motion was adopted.

The Reporter continued with a suggested change to Official Form 410S1's language to reflect the fact that HELOCs are based on an account rather than a note. The subcommittees recommended this change; however because the form is currently out for publication, this suggestion will be considered with other comments at the spring 2015 meeting. The Reporter suggested that a language change could be made at that time with a notation that it was a change made after publication.

The Reporter concluded her report by stating that the remaining outstanding issues regarding the mortgage rules and forms were considered by the subcommittees and they recommended that a working group review these issues and suggest any possible amendments to Bankruptcy Rule 3002.1. With regard to the suggestion to place mortgage actions on the main docket rather than on the claims docket, the subcommittees recommended no action. The Committee accepted the subcommittees' recommendation.

- (B) Suggestion from the National Association of Chapter 13 Trustees (NACTT) Mortgage Liaison Committee for proposed forms to implement Rule 3002.1(f) and (g).

The Reporter discussed the suggestion for proposed forms to implement Bankruptcy Rule 3002.1(f) and (g) and referred to the memo at Tab 5B. The

subcommittees considered the suggestion regarding proposed forms and reviewed the draft forms submitted by the NACTT's Mortgage Liaison Committee. The subcommittees agreed that the forms were well-drafted and believed that they would be useful as Director's Forms after review by a broader group. The subcommittees suggested that a working group review the forms, and the Committee agreed with the recommendation.

Judge Wedoff referred the review of the proposed forms to a working group and explained the difference between Official Forms and Director's Forms. Official Forms are reviewed and approved by the Committee, published, approved by the Standing Committee, and approved by the Judicial Conference. Director's Forms are drafted by the Administrative Office and often reviewed by the Committee, but are not mandatory and do not require any official approval or recommendation.

- (C) Suggestion 14-BK-C from Professor Timothy Tarvin to amend Director's Form 201A to provide pre-filing notice of the privilege against self-incrimination in consumer bankruptcy cases.

The Assistant Reporter discussed the suggestion to add a warning to Director's Form 201A about the privilege against self-incrimination. A memo was provided at Tab 5C of the agenda materials. The subcommittees discussed the issue and noted that while this type of warning is provided in some other legal materials and the privilege against self-incrimination exists in bankruptcy, there are a number of issues with including the warning on Director's Form 201A. First, there is case law suggesting that a case may be dismissed if it cannot be administered because a debtor invoked the privilege, and second, including the language would be complicated and potentially incomplete. Another factor considered by the subcommittees was that the cases cited in the suggestion to support the inclusion of the warning may not have been decided differently if the privilege was invoked. Based on these reasons, the subcommittees recommended that no further action be taken on the suggestion, and the Committee agreed with the recommendation.

6. Report by the Subcommittee on Forms and the Forms Modernization Project.

- (A) Report on the status of the Forms Modernization Project (FMP) including: (1) clean up issues pertaining to the means test forms; (2) proposed technical changes to previously approved individual debtor forms; (3) renumbering modernized Official Forms 3A, 3B, 6I, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2; and (4) renumbering proposed Official Form 112 to Official Form 108.

Judge Perris started the discussion with an explanation of the basis of the FMP, explaining that at the time the project started the forms had not been reviewed in total for over 20 years. The Next Generation of CM/ECF (Next Gen) project started at

approximately the same time and it made sense to plan to utilize the newly modernized CM/ECF system in connection with the forms.

Prior to giving a more detailed report on the FMP, Judge Perris provided an update on the work on the Next Gen CM/ECF Working Group (Next Gen Working Group). She provided a brief overview of the work of the Next Gen Working Group, stating that the group was reduced to a smaller group to prioritize the tasks to be done for Next Gen. The modernized forms are not a priority for completion for the Next Gen Working Group. Representatives of the Administrative Office's (AO) technology group were involved with the FMP from its inception and represented that the forms would be data-enabled and expandable. In addition, the AO technology group indicated that the data could be used to create a number of reports, both existing and to be developed. At some point after the creation of the modernized forms, the AO technology group determined that the development of the data elements on the forms would be delayed beyond the first release of Next Gen and that a business objects program would be used with the data. Jim Waldron explained the business objects program and advised that the issue of providing data to outside users is on hold.

Several members noted experiences with court employees assisting with program development for the AO, and they suggested that this procedure may assist with the completion of the work required to make the modernized forms useful in Next Gen.

Judge Perris stated that the Committee needs to continue pressuring the AO to complete the work on the forms. David Lander made the point that the cost to the bar, trustees, and debtors should not be overlooked, and that the new forms will have a real impact on cost without the technology piece.

Judge Perris cited the form chart included at Tab 6 listing the status of each form, and advised that all the forms are drafted and almost all have been published or approved by the Standing Committee. The few remaining forms, which have been reviewed and drafted, include the small business forms. The FMP recommended that these forms be referred to the Business Subcommittee for review, along with Exhibit A to current Official Form 1 (to be renamed Official Form 201A, see below). Tom Mayer explained the issue with this form, mainly that many companies de-register their companies prior to filing for bankruptcy. The form could be revised to reflect this practice, as well as to expand the time period for required reporting. A motion was made to refer the small business forms and Exhibit A to Official Form 1 to the Business Subcommittee for review, and the motion was approved. Judge Perris stated that a final project to be completed is the modernization of the Director's Forms.

Next Judge Wedoff explained a small change required to Official Form 22B to reflect the fact that a non-filing spouse's income is not relevant in an individual debtor case if it is not used to support the debtor or debtor's dependents. The change - the

deletion of lines 12-14 - will be made when the re-numbered forms are made effective with the other modernized forms (discussed below). Judge Wedoff confirmed that this is not a change that would require publication. A memo explaining the change was included in the materials at Tab 6.

Scott Myers reported on the modernized forms that must be renumbered to match the remainder of the modernized forms. Mr. Myers advised that the forms were included within the agenda materials at Tab 6 and he provided background regarding the purpose of the renumbering of the forms. A suggestion was submitted to renumber Official Forms 22A-1 through 22C-2 to Official Form 122A-1 through 122C-2. As a result, Official Form 8 will be renumbered as Official Form 108 rather than Official Form 112. The form number changes do not need to be published and can go into effect with the remainder of the modernized forms. A motion was made to approve the revised and renumbered forms and the motion was approved.

Mr. Myers continued that Exhibit A to Official Form 1 should be renumbered as Official Form 201A until any revised version of the form becomes effective. A motion was made to revise the motion previously made to include the renumbering of Exhibit A, and the motion was approved. The revised motion to approve the revised and renumbered forms was approved.

7. Report by the Subcommittee on Business Issues.

- (A) Recommendation concerning *Stern* amendments to Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 previously approved by the Judicial Conference, but withdrawn from presentation to the Supreme Court in light of the pending *Arkison* matter.

The Assistant Reporter explained the history of the *Stern*-related amendments, namely that *Executive Benefits Insurance Agency v. Arkison* was heard by the Supreme Court during the 2013 Term, causing the Standing Committee to withdraw from Supreme Court consideration its proposed rule amendments based on *Stern*. The Court has now granted certiorari in *Wellness Int'l Network v. Sharif*, and the issue of consent may be considered in that case. The amendments will be held pending a decision in *Wellness*.

- (B) Recommendation concerning suggestion 12-BK-I by Judge Stuart Bernstein, that Official Forms 9F and 9F(Alt.) be amended to address complaints to deny discharge for a debt “of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit.”

Judge Bernstein explained that this was a suggestion he made prior to membership on the Committee. The issue raised concerns with the language used on Official Forms 9F and 9F(Alt.) regarding the commencement of a dischargeability action

and the deadline for filing such an action. The subcommittee's suggested change was to narrow the language in the forms by limiting the statutory reference to section 523(c) of the Bankruptcy Code to reflect a potential ambiguity in section 1141(d)(6)(A) of the Bankruptcy Code. A motion was made to accept the recommendation to change line 8 on Official Forms 9F and 9F(Alt.) (to be renumbered Form 309F), and the motion was approved. Judge Wedoff asked the group to consider whether this change requires republication, and the Reporter reminded the group that it is instructional language on the form. Judge Bernstein stated that parties rely on this language in litigation, so the conclusion was that the form should likely be republished. A decision about publication will be made at the spring 2015 meeting.

- (C) Suggestion by David Lander for a rule change to address limiting notice in large cases for motions that do not impact all creditors.

This issue was discussed as part of Agenda Item 4C.

- (D) Suggestion by Judge Harris to amend Bankruptcy Rule 1001 to track pending changes to Civil Rule 1.

The Reporter discussed the suggestion to amend Bankruptcy Rule 1001. An amendment to Civil Rule 1 to emphasize the need for cooperation among parties has been approved by the Judicial Conference, and Rule 1001 is largely based on Civil Rule 1 (with the exception of the term "administered"). The related amended civil discovery rules will be automatically incorporated in the Bankruptcy Rules, so the subcommittee determined that it made sense to ensure that the language of Bankruptcy Rule 1001 parallels Civil Rule 1 with an explanation of the change in the Committee Note.

Professor Coquillette suggested that the reference to attorneys be removed from the Committee Note, given that the language was objected to as part of the revision of Civil Rule 1. Judge Harris suggested that the language be revised to incorporate the Civil Rule 1 amendments by reference. Further discussion was had regarding the reference to attorneys, and Professor Coquillette explained that the American Bar Association and other groups objected to the idea that all attorneys have the same types of practice and responsibilities with regard to Civil Rule 1. The Reporter explained that the reference to attorneys appears in the Committee Note accompanying an earlier amendment to Civil Rule 1 that is now being incorporated into Rule 1001. A motion was made to adopt the suggested changes to the rule and Committee Note and the motion was approved.

8. Report by the Subcommittee on Privacy, Public Access, and Appeals.

- (A) Suggestion 12-BK-H by Alan Resnick to amend Rule 8013 to allow an appellate body to treat a bankruptcy court's judgment, order, or decree as proposed findings and conclusions if there is a constitutional issue in the bankruptcy court's ruling.

The Assistant Reporter provided the report, citing a memo included at Tab 8A of the agenda materials. The subcommittee discussed this suggestion and determined to wait for further developments in light on the uncertainty in this area. The Supreme Court will consider *Wellness Int'l Network v. Sharif* this Term, and following a decision in that case, the subcommittee will revisit the issue.

- (B) Status report concerning issues pending in: (1) the bullpen - amendments previously approved for publication to Rules 8002, 8006, and to 8023; and (2) the dugout - consideration of Comments 12-BK - 005, 12-BK-015, 12-BK040 regarding designation of the record in bankruptcy appeals.

Judge Jordan provided the report on these issues, citing a memo included at Tab 8B. He advised that there are three matters currently in the bull pen that relate to appellate issues. The amended rules will be effective December 1, 2014, so these issues will remain in the bull pen until after the effective date of the rules. Judge Jordan explained the various items in the bull pen, and there was no objection from the Committee to retaining the issues in the bull pen. He noted that for the issue regarding the record on appeal, the subcommittee is waiting for action from several other Judicial Conference committees.

- 9. Report by the Subcommittee on Technology and Cross Border Insolvency.

There was no report from this subcommittee.

- 10. Report by the Subcommittee on Attorney Conduct and Health Care.

- (A) Status report concerning the subcommittee's consideration of Suggestion 13-BK-C by the American Bankruptcy Institute's (ABI) Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

Judge Robert Jonker discussed the subcommittee's work on this issue. A memo was included in the materials at Tab 10. The suggestion is from the ABI to make changes to Bankruptcy Rule 2014 governing the retention of professionals. The broad language of the rule has led to some problems for attorneys in larger cases. The subcommittee felt that the suggestion was too elaborate but that some change should be made to the rule. The subcommittee noted that there was a suggestion similar to the ABI's suggestion put forward fifteen years ago and there was objection from the Judicial Conference.

The subcommittee's current working draft revises the "all connections" language by providing an exception for "cause shown" to limit the broad nature of the required

disclosures. Members of the subcommittee raised a concern that any discretion regarding disclosure should not be left to the attorney making the disclosure. Another concern was that the lack of disclosure of relevant connections rarely causes any problems. The subcommittee determined to seek the input of various experts in the field, including judges and attorneys, to evaluate the best way forward.

Several members asked about the supplemental filing suggestion and whether an attorney would be required to disclose supplemental information relevant to another member of his or her firm but not relevant to the attorney. It was suggested that the subcommittee consider this issue. A suggestion was made to provide a “safe harbor” for any inadvertent lack of disclosure through a narrative describing the nature of the attorney’s employment.

Information Items

11. Recommended revisions to proposed chapter 13 plan form.

Judge Wedoff updated the group on the proposed revisions to the chapter 13 plan form. He reviewed the changes to the chapter 13 plan form that the Working Group proposed in response to suggestions and comments that were made since the spring 2014 Committee meeting. Judge Wedoff stated Judge Ikuta has asked him to remain involved with the Working Group after he leaves the Committee.

12. Oral update on opinions interpreting section 109(h) of the Bankruptcy Code.

Professor Gibson explained that the opinions involved a technical change regarding the timing of consumer debtor’s completion of credit-counseling briefing. The issue is whether it is permissible for debtors to complete the credit-counseling briefing on the day of the filing of the petition but after the time of the filing of the petition. The majority of the cases have held that the briefing had to occur prior to the filing of the petition but one case held the opposite. This case was appealed directly to the Seventh Circuit. The case may be moot because the underlying chapter 13 case was dismissed for other reasons. The Reporter will continue to monitor case law interpreting section 109(h).

13. Oral report on the status of bankruptcy-related legislation.

Judge Wedoff stated that there is a pending piece of legislation called the Financial Institutions Bankruptcy Act which concerns Systematically Important Financial Institutions (or “too big to fail companies”) that are currently covered by the Dodd Frank Act. Under the legislation, in certain circumstances the Federal Reserve would file a petition in support of the bankruptcy of the institution with a bankruptcy judge (one of 10 on a panel selected by the Chief Justice). If the petition is opposed, the bankruptcy judge

would have 18 hours to make a decision and any appeal would have to be filed in one hour. The court of appeals would be required to decide the appeal within 14 hours. The concept is that the decision would be made while the world markets are closed. Judge Wedoff advised there is little chance that this legislation will be passed in this session of Congress, but it is possible in the next session.

14. *Bullpen*: The following items have been approved for submission to the Committee on Practice and Procedure in the future:
 - (A) Proposed revisions to Rule 8002(a)(5) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting, see Agenda Item 8(B);*
 - (B) Proposed revisions to Rule 8006(b) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting, see Agenda Item 8(B);*
 - (C) Proposed revisions to Rule 8023. *Approved at the spring 2014 Advisory Committee meeting, see Agenda Item 8(B);*and
 - (D) Suggestion 13-BK-G that Rule 1015(b) be changed to use the word “spouse.” *Approved at the spring 2014 meeting, see Agenda Item 4(E).*

15. *Dugout*. Suggestions and issues deferred for future consideration.
 - (A) Recommendation concerning Suggestion 11-BK-N by David S. Yen for fee waiver forms addressing fees other than the chapter 7 filing fee. *See Agenda Item 4(D).*
 - (B) Suggestion 12-BK-M by Judge Scott Dales to amend Rule 2001(h) to mitigate the cost of giving notice to creditors who have not filed proof of claim. *Placed in dugout at fall 2013 meeting pending receipt of comments on the Chapter 13 Plan Form and related rules amendments, see Agenda Item 4(C).*

16. Future meetings: Spring 2015 meeting, April 21-22 in Pasadena, California.

Judge Ikuta welcomed everyone to Pasadena on April 21-22, 2015. The meeting will be held at the courthouse. As for the fall 2015 meeting, the Committee may meet in Washington D.C.

17. New business.

There was no new business.

18. Adjourn.

DRAFT

Judge Wedoff thanked everyone for attending and for the work of each member of the Committee.

TAB 4

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TAB 4A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CHAIR

JONATHAN C. ROSE
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SANDRA SEGAL IKUTA
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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. David G. Campbell
Advisory Committee on Civil Rules

RE: Report of Advisory Committee on Civil Rules

DATE: December 2, 2014

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on October 30, 2014, concluding in one day an agenda that had been scheduled to carry over to October 31. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

The Committee has no action items to recommend.

Deliberations at the October meeting fell into four areas.

The consideration of e-rules amendments has been assigned to the all-committees subcommittee, and will be reflected in its report.

The second bundle of topics focused on a number of proposed rules amendments that have been submitted to the Committee over the last few years. These proposals and the Committee's deliberations on them are described extensively in the draft Minutes. They will be summarized in Part II, some rather fully and others briefly. The summaries follow the order of discussion in the draft Minutes, facilitating reference when curiosity prompts a search for greater detail.

The third kind of work involved ongoing subcommittee projects. Part III summarizes the Rule 23 Subcommittee report, and notes the projects pending before other subcommittees.

Finally, Part IV reports briefly on the hope that ways may be found to encourage the development of pilot projects to test innovations in civil litigation and provide empirical data regarding their effectiveness. It also reflects discussion of ways to advance early understanding and implementation of rules amendments when they have been prescribed and are to take effect.

I. E-RULES

The Committee has reported these tentative recommendations to the all-committees Subcommittee:

The Civil Rules should mandate e-filing. Exceptions should be allowed for good cause. Paper filing also may be permitted or required by local rule. Any provision for electronic signatures remains open for further consideration. Reactions to the rule published by the Bankruptcy Rules Committee in 2013 suggest that it would be unwise to go forward with a general provision for electronic signatures. But it might be useful to provide for electronic signing by the person who makes the filing. Filing by an authorized user could count automatically as the user's signature. This approach would not address the questions raised by other signatures, such as signatures on affidavits or declarations filed to support a summary-judgment motion. And, although present Rule 5(d)(3) authorizes local rules that cover electronic verification, it may be safer to leave verification out of the rule unless consideration by the subcommittee produces a persuasive provision.

The Civil Rules also should provide for e-service of the papers described in Rule 5(a), deleting the requirement in present Rule 5(b)(2)(E) that consent be obtained from the person served. Here too, exemptions could be made for good cause or by local rule.

Rule 5(d)(1) would be amended to provide that a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

The Committee considered the "template" rule that would equate electrons with paper for all purposes throughout the Civil Rules, "unless otherwise provided." The template comes in two parts. The first provides that any reference to information in written form includes electronically stored information. The second provides that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. It has been recognized from the beginning that these approaches may fit some sets of rules better than other sets. The Committee concluded that it is too early to attempt to adapt these approaches to the Civil Rules. Many different words in many different rules can be understood to imply paper. Great and at times risky effort will be required to sort through all of them to determine whether electronic modes are

equally suitable. Emerging problems in practice may come to justify the effort. But the Committee is not aware of any pressing needs to act now, and recognizes that the most satisfactory resolutions may well arise from practice in the continual migration to the electronic universe.

Short of a generic rule, several individual Civil Rules could be revised to equate electrons with paper. One simple example is Rule 72(b)(1), which directs that the clerk must promptly "mail" to each party a copy of a magistrate judge's recommended disposition. "No one mails." "Serve" could easily be substituted. And it may be substituted when a general package of e-rules proposals is ready for publication. But there is no need to act now.

II. ACCUMULATED DOCKET MATTERS

Signatures on Notice of Removal. Several removal statutes allow any one defendant to remove an action from state court. Some are ambiguous. 28 U.S.C. § 1441(a) provides for removal "by the defendant or the defendants." Section 1446(b)(1)(A) provides that if an action is "removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal * * *." The circuits have taken different approaches to a simple question: Can one defendant sign a notice of removal, representing that all other defendants authorize and join in the removal? A uniform answer to this question could be given by amending Civil Rule 81(c)(2). The answer might be that all defendants must sign separately. It might be that one can sign on behalf of all, expressly representing authority to sign for all. Or some combination could be found, with a joint notice for some and separate notices for all others. One reason to hesitate is that the circuits disagree on the question whether § 1452 authorizes a single defendant to remove a claim related to a bankruptcy case. A Rule 81 provision limited to removals under § 1441(a) might create uncertainty in the current circumstance, and might require revision if a uniform answer is given. A provision addressed to any removal that must be joined by all defendants might solve that problem. But deeper questions remain: Does the Committee have power under the Rules Enabling Act to resolve judicial disagreements on the meaning of a statute? And even if it has the power, is it wise to do so? A lawyer contemplating removal should take care to discover and comply with circuit practice. Most lawyers are careful to ensure that all parties join in removal when the underlying statute requires unanimity. Matters that bear on removal statutes should be approached only if there is a serious need, and even then should be approached with caution. The Committee concluded that this subject should be tabled.

Third-Party Litigation Financing. This proposal would amend Civil Rule 26(a)(1)(A) to require automatic initial disclosure of third-party litigation financing agreements. Contingent-fee agreements would not be included in the concept. An analogy is offered to the initial disclosure of liability insurance. The proponents suggest several advantages. Disclosure may promote settlement. It will protect against unknown conflicts of interest by ensuring judges have access to information, not provided by Rule 7.1 disclosures, identifying third-party financing entities in which the judge may have an interest. The defendant has an intrinsic interest in knowing who the true adversaries are. Knowing of third-party financing may affect rulings on motions to shift the

costs of discovery, or for sanctions.

Discussion reflected concerns that third-party financing is a relatively new and evolving phenomenon. It takes many forms that may present distinctive questions. A study paper for the ABA 20/20 Commission on Ethics expressed the hope that work will continue to study the impact of funding on counsel's independence, candor, confidentiality, and undivided loyalty.

The Committee agreed that the questions raised by third-party financing are important. But they have not been fully identified, and may change as practices develop further. In addition, the Committee agreed that judges currently have the power to obtain information about third-party funding when it is relevant in a particular case. An attempt to craft rules now would be premature. These questions will not be pursued now.

Nonparty Rule 30(b)(6) Depositions. This proposal describes a concern that notices of a Rule 30(b)(6) deposition of an entity that is not a party to the underlying action often set an unreasonably short time for deposing the persons designated to testify for the entity. Rule 30(b)(6) presents other possible problems; several years ago the Committee considered a lengthy proposal that addressed attempts to elicit testimony outside the matters described for the examination. The rule was the subject of an exacting review and evaluation that extended over several Committee meetings. Discussion noted that the Committee had recently devoted substantial work to considering Rule 45 subpoenas — the means used to compel a nonparty to appear for a deposition — without having encountered the "short notice" issue. Nor were Committee members aware of the problem as described. This proposal was set aside.

Attorney-Client Privilege Appeals. In *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009), the Supreme Court ruled that the collateral-order appeal doctrine does not support appeal from orders that reject claims of attorney-client privilege. The opinion suggested that the Rules Enabling Act process is the best means of considering the question whether appellate review should be expanded beyond the infrequent opportunities provided by disobedience and contempt, certification under 28 U.S.C. § 1292(b), and extraordinary writ review. The Appellate Rules Committee has considered these questions and has decided not to propose any new rule. The Civil Rules Committee reached the same conclusion.

Rule 41. This submission came in the form of a law review article, Bradley Scott Shannon, "Dismissing Federal Rule of Civil Procedure 41," 52 U. of Louisville L. Rev. 265 (2014). The first part of the article describes several well-known shortcomings in the rule text, including these: (1) The unilateral right to dismiss without prejudice should be cut off by a motion to dismiss as well as by an answer or motion for summary judgment. (2) The reference to dismissing "an action" should be elaborated to reach dismissal of part of an action, whether a particular claim or a particular party. (3) Rule 41(c) should be expanded to address dismissal of all claims after the complaint, not only counterclaims, crossclaims, or third-party claims. (4) The events that cut off the right to unilaterally dismiss under Rule 41(c) should be expanded. The

second part of the article criticizes the reliance in Rule 41 on such concepts as "prejudice," "without prejudice," and "on the merits." The suggested remedy is to substitute more direct references to "preclusion." Although Professor Shannon has identified some shortcomings in the Rule 41 text, no member of the Committee has encountered problems in practice. The Committee also expressed concern about the potential complexity of writing precise preclusion rules into Rule 41, as well as the significant risk of unintended consequences. Revision will not be undertaken.

Rule 48: Non-Unanimous Verdicts in Diversity Cases. This proposal would amend Rule 48 to direct that state majority-verdict rules be applied in diversity cases. Several reasons were offered. Defendants often believe that majority-verdict rules favor plaintiffs, creating an incentive to remove to federal court cases that otherwise would remain in state court. State majority-verdict rules, further, may reflect substantive state values that should be respected by federal courts when enforcing state-law claims. And majority-verdict rules may be better than the antiquated unanimity requirement enshrined in Rule 48 and federal tradition. Adopting a majority-verdict rule for all cases, not diversity cases alone, would have a further advantage. If majority verdict rules were limited to state-law claims, there could be significant difficulties in asking a single jury to reach unanimity as to federal-question claims in the same case.

Discussion revealed cogent arguments on all sides of these considerations. It seems inevitable that those who oppose a shift to majority verdicts will invoke the Seventh Amendment, whether the shift is limited to diversity (and supplemental jurisdiction) cases or is adopted for all cases in federal court. At the end of this vigorous discussion, the Committee voted to remove the proposal from the docket.

Rule 56: Summary-judgment Standards. This submission is an article, Suja A. Thomas, "Summary Judgment and the Reasonable Jury Standard," 97 *Judicature* 222 (2014). Parts of the article intimate that judges are simply incapable of understanding what it may be reasonable for a jury to find. But the proposal at the end is not to abolish summary judgment, nor even to undertake a present restatement of the standard for summary judgment. Instead, study of the standard is proposed, likely invoking the aid of the Federal Judicial Center. The Federal Judicial Center has undertaken several studies of summary-judgment practice. But its researchers have not been able to design a study that would advance understanding of what the summary-judgment standard means in actual application. The Committee removed this proposal from the agenda.

Rule 68: Invigorate Offers of Judgment. The Committee published proposals to amend Rule 68 in 1983. Active responses led to publication of a substantially revised proposal in 1984. The project was then abandoned. Rule 68 was taken up again more than 20 years ago. Successive drafts became increasingly complicated in attempting to respond to discoveries of ever-increasing complications. That effort was abandoned in 1994 without publishing any proposals. Rule 68, however, remains a popular subject as measured by the regular appearance of proposals by bar groups and others that revisions should be made. The proposals vary, but the common theme is

that Rule 68 is not much used, that its use should be encouraged, and that encouragement should come by adding "teeth" in the form of stronger sanctions for failing to win a judgment better than a rejected offer. Most of the proposals would add a provision for offers by plaintiffs, not only defendants as in present Rule 68. These proposals commonly suggest that an award of attorney fees is the appropriate sanction when a defendant rejects an offer and then loses even more by judgment — the successful plaintiff ordinarily would recover statutory costs in any event, so the costs sanctions in present Rule 68 would have no meaning.

Reliance on attorney fees as sanctions stirs deep concerns about the "American Rule." It also invites an evaluation of the Supreme Court's reading of present Rule 68. Relying on "plain meaning," the Court ruled that a plaintiff loses the right to statutory attorney fees incurred after rejecting an offer that was better than a lower judgment the plaintiff actually wins. This consequence follows, however, only if the underlying statute provides a fee award as "costs," the word in Rule 68(d). If the statute simply provides a fee award, failure to win a judgment better than the offer does not cut off the statutory right.

Nor is the statutory fee issue the only Supreme Court interpretation that must be evaluated if a Rule 68 project is launched. Rule 68(d) provides for sanctions "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." So if a defendant offers \$10,000 and the judgment is for \$9,000 or \$1, the defendant is entitled to costs incurred after the offer was made. But if judgment is for the defendant, Rule 68 sanctions disappear because the plaintiff did not "obtain" a judgment. So long as the only consequence is an award of costs, this makes little difference since the prevailing defendant ordinarily would be entitled to costs. But if more substantial sanctions are adopted, the distinction becomes important.

The Committee recognizes that the persistence of Rule 68 proposals warrants serious consideration of possible revisions, or even potential abrogation. The vigorous responses that met the proposals published in 1983 and 1984, and the challenging complexities encountered in attempting to draft a more elaborate rule 20 years ago, will have to be faced if any new project is undertaken. One avenue that can be explored without yet facing these challenges will be to study counterpart rules in the state courts. The Committee concluded that state rules should be studied before deciding what, if anything, should be done next. A review of state rules and any available empirical studies will be completed before the Committee's April meeting.

Rule 4(c)(1): "Copy" of the Complaint. This proposal comes from a federal judge who was faced with the cost of printing more than 9,000 pages to serve 30 defendants with 300 pages of a complaint and exhibits filed by a pro se prisoner plaintiff. The suggestion is that an electronic medium, such as a CD, should be counted as a "copy" of the complaint to be served with the summons. Discussion reflected the concern that not all defendants will be able to use whatever e-medium is used, and the belief that this subject should be addressed as part of the continuing effort to bring the rules into the era of e-communication. It also was noted that informal arrangements have been made in some courts with defendants who agree to accept e-form copies.

The conclusion was to take no action on this suggestion.

Rule 30(b)(2). Rule 30(b)(2) provides that a notice of a party's deposition may be accompanied by a request under Rule 34 to produce "documents and tangible things at the deposition." The suggestion is to add ESI: "documents, electronically stored information, and tangible things." The suggestion reflects a deliberate choice made in developing the 2006 amendments that brought ESI directly into rule text. The basic choice was to treat ESI separately in Rule 34(a)(1)(A), not as a subcategory of "documents." The secondary choice was to add "ESI" to the text of some of the other rules that refer to "documents," but not to add it to other rules that also refer to "documents." The Committee concluded that this deliberate choice has not produced any problems in practice, and that there is no point now in either making ESI a category of "documents" or adding ESI to every rule that now refers to documents.

Rule 4(e)(1). Rule 4(e)(1) provides for service on an individual by following state law. State law may provide for leaving the summons and complaint unattended at the individual's dwelling or usual place of abode. The suggestion is that the server should take and file a picture of the process affixed to the dwelling. As a practical matter, a person intent on depriving the defendant of actual notice could take the picture and then remove the process. More generally, this specific proposal does not address the problem of "sewer service" — the deliberate filing of false proofs of service after discarding the summons and complaint after minimal or no efforts to accomplish actual service. The Committee recognizes that problems persist with falsified proofs of service. But it does not believe that amending the rules will provide a satisfactory answer.

Rule 15(a)(3): "Any required response". Rule 15(a)(3) sets the time for "any required response" to an amended pleading. The suggestion is that this wording, adopted in the Style Project, has introduced an ambiguity. There is no doubt about amendment of a pleading that does not require a response — an answer that does not include a counterclaim, for example. But does every amendment of a pleading that does require a response require amendment of a responsive pleading that already has been filed? The Committee concluded that it is better to leave the rule as it stands. Court files might be neater if there is always an amended responsive pleading to correspond to an amended pleading, but trivial amendments that do not affect the responsive pleading may be addressed by less formal but equally effective measures.

Rule 55(b): Partial Default Judgment. This suggestion appears to rest on a misreading of present Rule 55(b). It will be removed from the agenda.

New Rule 33(e). This proposal would adopt a new Rule 33(e) that would provide a precisely worded interrogatory that would not count against the presumptive limit of 25 interrogatories. The interrogatory would ask for specific and detailed information about the grounds for failing to respond to a Rule 36 request to admit with an "unqualified admission." The Committee decided to remove the proposal from the agenda.

Rule 8: Format for Complaint. The Committee will not take up this proposal to amend Rule 8 to provide a general format for a complaint. The proposal would, in addition to other matters, direct inclusion of "alleged acts and omissions of the parties, with times and places"; "alleged law regarding the facts"; and "the civil remedy or criminal relief requested." The time may come when pleading issues should be restored to an active place on the agenda, but this proposal does not prompt present action.

Rule 15(a)(1) cut-off of amendments as a matter of course; Rule 12(f) expanded to strike material in a motion; Discovery times Each of these proposals was removed from the docket. Elaboration seems unnecessary.

e-discovery. A number of proposals addressing e-discovery were made while the recent work went on. They were all considered — many of them provided valuable help — in framing the proposals now before the Supreme Court. They too have been removed from the docket.

III. SUBCOMMITTEE ACTIVITY

Rule 23 Subcommittee. The Rule 23 Subcommittee continues to reach out to other groups for advice that will inform the decision whether to recommend that work begin on possible class-action amendments. This decision will depend on identifying current practices that seem troubling in ways that might be improved by amending Rule 23. All Subcommittee members appeared for a panel at the ABA National Class Action Institute to seek input. The Subcommittee will appear on the program for the afternoon before the formal opening of the American Law Institute Annual Meeting next May. Other organized events may be sought out, and less formal inquiries also are being pursued. The Subcommittee also hopes to arrange a miniconference at some time during 2015. The Subcommittee plans to present conceptual drafts of possible rules amendments at the April 2015 Advisory Committee meeting, on the understanding that the drafts are not a recommendation whether to recommend rules for publication and possible adoption.

A number of issues have been identified as subjects for further development. But it remains important to solicit suggestions for other subjects, recognizing that it will be difficult to expand the range of possible revisions once any project is well under way.

A cluster of issues persist with respect to settlement, the eventual outcome of almost all class actions.

The criteria for certifying a settlement class are important. It is understood that concerns of manageability are substantially changed when a class is certified for settlement, not for trial. But it is not clear what other differences there may be. Does the prospect of settlement, for example, reduce concerns about the variability of state law that might defeat a finding that common questions predominate for a Rule 23(b)(3) certification?

Criteria for reviewing whether a settlement is "fair, reasonable, and adequate" might be added to rule text. A lengthy list of criteria was considered for rule text in developing the proposals that led to the 2003 amendments. This list was then transferred to the Committee Note, and eventually abandoned. But it may remain useful to provide some guidance, perhaps by developing a list of a few rather broad factors rather than the dozen or more factors that have been identified in the cases.

Cy pres awards have drawn particular attention in recent years. Some courts have already adopted the approach recommended in the ALI Principles of Aggregate Litigation. But fair questions remain. One approach is to reduce the amount left over for cy pres distribution to the minimum that can be achieved after all feasible distributions to class members, including a second round of distributions after the rate of initial claiming fails to deplete a settlement fund. Another is to rely on cy pres distribution of whatever remains unclaimed after a first round of claims. Still another is to recognize that there may be circumstances in which the difficulty of identifying and compensating class members who were actually injured, or the cost of distributing relatively trivial sums, justify a cy pres or "fluid" recovery that will provide some public benefit and enforce the policies reflected in outlawing the activities challenged by the class.

One of the reasons for disquiet about cy pres awards is the perception that at times they are made to recipients that will use the award for purposes that have little or no relation to the interests of the class. Awards to educational institutions favored by counsel or the court are an example. Could cy pres provisions in Rule 23 effectively direct that the award go to an entity that has interests closely aligned with class members' interests?

Whatever may be made of cy pres awards, it will be important to consider possible Enabling Act limitations on the scope of any Rule 23 provisions that might be proposed.

Objectors to settlements present another set of longstanding issues. Once the class and its adversaries have worked out a settlement, they join in lauding its virtues. The independent advice of objectors may play a vital role in aiding the court's review. A variety of proposals to enhance the effectiveness of objectors were considered in the most recent round of Rule 23 studies, but were put aside. If potential objectors are not to be included in evaluating the conduct of the litigation up to the point where serious settlement negotiations begin, and are not to be included in the negotiations, the cost of providing them with information to evaluate the proposed settlement can be high. Beyond that, parties to a settlement commonly distrust an objector's motives. Some objectors are genuinely motivated by a desire to improve the settlement, both for the benefit of class members and to enhance enforcement of the underlying law. Some may not be so motivated. It remains an open question whether it is possible to identify rules provisions that would prove helpful. If these questions are pursued, it will be important to identify and learn from lawyers who frequently appear as objectors.

A special set of issues arise when an objector appeals and then settles pending appeal. The Appellate Rules Committee is considering approaches that might constrain the temptation to appeal in order to capitalize on the nuisance value of the appeal. The two committees will work together to develop these issues.

The role of "issues" classes under Rule 23(c)(4) has long seemed uncertain to many observers, including the relation to the "predominance" requirement in Rule 23(b)(3). Some observers contend that disagreements among the circuits on the interpretation of Rule 23(c)(4) may be on the way to a resolution that will forestall any role for rule amendments. But the point deserves further investigation.

Notice issues also remain. Most of the current discussion focuses on the wish for less expensive means of effecting notice. Individual mail is expensive. Publication in traditional newspapers is expensive. In some circumstances widespread notice can be effected at lower cost, and perhaps more effectively, by various electronic means such as e-mail and social media. There are sensitive concerns about due process and protecting a meaningful right to opt out of a (b)(3) class, but these issues deserve at least an inquiry to determine whether meaningful improvements can be made in the rule. A subset of notice questions might ask whether the present optional notice provisions for (b)(1) and (b)(2) classes might be tightened.

A number of other topics have been identified. It is important to gain advice on the value of adding them to an active agenda. The Supreme Court has spoken on the award of damages incident to a Rule 23(b)(2) class certified for injunctive or declaratory relief, but there may be room to clarify or modify the rule. Consideration of the "merits" at the certification stage has continued to grow: is there room for regulation or improvement? Recent cases have sharpened the focus on the "ascertainability" of class membership — again, is there both reason and opportunity to address this concern by new rule text? Rule 68 offers of judgment seem to be coming into increasing favor as attempts to moot individual class representatives before certification, hoping to moot the entire action. There is no reason to suppose that the mooting effect of an offer of complete relief should depend on the choice whether to clothe it in Rule 68 garb, but the question might be addressed in part through Rule 68 or more generally in Rule 23. There is a sensitive tie to Article III mootness doctrine, but this concern might be readily overcome.

A new issue emerged for the first time at the Committee meeting. The Department of Justice is concerned that the 14-day period allowed to seek permission to appeal an order granting or denying class-action certification is too short for the Department of Justice. The Department would favor an amendment that, like the provisions in Rule 12, would allow more time when the United States is a party.

Other possible issues have been identified but placed on hold. What is most important now is to encourage further suggestions, beginning with this meeting of the Standing Committee.

Other Subcommittees. The Discovery Subcommittee carries forward on its agenda the question whether additional "requester pays" provisions might be included in the discovery rules.

The Appellate Rules Committee has formed a joint subcommittee with this Committee to work on issues that involve both sets of rules. The current agenda includes two sets of issues. One is a long-pending effort to decide whether rules provisions should be adopted to address efforts to manufacture a final judgment by voluntarily dismissing what remains of an action after an unfavorable ruling. The other addresses discontinuities in the Civil Rule 62 provisions for stays and bonds pending appeal.

IV(A). PILOT PROJECTS

The Committee devoted substantial time to exploring the possibilities of enhancing rules reform by means of pilot projects that put possible new rules into actual practice. Rules revisions have often relied heavily on the lessons of practical experience as reported by lawyers and judges. Information of this sort can be invaluable, and may be the best available foundation for work. In recent years the committees have turned increasingly to empirical work, frequently asking the Federal Judicial Center to frame studies of the ways in which current rules work in real cases. These studies also have proved valuable, and often are evaluated both in their own terms and by drawing from subjective reports of experience to help understand the events that are measured by the empirical inquiry.

Beyond these efforts, much may be learned by controlled experiments in forms that may be called "pilot projects." A pilot project is designed to implement new rules in real cases. It should be designed carefully, beginning with an attempt to identify the kinds of questions that may be fruitfully tested. What reasons suggest that a new procedure might prove beneficial? What fact information will help prove or disprove those reasons? How can a project be structured so as to yield the fact information in measurable form? If structured from the beginning with the help of empirical experts who can encourage a design that will yield reliable information that addresses the intended questions without introducing confounding variables, pilot projects could become a particularly valuable means of improving the rules.

One general problem that must be faced is whether to make participation in a pilot project mandatory. If parties and lawyers are allowed to opt out of the project, the results may be skewed because the cases that remain are not representative of the population that must be studied. There even may be too few cases remaining to support evaluation, no matter how well the few may resemble the entire class. Mandatory participation, however, presents serious questions if the project modifies the national rules. A local rule must be consistent with the national rules. Finding other authority, such as adoption by order on an individual case-by-case basis, may encounter resistance.

A different limit appears when searching for empirical information about standards. Framing a pilot project to measure the effect of different pleading standards, for example, would be difficult. Outcomes could be measured, but evaluating any differences would be difficult at best. Evaluating the differences may be addressed by interviewing lawyers or judges; interviews can advance understanding, but are vulnerable to challenge as subjective, as not rigorous.

Three pilot projects in the Southern District of New York were described. One is adoption of the discovery protocols for individual employment cases that have been adopted by some 50 judges around the country. The second, for some commonly encountered types of actions brought under 42 U.S.C. § 1983, adopts mandatory disclosure of core discovery and requires that plaintiffs make a settlement demand. The case goes automatically to mediators. The third, now concluded, tested a set of best practices for complex cases. Although it may be difficult to evaluate the best practices after a mere 3 years, "there is a value in generating experiences to discuss even if their actual effect cannot be measured statistically."

The Seventh Circuit e-discovery project also was discussed. The project has helped to develop "great expertise in e-discovery," and has "changed the culture in our Circuit."

The nationwide 10-year pilot project for patent cases also was discussed.

The success of the discovery protocols for individual employment cases has encouraged suggestions that similar protocols should be developed for other types of cases. Suitable candidates might be employment class actions, or actions under the Individuals with Disabilities Education Act or the Fair Credit Reporting Act. The process of generating the protocols for individual employment cases was arduous. The participants were very good lawyers from both plaintiff and defense practices. Three judges engaged in the Enabling Act process provided support and encouragement. The Institute for the Advancement of the American Legal System promoted the work. But with all of those advantages, the work resembled a labor negotiation, with much hard bargaining and several moments that prompted legitimate fears of a breakdown. Still, the result is worth it. All sides seem satisfied with the product.

Less formal projects also were noted. The Northern District of California adopted an expedited trial process that has been abandoned for lack of takers. A Committee member reported an experiment with case-specific orders that offered a trial in 4 months with minimal or no discovery and no motions for summary judgment. After 1,100 cases the order was discontinued because almost no one had seized the opportunity.

IV(B). PROMOTING NEW RULES

A number of important proposed Civil Rules amendments are now before the Supreme Court. If the Court prescribes them and Congress acquiesces, they will take effect next December 1.

Lawyers and even judges may lag in coming to recognize and understand new rules provisions. Means to encourage understanding and thoughtful implementation are always useful. Finding effective means to bring these new rules into effective practice will be important.

The Federal Judicial Center takes the lead in creating educational programs for judges, and will be ready if the proposed changes are adopted.

There may be new ways in which the Committees can encourage the development of programs to educate the bar in the new rules. It might help to prepare descriptive materials that can be used by groups that offer continuing education, bar groups, Circuit conferences, Inns of Court, and others. The Committee is considering what it may be able to do.

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TAB 4B

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 30, 2014

1 The Civil Rules Advisory Committee met at the Administrative
2 Office of the United States Courts in Washington, D.C., on October
3 30, 2014. (The meeting was scheduled to carry over to October 31,
4 but all business was concluded by the end of the day on October
5 30.) Participants included Judge David G. Campbell, Committee
6 Chair, and Committee members John M. Barkett, Esq.; Hon. Joyce
7 Branda; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge
8 Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W.
9 Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.;
10 Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene
11 E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer.
12 Outgoing members Peter D. Keisler, Esq. and Judge John G. Koeltl
13 also attended. Professor Edward H. Cooper participated as Reporter,
14 and Professor Richard L. Marcus participated as Associate Reporter.
15 Professor Daniel R. Coquillette, Reporter, represented the Standing
16 Committee. Judge Arthur I. Harris participated as liaison from the
17 Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk
18 representative, also participated. The Department of Justice was
19 further represented by Theodore Hirt. Jonathan C. Rose and Julie
20 Wilson represented the Administrative Office. Emery Lee attended
21 for the Federal Judicial Center. Observers included Donald Bivens
22 (ABA Litigation Section); Joseph D. Garrison, Esq. (National
23 Employment Lawyers Association); Ken Lazarus, Esq. (AMA); Jerome
24 Scanlan (EEOC); Alex Dahl, Esq. (Lawyers for Civil Justice); John
25 Beisner, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center
26 for Constitutional Litigation); Ariana Tadler, Esq.; Henry Kelsen,
27 Esq.; and William Butterfield, Esq.

28 Judge Campbell opened the meeting by noting that Judge Sutton,
29 Chair of the Standing Committee, was unable to maintain his usual
30 practice of attending the meeting because he is in Australia.

31 Judge Campbell continued by marking the "comings and goings."
32 Both of the outgoing members, Peter Keisler and John Koeltl, have
33 been kind enough to attend this meeting to lend their help in
34 committee deliberations. Both will be sorely missed.

35 Judge Koeltl won a rare one-year extension after the
36 conclusion of his second three-year term to enable him to carry
37 through to conclusion in the Standing Committee and Judicial
38 Conference the proposed rules amendments that came to be described
39 as the "Duke package." It would be more honest to describe them as
40 the Koeltl Package. He single-handedly brought the Duke Conference
41 together, and then guided the Duke Conference Subcommittee through
42 an examination of countless possible amendments before settling on
43 the package that is now before the Supreme Court. It is difficult
44 to imagine anyone working harder than he has worked. Judge Koeltl
45 responded that working with the Committee "has been a wonderful

46 experience." The Duke Rules package "has been a true group
47 production, in Subcommittee and Committee." "I treasure my time on
48 the Committee."

49 Peter Keisler will be equally missed. "He has a unique ability
50 to clarify complexity, to see purpose and policy beneath the
51 details." Most recently, he has worked hard with both the Duke
52 Conference Subcommittee and the Discovery Subcommittee as it worked
53 through Rule 37(e) on the failure to preserve electronically stored
54 information. The Committee was graced by his presence not only
55 through the six years of his two terms as a member from the bar but
56 also during his earlier years as Assistant Attorney General for the
57 Civil Division. Peter Keisler responded that his first contact with
58 the Rules Committees was when Judge Scirica and Judge Levi visited
59 him at the Department of Justice to urge that the Department
60 actively urge Congress to defer to the Rules Committees as Rule 23
61 amendments were being developed. At the time, he wondered why
62 Congress should not take up such matters when it wishes. But now
63 the advantages of the Enabling Act process are clear. The
64 Committees are open-minded, impartial, richly experienced in the
65 real world of procedure. "I am glad for term limits on Committee
66 membership. But I am also glad that there are no term limits on
67 friendship."

68 Two new members were welcomed.

69 Judge Shaffer has been a magistrate judge in Colorado for many
70 years. "I knew him years ago from reading his opinions." His recent
71 opinions have helped the Committee work through the proposed
72 revisions of Rule 37(e). His earlier career included litigation in
73 private practice, following litigation in the Department of Justice
74 in environmental cases and civil rights cases. He also served as a
75 lawyer in the Navy.

76 Virginia Seitz is a partner of Peter Keisler. She has recently
77 served as Assistant Attorney General for the Office of Legal
78 Counsel. She has a long-established appellate practice.

79 Acting Assistant Attorney General for the Civil Division,
80 Joyce Branda, was also welcomed.

81 Donald Bivens was welcomed as the new liaison from the ABA
82 Section of Litigation.

83 Judge Campbell reported that the Duke Package and Rule 37(e)
84 proposals went through the Judicial Conference on the consent
85 calendar. The next step is review by the Supreme Court. If the
86 proposals succeed there, they will go on to Congress.

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87 *April 2014 Minutes*

88 The draft minutes of the April 2014 Committee meeting were
89 approved without dissent, subject to correction of typographical
90 and similar errors.

91 *Legislative Report*

92 Julie Wilson provided the legislative report for the
93 Administrative Office. It does not seem likely that the remainder
94 of this Congress will enact laws that bear on the rules committees'
95 work. Variations of bills made familiar from past Congresses have
96 been introduced, including a lawsuit abuse reduction act, a
97 sunshine in litigation act, and a job creations act. Patent
98 legislation passed in the House, but it was pulled from the
99 discussion calendar in the Senate. Some form of patent legislation
100 may be introduced in the new Congress. There also have been efforts
101 to federalize some parts of trade secret law through bills that
102 invoke Civil Rule 65, the injunctions rule. These matters are being
103 monitored by the Administrative Office staff.

104 The Committee was reminded that the recent patent litigation
105 bills would create a lot of work for the Committee. Virtually every
106 version directed the rules committees to write new rules; some of
107 these provisions directed that the rules be prepared within a
108 period of six months.

109 *Forms*

110 Judge Campbell reported that the Forms Working Group in the
111 Administrative Office has already begun deliberating what response
112 they might make if the proposed abrogation of Rule 84 and the Rule
113 84 Forms is approved by the Supreme Court and Congress. They have
114 begun to think about new forms that might be created. This
115 Committee will keep in touch with the Working Group, perhaps by
116 means as formal as appointing a liaison member.

117 *Rule 67*

118 Judge Diamond reported that Rule 67(b) directs that money paid
119 into court under Rule 67(a) "must be deposited in an interest-
120 bearing account or invested in a court-approved, interest-bearing
121 instrument." Most often, the money paid into court is a relatively
122 modest sum. By statute, the clerk of the district court cannot
123 administer the funds. There must be some other administrator. And
124 the IRS recently decided that quarterly tax forms are required. The
125 burdens of complying with these tax-reporting obligations led some
126 Administrative Office staff to suggest that Rule 67(b) be amended
127 to delete the requirement that money be deposited in an interest-

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128 bearing account. But it seemed foolish to forgo interest, whether
129 at present low interest rates or at the rates that may prevail in
130 the future. Working with AO staff, Judge Diamond urged a different
131 approach. The IRS has at last agreed that it will be proper to
132 establish a single general interest-bearing account, administered
133 by the Administrative Office, to receive all Rule 67 deposits. All
134 can be reported in a single tax form. Any need to consider Rule 67
135 amendments seems to have passed.

136 Judge Campbell thanked Judge Diamond for his successful work
137 on this project.

138 *e-Rules*

139 Judge Campbell introduced the e-Rules topic by observing that
140 the Rules straddle the old world of paper and the new e-world. The
141 Standing Committee has established a subcommittee chaired by Judge
142 Chagares and constituted by members from each advisory committee.
143 Judge Oliver and Laura Briggs represent this Committee.

144 Judge Oliver noted that the subcommittee is looking at all of
145 the sets of rules to determine whether there are common problems
146 that may yield to common solutions. There indeed appears to be some
147 commonality, but it also has been agreed that there is no one-size-
148 fits-all resolution.

149 All committees have published for comment rules amendments
150 that would eliminate the allowance of "3 added days" to respond to
151 a paper served by electronic means.

152 Attention has turned to e-filing and e-service.

153 e-filing: e-filing now is left to local rules. 92 districts have e-
154 filing rules. 85 districts require e-filing, with various
155 exceptions. Rule 5(b)(2)(E) provides for service of papers
156 described by Rule 5(a) by electronic means, but only if the person
157 served consented in writing. Despite the requirement for consent,
158 many districts effectively force consent by requiring e-filing and
159 making consent to e-service a condition of entering the e-filing
160 system.

161 Laura Briggs noted that she, Judge Oliver, and the Reporter
162 agree that mandatory e-filing should be adopted as a general
163 national matter. Mandatory e-service also seems ripe for adoption.
164 So too, it seems time to provide that a Notice of Electronic
165 filing, automatically generated on e-filing, serves as a
166 certificate of service on anyone served through the court's system.
167 The question of what to do about e-signatures, on the other hand,
168 is a mess. A proposal addressing e-signatures was published by the

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169 Bankruptcy Rules Committee in the summer of 2013 but has been
170 withdrawn in the face of the comments it generated.

171 The e-filing draft Rule 5(d)(3) on page 82 of the agenda
172 materials was presented for discussion, with a revision suggested
173 by Laura Briggs and also by the Appellate Rules Committee (the
174 revision is double-underlined):

175 **(d) Filing. * * ***

176 (3) *Electronic Filing, Signing, or Verification.* ~~A court may,~~
177 ~~by local rule, allow papers to be filed~~ All filings must
178 be made, signed, or verified by electronic means that are
179 consistent with any technical standards established by
180 the Judicial Conference of the United States. Paper
181 filing must be allowed for good cause, and may be
182 required, or may be allowed for other reasons, by local
183 rule. A local rule may require electronic filing only if
184 reasonable exceptions are allowed.

185 Discussion began with the observation that the series "made,
186 signed, or verified" should not be carried over in the disjunctive
187 from the present rule. The question of e-signatures has continued
188 to cause trouble. It may be useful to allow local rules that
189 experiment with e-signatures, as the present rule seems to allow,
190 but it is not yet time to require them. Verification is tightly
191 tied to signatures. Alternative drafting should be found. The
192 drafting will depend on choices yet to be made. If, for example, it
193 is determined that courts should be allowed to experiment with
194 electronic signing or verification, the rule could be recast: "All
195 filings must be made by electronic means * * *. A court may, by
196 local rule, allow papers to be signed or verified by such
197 electronic means. Paper filing must be allowed * * *." This
198 approach is subject to the perennial "cosmic issue" posed by local
199 rules. Do we want 94 approaches to e-signing or verification? But
200 it is hard to establish a uniform rule at this stage of practice.
201 And it is at least possible that there may be geographic or
202 demographic differences that make different approaches suitable in
203 different areas.

204 Why, it was asked, do 9 districts not require electronic
205 filing? If there are good local reasons, should we defer? Or if it
206 seems likely they will gradually move to require e-filing, should
207 we simply await the outcome? No one could recall any suggestions
208 from the bar that the present rule is not working. But it was
209 answered that a uniform rule will be useful. At the same time,
210 exceptions must be allowed. "Good cause" may not be sufficient to
211 capture the need for exceptions. Local conditions may vary in ways
212 that support categorical exceptions suitable to one district but

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213 not others.

214 e-service: The draft in the agenda book, pages 83-84, adapts
215 present Rule 5(b)(2)(E):

216 **(b) Service: How made. * * ***

217 **(2) Service in General.** A paper is served under this rule
218 by: * * *

219 (E) sending it by electronic means – unless if the
220 person consented in writing shows good cause to be
221 exempted from such service or is exempted from
222 electronic service by local rule – in which event
223 service is complete upon transmission, but is not
224 effective if the serving party learns that it did
225 not reach the person to be served; or * * *

226 The first suggestion was that the long phrase set off by em
227 dashes is too long to support easy reading. An easy fix may work by
228 framing this subparagraph as two sentences:

229 (E) sending it by electronic means, unless the person
230 shows good cause to be exempted from such service
231 or is exempted by local rule. Electronic service is
232 complete upon transmission, but is not effective if
233 the serving party learns that it did not reach the
234 person to be served; or * * *

235 The exemption for good cause provoked a question asking who
236 would show good cause? A pro se litigant? A prisoner? Will it be
237 difficult to show good cause? Laura Briggs answered that in her
238 court she had never encountered a request to be exempt. But her
239 court automatically excludes pro se litigants. A judge observed
240 that his court automatically exempts pro se litigants from e-
241 service unless a judge authorizes it. Another judge observed that
242 a "good cause" showing is something separate from a categorical
243 exemption – it implies that a judge will be involved. His court had
244 some requests for exemptions in the early days of e-service.

245 Notice of Electronic Filing: The Committee on Court Administration
246 and Case Management has suggested that a notice of electronic
247 filing automatically generated by the court's filing system should
248 count as a certificate of service. The simpler of the versions in
249 the agenda materials, set out at pages 84-85, would add this
250 provision at the end of Rule 5(d)(1):

251 **(d) Filing.**

252 **(1) Required Filings; Certificate of Service.** Any paper after
253 the complaint that is required to be served ~~together~~

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254 ~~with a certificate of service~~ must be filed within a
255 reasonable time after service; a certificate of service
256 also must be filed, but a notice of electronic filing is
257 a certificate of service on any party served through the
258 court's transmission facilities.

259 It was reported that two districts in the Seventh Circuit have
260 local rules to this effect. The rules also provide that a
261 certificate must be filed to show service on parties that were not
262 served by electronic means.

263 The circuit clerk representative on the Appellate Rules
264 Committee surveyed other circuit clerks. A majority of them were
265 comfortable with allowing a notice of electronic filing to stand as
266 a certificate of service. But a minority preferred to require a
267 separate certificate of service because that may prompt the party
268 making service to think about the need to make paper service on
269 parties who are not participating in the e-filing system.

270 This proposal was not much discussed. The agenda materials
271 opened a further question by asking whether there must be a
272 certificate of service for the certificate of service; Rule
273 5(a)(1)(E), requiring service of "[a] written notice, appearance,
274 demand, or offer of judgment, or any similar paper," is ambiguous.
275 Discussion was limited to the observation that in one district
276 lawyers include a certificate of service at the end of the document
277 that is served, so that the certificate of service is itself served
278 with the document. There was no interest in addressing this
279 question by rule amendment.

280 Generic e-paper Rule: The Standing Committee subcommittee has
281 prepared a template rule that in generic terms provides that
282 electrons are equal to paper. The first part provides that a
283 reference in a set of rules to information in written form includes
284 electronically stored information. The second part provides that
285 any action that can or must be completed by filing or sending paper
286 may also be accomplished by electronic means. Each part could
287 include an "unless otherwise provided" qualification.

288 The "otherwise provided" provision could be adapted to any
289 particular set of rules by either of two approaches. One would list
290 all of the exceptions as part of the generic rule. The other would
291 include only the bland "otherwise provided" provision in the
292 generic rule, but then provide exemptions - with or without a
293 cross-reference to the generic rule - in individual rules. The
294 subcommittee discussions have recognized that different approaches
295 may be suitable in different sets of rules, and that any particular
296 set of rules may raise so many questions about exceptions that it
297 is better to avoid any generic provision.

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298 The Appellate Rules Committee is attracted to the first part,
299 providing that any reference to paper embraces electrons. It is
300 more concerned about the complications of providing that electronic
301 means can be used to effect any act that can be effected with
302 paper.

303 The questions for the Civil Rules may be distinct from the
304 questions presented by other sets of rules. It is clear that many
305 exceptions are likely to be desirable, beginning with several rules
306 that provide for initiating process – not only the familiar Rule 4
307 provisions for serving summons and complaint, but also process
308 under Rule 4.1, third-party complaints, warrants in admiralty
309 proceedings, and others. A great many different words in the rules
310 may imply paper. A simple example, complicated by evolving
311 technology and social mores, is the references to "newspaper" for
312 notice in condemnation proceedings, Rule 71.1(3)(B), and in
313 limitation-of-liability proceedings, Supplemental Rule F(4). What
314 counts as a "newspaper" today? Tomorrow? Sorting through all these
315 words, carefully, will not only be a lengthy chore. It may tax
316 understanding of present and evolving realities in an ever more
317 complex network world.

318 Discussion began with the observation that Evidence Rule
319 101(b)(6) already includes a generic provision: "a reference to any
320 kind of written material or any other medium includes
321 electronically stored information." But the Evidence Rules deal
322 with a totally different set of problems. The Civil Rules, for
323 example, embody due process notions of notice. The Civil Rules,
324 further, include a great many different words that would have to be
325 studied as possible occasions for exceptions from the equation of
326 electrons with paper.

327 The discussion turned to an open question put to the judge and
328 lawyer members: are there actual problems in practice caused by
329 uncertainties about what can be done by electronic means? No
330 committee member had encountered such problems. No one knew of any
331 local rules that address this question, apart from Local Rule 5.1
332 in the Northern, Eastern, and Western Districts of Oklahoma: "Any
333 paper filed electronically constitutes a written paper for purposes
334 of applying these rules and the Federal Rules of Civil Procedure."
335 It would be possible to ask the Federal Judicial Center to do a
336 study, but their research capacities are finite and may be better
337 devoted to more important topics. It also was observed that no
338 matter what the form of service, the common problem arises when a
339 party protests "I did not get it."

340 The Committee concluded that the very complex and time-
341 consuming task of reviewing and revising the Civil Rules to reflect
342 modern e-developments is not warranted in the absence of actual

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343 problems. Because no one has encountered such problems and the
344 rules seem to be working well in the modern electronic world, the
345 Committee concluded that the time has not yet come for the Civil
346 Rules to adopt either part of the generic template.

347 Other Civil Rule e-issues: The agenda materials, pages 89-93, list
348 a number of rules that might include specific provisions equating
349 electrons with paper. Brief discussion narrowed the list to Rule
350 72(b)(1), which directs that the clerk must promptly "mail" to each
351 party a copy of a magistrate judge's recommended disposition. "No
352 one mails." Changing it to a direction that the clerk "serve" a
353 copy is an easy and quite safe change. But this may be an
354 illustration of a gradual phenomenon in which it will come to be
355 accepted that "mail" embraces both postal and electronic delivery.
356 This rule change might be included at a time when other e-rule
357 changes are proposed. But there is no urgent need to bless what
358 clerks are doing now.

359 A particular example was discussed briefly. Rule 7.1 requires
360 that 2 copies of a disclosure statement be filed. The apparent
361 purpose was to provide one copy for the court file and one copy for
362 the judge assigned to the case. In an era of electronic court
363 records, there is no apparent need for 2 copies. But the Appellate
364 Rules Committee is considering possible substantive changes in
365 their disclosure rule, Rule 26.1. Changes in one disclosure rule
366 will require reconsideration of other disclosure rules – the rules
367 were adopted in common, through joint deliberations. It is better
368 to hold off on a minor amendment today when there is a real
369 prospect of more serious amendments in the near future.

370 It was concluded that the "other civil rules" changes to
371 embrace electronic practice should be deferred.

372 **Rule 81: Signatures on Notice of Removal**

373 The general removal provision, 28 U.S.C. § 1441(a), provides
374 for removal "by the defendant or the defendants." Section
375 1446(b)(2)(A) provides that "When a civil action is removed solely
376 under section 1441(a), all defendants who have been properly joined
377 and served must join in or consent to the removal of the action."
378 Several circuits have taken different approaches to a simple
379 question: can the attorney for one party file a notice of removal
380 on behalf of all, expressly stating that all other defendants join
381 in or consent to the removal?

382 It has been suggested that it might be useful to resolve this
383 circuit split by amending Rule 81(c)(2). Either answer could be
384 given: each defendant must separately sign, or one could sign on
385 behalf of all with an express statement that all others consent or

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386 join in the removal. Drafting would have to resolve a particular
387 question. Some removal statutes clearly provide that any defendant
388 can remove the entire action. Others are, by their terms,
389 ambiguous. Section 1442 provides that an action against United
390 States officers "may be removed by them." It is said that this
391 statute, and the similar provisions in §§ 1442a and 1443, allow
392 removal by any one defendant. But it is not clear that it would be
393 wise to assume this answer in drafting Rule 81. Beyond that, there
394 is a split in the circuits with respect to removal under the § 1452
395 provision for claims related to bankruptcy cases – some hold that
396 all defendants must join in removing, while others allow any one
397 defendant to remove. If a Rule 81 provision were drafted to apply
398 only to removals under § 1441(a), reflecting § 1446(b)(2)(A), it
399 would at least leave the question of § 1452 removal in limbo. But
400 it would hardly do to take sides on this question of statutory
401 interpretation. An alternative might be to draft a rule that
402 applies to any removal that requires joinder of all defendants who
403 have been properly joined and served. That approach would be
404 neutral on the questions of statutory interpretation.

405 Discussion began with an expression of hesitancy. Should the
406 Committee become involved in resolving a circuit split in
407 interpreting, not a Civil Rule, but a statute, and a statute that
408 deals with jurisdiction at that? A parallel example is provided by
409 an issue that has divided members of this judge's court – what to
410 do when a defendant who has diversity of citizenship with the
411 plaintiff removes before diversity-destroying defendants are
412 served. Should we try to address questions like that?

413 A lawyer observed that when the question of consent by all
414 arises, the practice is to make sure that everyone in fact joins in
415 the notice.

416 Another observation was framed as a question whether anyone
417 had encountered a situation in which a case was remanded because
418 one party had attempted to sign on behalf of all, with an express
419 statement that all had agreed? Removal tends to be approached with
420 care to meet all requirements. Lawyers are likely to find out how
421 the local circuit interprets the statute. This question probably
422 does not lead to "gotcha" problems.

423 A further observation was that it is wise to show caution in
424 using § 2072 to approach statutory problems. "The preemption power
425 is precious," and should be jealously protected by sparing use.

426 It was agreed that this question will be tabled.

427 **Pending Docket Matters**

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428 Judge Campbell introduced a long series of pending docket
429 matters by noting that it is important to undertake periodic
430 surveys of public proposals that have accumulated during periods of
431 intense work on other matters. It is important to provide close
432 attention to every proposal.

433 *Third-Party Litigation Financing: Dkt. 14-CV-B*

434 This proposal would add automatic initial disclosure of third-
435 party litigation financing agreements to Rule 26(a)(1)(A).

436 Third-party litigation financing is, or seems to be, a
437 relatively new phenomenon. It is not clear just what forms of
438 financial assistance to a lawyer or to a party might be included
439 under this label, nor is it clear whether the label itself should
440 be adopted. Many ads offering financial support to lawyers seem to
441 involve general loans to the firm, or to be ambiguous on the
442 relationship between possible financing terms and specific
443 individual litigation.

444 The proposal seeks to exclude contingent-fee agreements from
445 the disclosure requirement, referring to "any agreement under which
446 any person, other than an attorney permitted to charge a contingent
447 fee representing a party, has a right to receive compensation that
448 is contingent on, and sourced from any proceeds of the civil
449 action, by settlement, or otherwise." This language could include
450 assignments. If work proceeds, the rule language will require
451 careful attention to capturing the arrangements that seem fair
452 subjects for mandatory disclosure, excluding others.

453 The proposal has been supplemented in the few days before this
454 meeting by submissions from opponents and proponents of the
455 proposal addressing some issues raised in the Committee's agenda
456 memo.

457 The proponents of disclosure may be concerned more with
458 generating information to support careful examination of third-
459 party litigation financing in general than with the impact on
460 disclosure in any particular action.

461 Supporters of disclosure invoke the provision for initial
462 disclosure of liability insurance. This disclosure provision grew
463 out of 1970 amendments that resolved a disagreement among district
464 courts by allowing discovery of liability insurance. The idea was
465 that liability insurance plays an important role in the practical
466 decisions lawyers make in determining whether to settle and in
467 preparing to litigate. Permission for discovery was converted to
468 initial disclosure in 1993, making it routine. But the analogy is
469 not perfect. Long before 1970, liability insurance had come to play

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470 a central role in supporting actual effectuation of general tort
471 principles. Litigation financing is too new, and experience with it
472 too limited, to come squarely within the same principle. The effect
473 on settlement negotiations, for example, may be rather different.
474 The 1970 Committee Note recognized that discovery of insurance
475 terms and limits might encourage settlement, but in other cases
476 might make settlement more difficult. The role of insurers in
477 settlement negotiations is familiar, and in many states has led to
478 rules of liability for bad-faith refusal to settle. What role
479 litigation financing firms may play in settlement decisions,
480 properly or otherwise, is a thorny question.

481 The settlement question is one example of a broader range of
482 questions. Some third-party financing arrangements may, by their
483 terms or in operation, raise questions of professional
484 responsibility. How far may the lender intrude on the client's
485 freedom to decide whether to accept a settlement – for example, an
486 offer on terms that would reward the lender but leave very little
487 for the client? How far may the lender, either in making the
488 arrangement initially or as the action progresses, ask for
489 disclosures that intrude on confidentiality – and what protections
490 may there be to ensure truly informed client consent?

491 The proponents offer several policy reasons for disclosure.

492 First, it is urged that disclosure will help ensure that
493 judges do not have conflicts of interest arising from the judge's
494 stake in an enterprise that, directly or indirectly, is providing
495 the litigation financing. Present Rule 7.1 does not seem to extend
496 this far. Third-party litigation financing, further, may be
497 provided for the first time pending appeal, when the case is no
498 longer in the district court. Should a disclosure rule attempt to
499 reach this far, or should the Appellate Rules be revised in
500 parallel?

501 Another argument is that a defendant should know who is really
502 on the other side of the action. This can affect settlement
503 decisions, for example by knowing that the plaintiff has financial
504 support to stay in the litigation for the long haul. But is it
505 desirable to facilitate settlement at lower values when the
506 defendant knows there is no outside support and that it may be
507 easier to wear out the plaintiff's reserves? Third-party financing
508 firms, moreover, assert that they are always interested in quick,
509 sure payment through settlement.

510 Disclosure also is supported by arguing that it may be
511 important in deciding motions that seek to shift the burden of
512 litigation expenses. Even before the current pending proposals, the
513 rules provide that a court determining the proportionality of

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514 discovery should consider the parties' resources. The pending
515 proposals would amend Rule 26(c) to include an express reference to
516 allocating the expense of discovery as part of a protective order,
517 reflecting established practice. The argument is that it would be
518 unfair, or worse, to allow a party to pretend to have no more than
519 the party's own resources to bear the expenses of discovery. But
520 cost-shifting does not seem to happen often, and an inquiry into
521 third-party financing can always be made at the time of a cost-
522 shifting motion.

523 Finally, it is argued that information about third-party
524 financing can be useful in determining sanctions. Support is found
525 in a case from a Florida state court.

526 These questions are interesting. There is much to learn.
527 DePaul Law School held a conference on third-party financing last
528 year, generating more than 500 pages of articles. They provide a
529 fascinating introduction, but not a complete picture.

530 Discussion after this introduction began with the observation
531 that the question is not whether third-party financing agreements
532 are discoverable. They might – or might not – be discoverable as an
533 incident to settlement negotiations. The question whether to
534 provide for automatic initial disclosure may be premature. Whether
535 characterized as a range of phenomena or a broad phenomenon that
536 includes many variations, there are too many things involved to
537 justify adopting a disclosure requirement now. "This is too much
538 different from insurance." These views were echoed by others.

539 Another member offered an analogy to Supreme Court Rule 37.6,
540 which requires disclosures for briefs amicus curiae. The lawyer who
541 files the brief must reveal "whether counsel for a party authored
542 the brief in whole or in part and whether such counsel or a party
543 made a monetary contribution intended to fund the preparation or
544 submission of the brief," and identify contributors other than the
545 identified friend. The Court's interest in knowing who may be
546 masquerading as an amicus is perhaps different from third-party
547 financing of litigation as a whole, but suppose the identified
548 plaintiff has actually been paid off and is as much a shell as a
549 purported amicus?

550 A different member stated that he deals with third-party
551 financing in about half his cases, often in representing plaintiffs
552 in patent cases. The cost of litigating patent actions is ever
553 increasing. Simple out-of-pocket expenses can run into the millions
554 of dollars. Fewer lawyers are able to take these cases on
555 contingent-fee agreements alone. "Third-party litigation financing
556 makes it possible to bring cases that deserve to be brought." At
557 the same time, the ethical issues are real. Attention has been paid

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558 to these issues, and more attention will be paid to them. It is not
559 clear that initial disclosure will advance consideration of these
560 questions. And, although it seems clear that knowledge of third-
561 party financing can advance decision of specific issues in an
562 individual case – cost-shifting is an example – that is better
563 dealt with in the case than by adopting initial disclosure. So too,
564 the analogy to insurance disclosure is not close. It is hard to
565 follow the argument that disclosure will remove a deterrent to
566 settlement. Knowing the specific terms of the financing agreement
567 will not contribute to that. There are, moreover, many different
568 forms of financing: it may be as simple as a loan, with contingent
569 repayment, that leaves the lender entirely out of the conduct of
570 the litigation. But some funders want to be involved in developing
571 and pursuing the case, and in settlement. These arrangements bear
572 on attorney-client privilege, and may lead to divided loyalties as
573 between lender and client. Again, those problems do not have much
574 to do with the disclosure proposal.

575 A judge expressed doubts about the need for disclosure. He
576 routinely requires the person with settlement authority to be
577 present at conferences; "I can get the information I need."
578 Similarly, the information can be got if it is relevant to cost-
579 shifting.

580 Another judge agreed that the proposal is premature. We do not
581 yet know enough about the many kinds of financing arrangements to
582 be able to make rules.

583 A member noted that the ABA 20/20 Commission on Ethics
584 produced a white paper on alternative litigation funding. The paper
585 noted that these practices are evolving. The paper expressed a hope
586 that work would continue toward studying the impact of funding on
587 counsel's independence, candor, confidentiality, and undivided
588 loyalty.

589 A third judge thought third-party funding "is like ghost-
590 writing; I like to know who's writing what I read." The judges on
591 her court have not yet agreed whether they can compel disclosure of
592 third-party financing. But this belongs in the array of things that
593 judges should be aware of.

594 A fourth judge agreed with a different analogy. Professional-
595 looking filings appear in pro se cases. It is useful to know
596 whether the party has had professional help in order to decide
597 whether to measure a pleading by the more forgiving standards that
598 apply to pro se parties. "I do ask questions at status hearings;
599 some of my colleagues are more aggressive." His court is
600 considering a local rule to address this question. The third judge
601 agreed – she has a standing order that requires identification of

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602 the actual author.

603 A fifth judge suggested that the concern about potential
604 conflicts extends beyond judges to include opposing counsel. But
605 this is not a study for this Committee to undertake.

606 And a sixth judge agreed that courts have the tools to get the
607 information needed to rule on discovery issues, and to order
608 appearance by a person with settlement authority, and so on. The
609 task of determining the author of nominally pro se papers presents
610 a different question.

611 Discussion concluded with the observation that no one has
612 argued that these questions are unimportant. Nor has it been argued
613 that they should be ignored. But third-party financing practices
614 are in a formative stage. They are being examined by others. They
615 have ethical overtones. We should not act now.

616 Another member agreed that the question is premature. There
617 has been a flurry of articles. "The authors are all over the
618 place." Some, highly respected, have suggested that the concerns
619 reflected by this proposal are premature.

620 The Committee decided not to act on these issues now.

621 *Nonparty Rule 30(b)(6) Depositions: Dkt. 13-CV-E*

622 The Committee on Federal Courts of the New York City Bar
623 submits proposals to address problems they believe arise from
624 notices to take Rule 30(b)(6) depositions of entities that are not
625 parties to the underlying litigation. The central problem is that
626 notices set the deposition at a time too early to enable the
627 nonparty to properly educate the witnesses who will appear to
628 provide testimony for the nonparty named as the deponent. The
629 response to this problem takes two forms: Objections are advanced
630 as to the scope of the subpoena, and the witnesses are prepared
631 only on subjects within the scope accepted by the nonparty entity.
632 The nonparty also may move for a protective order, and take the
633 position that it need not appear for the deposition before the
634 court rules on the objections.

635 The proposal rejects one possible remedy, adaptation of the
636 Rule 45(d)(2)(B) procedure that allows an objection to a subpoena
637 to produce and suspends the subpoena until the court orders
638 enforcement. This approach is thought too severe for depositions,
639 because a deposition is a discrete event and does not provide the
640 opportunities for negotiation that occur in the course of a
641 "rolling" response to a subpoena to produce. Instead, it is urged
642 that the rules should require a minimum 21-day notice of the

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643 deposition. In addition, the proposal would require that a subpoena
644 addressed to a nonparty entity for a Rule 30(b)(6) deposition state
645 the reasons for seeking discovery of the matters identified in the
646 notice. Finally, the suggestion would amend Rule 30, probably by
647 adding a new subdivision, to provide that a motion for a protective
648 order or to quash or modify the subpoena voids the time stated for
649 the deposition.

650 Reasons for caution were sketched. This proposal is the first
651 indication of the problem it describes. Rule 30(b)(6) was explored
652 in some depth a few years ago in response to suggestions made by a
653 committee of the New York State Bar Association; the question of
654 inadequate notice to a nonparty Rule 30(b)(6) deponent was not even
655 mentioned then. Nor have there been any other suggestions of this
656 problem.

657 Discussion began with a similar observation that the Committee
658 recently engaged in an in-depth exploration of Rule 45. The work
659 began with identification of 17 possible topics that might be
660 addressed, and narrowed the list to the changes that became
661 effective less than a year ago. This proposal comes as describing
662 a surprise set of issues.

663 Judge Koeltl said that any suspicion that the proposal may
664 reflect problems unique to practice in the Southern or Eastern
665 Districts of New York should be laid to rest. "I do not see it as
666 a problem." He expressed enormous respect for the City Bar's
667 Federal Courts Committee. It did wonderful work for the Duke
668 Conference, and again in its comments on the Duke Rules Package.
669 But this should not be a problem in the Southern District. Local
670 rules require a conference with the court before making a discovery
671 motion. "I've never seen this as a problem."

672 Another judge observed that if the nonparty deponent is in
673 another state, enforcement of the subpoena will be in the court
674 where compliance is expected. And the party serving the subpoena is
675 required to take steps to avoid imposing unreasonable burdens on
676 the deponent. Rule 45(d)(3)(A) provides further protection,
677 requiring the court to quash or modify a subpoena that fails to
678 allow a reasonable time to comply. "The rules provide pretty good
679 protection" now.

680 A third judge suggested that generally the Committee seeks to
681 frame rules of general application. "This seems a very specific
682 problem; a rule addressed to it could create collateral problems.
683 If there's a problem, it arises from judges who are not tending to
684 their cases."

685 A fourth judge thought that the problem reflects the kinds of

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686 concerns that underlie the pending proposal to amend Rule 1 to
687 include the parties in the obligation to construe and administer
688 the rules to achieve the just, speedy, and inexpensive
689 determination of the action. The deponent's lawyer should describe
690 the problem to the lawyer who issued the subpoena, and they should
691 work out a suitable time for the deposition. It is in no one's
692 interest to have an ill-prepared witness.

693 Still another judge observed that in some circumstances a
694 lawyer may have strategic reasons to hope for an ill-prepared
695 witness testifying under Rule 30(b)(6) for an entity that is a
696 party – that was the subject of the earlier Rule 30(b)(6) inquiry.
697 But there is no similar potential for strategic advantage when the
698 witness testifies for a nonparty entity. "Lawyers should be able to
699 resolve this."

700 A member noted that the ABA Litigation Section Pretrial Task
701 Force has Rule 30(b)(6) on its agenda, and may eventually bring
702 forward proposals for revision. The question of setting the time
703 for a nonparty Rule 30(b)(6) deposition too soon has not been on
704 its list.

705 It was concluded that this proposal should be set aside.

706 *Attorney-Client Privilege Appeals: Dkt. 10-CV-A*

707 Professor Marcus introduced this proposal, which would amend
708 Rule 37 to authorize a court of appeals to grant a petition for
709 immediate interlocutory review of a ruling that grants or denies a
710 motion to compel discovery of information claimed to be protected
711 by attorney-client privilege. The revision would be drawn on lines
712 that parallel permissive Rule 23(f) appeals from orders granting or
713 denying class certification. A similar provision has been submitted
714 to the Appellate Rules Committee, which has decided not to pursue
715 it. Their view is that existing opportunities for review suffice,
716 although they are not often invoked. The traditional remedy is to
717 disobey the order to produce, be held in contempt, and appeal the
718 contempt order – and even that approach is limited by the rule that
719 a party can appeal only a criminal contempt order, not a civil
720 contempt order. Another remedy is by extraordinary writ; mandamus
721 may be somewhat more freely available to test questions of
722 privilege and other confidentiality concerns, but still is
723 carefully limited. Extending beyond the limits of these remedies –
724 and recognizing the possible availability of § 1292(b) appeals by
725 permission of both the district court and the court of appeals –
726 will create difficult problems of drawing lines that promote
727 desirable opportunities for appeal without stimulating many ill-
728 founded attempts.

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729 The question arises from the decision in Mohawk Industries,
730 Inc. v. Carpenter, 130 S.Ct. 599 (2009). The Court ruled that the
731 collateral-order doctrine supports "finality" only as to all cases
732 within a described "category," or as to none of them. An order
733 compelling production of materials found to have been initially
734 protected by attorney-client privilege, but to have lost the
735 protection by waiver, was in a category that did not fit the
736 criteria for collateral-order appeal in all cases. Alternative
737 means of review provide adequate protection. At the same time, the
738 Court suggested that if it is desirable to provide somewhat greater
739 opportunities for interlocutory review, it is better that they be
740 established through the Rules Enabling Act than by judicial
741 elaboration of § 1291 or other judicial doctrines.

742 Invocation of the Rule 23(f) analogy helps to frame the
743 question. Grant or denial of class certification can have an
744 enormous impact on the case – denials were once held appealable as
745 the "death knell" of actions that could not be expected to survive
746 if only individual claims remained to be litigated (another example
747 of collateral-order appeal doctrine rejected by the Supreme court),
748 while grants can exert a hydraulic pressure to settle while facing
749 the great costs of defending a class action and the risks of "bet-
750 the-company" judgments. The stakes are high. And, although there
751 are many class actions and no small number of requests for Rule
752 23(f) appeals, the occasions for potential appeals remain finite.
753 Even if the categories of appeal were limited to attorney-client
754 issues, these issues arise far more often, and are likely to be
755 much less momentous.

756 A judge observed that the opportunities for appellate review
757 that remain available after the Mohawk decision "are not much
758 help." But attorney-client privilege is invoked in an overwhelming
759 number of cases. And it often is raised without even attempting to
760 comply with the requirements of Rule 26(b)(5)(A) to describe the
761 nature of the matters objected to in a way that will enable other
762 parties to assess the claim of privilege. "The potential
763 applications are enormous."

764 A lawyer noted that if the problem involves waiver of the
765 privilege, Evidence Rule 502(d) and the proposed Civil Rules
766 amendments that provide express reminders of Rule 502(d) "reflect
767 a big effort to reduce the occasions for waiver." Judges, moreover,
768 generally do a really good job in ruling on privilege issues. These
769 issues come up far more often than reported cases might suggest.
770 The Appellate Rules Committee seems to have got it right.

771 Another judge noted that there are many privileges apart from
772 the attorney-client privilege beloved by lawyers. Why should a
773 special appeal provision be limited to just this one privilege? And

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774 what of work-product protection? We should stay away from these
775 issues.

776 The Committee concluded that this subject should be removed
777 from the agenda.

778 *Rule 41: Dkt. 14-CV-D; 10-CV-C*

779 Docket item 14-CV-D was the submission of a law review article
780 by Professor Bradley Scott Shannon, "Dismissing Federal Rule of
781 Civil Procedure 41," 52 U. of Louisville L.Rev. 265 (2014).

782 The article advances two basic packages of suggestions. The
783 first identifies several well-known shortcomings in Rule 41. The
784 second bewails the reliance of Rule 41 on the often-criticized
785 terms "with prejudice," "without prejudice," and "on the merits."

786 Among the perceived shortcomings are these: (1) The unilateral
787 right to dismiss without prejudice should be terminated by a motion
788 to dismiss as well as by an answer or a motion for summary
789 judgment. There is an obvious analogy to the right to amend a
790 pleading once as a matter of course under Rule 15(a)(1)(A) – Rule
791 15 was recently amended to cut off this right 21 days after a
792 motion under Rule 12(b), (e), or (f). (2) Rule 41(a)(1)(A)
793 addresses dismissal of "an action." Provision should be made for
794 dismissing part of an action, whether it be one of several claims
795 or one of several parties. Dismissal of a claim might better be
796 accomplished by Rule 15 amendment of the pleading – Rule 15 covers
797 not only an initial period when amendment does not require court
798 permission but also later times in the action when leave is
799 required but is freely granted. Addressing dismissal of a "claim"
800 without prejudice, further, might invite confusion about the
801 various approaches that define what is a "claim" according to the
802 context of inquiry. There is a risk of confusing what is a "claim"
803 for the claim-preclusion aspect of res judicata with what might
804 suitably be treated as a "claim" for voluntary abandonment.
805 Dismissal of all claims against a party also can be accomplished
806 through Rule 15, but Rule 41 might be amended to address this. (3)
807 Rule 41(c) addresses voluntary dismissal of a counterclaim,
808 crossclaim or third-party claim; other claims are not addressed. As
809 just one example, a third-party defendant may file a claim against
810 the original plaintiff. The suggestion is that Rule 41(c) should be
811 amended to provide that it "applies similarly" to dismissal of any
812 type of claim not enumerated. (4) A related possibility would be to
813 add a motion for summary judgment (or a Rule 12 motion) to the
814 events that cut off unilateral dismissal without prejudice of a
815 counterclaim, crossclaim, or third-party claim under Rule 41(c).
816 (There is a respectable view that "summary judgment" was omitted
817 from Rule 41(c) by simple absent-mindedness.)

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818 The difficulties that inhere in the concepts of "prejudice,"
819 "on the merits," and the like also are well known. For example,
820 Rule 41(b) provides that a dismissal for lack of jurisdiction is
821 not on the merits. But the dismissal in fact establishes issue
822 preclusion on any matter necessarily decided in finding a lack of
823 jurisdiction. The claim, on the other hand, is not precluded if a
824 subsequent action is brought in a court that does have
825 jurisdiction. The proposed remedy is to amend Rule 41 to refer
826 directly to preclusion consequences - "does not preclude,"
827 "precludes," and so on. Reasons for caution on this score begin
828 with the proposition that the intricacies of applying present Rule
829 41 are well known and have been thoroughly addressed by the courts
830 and in the literature. So there is a real prospect that abandoning
831 the familiar and familiarly interpreted phrases in favor of open-
832 ended invocations of general preclusion law could invite new
833 confusions and unsettling arguments. There is little reason to
834 believe that better preclusion results would be reached.

835 Discussion began by asking the Committee whether they see
836 these problems in practice.

837 A judge said that these problems are easily worked out in
838 practice. For example, a motion may be made for default judgment
839 against one defendant when another defendant has not been properly
840 served. To get to and through a hearing on damages, the plaintiff
841 may amend the complaint to dismiss the defendant not served. Or on
842 a motion to review a proposed settlement under the Fair Labor
843 Standards Act, the parties may discover that they have unresolved
844 issues as to attorney fees and prefer to dismiss so they can work
845 out a full settlement.

846 The conclusion was that Professor Shannon has pointed to ways
847 in which Rule 41 can be improved. But the Committee operates in the
848 instinctive belief that it is better to resist the temptation to
849 make abstract improvements in the rules. The risk of unintended
850 consequences counsels caution. Amendments to address real-world
851 problems are more important. For Rule 41, that holds for these
852 proposals. They will be put aside.

853 *Rule 48: Non-Unanimous Verdicts in Diversity Cases: Dkt. 13-CV-A*

854 This proposal would amend Rule 48 to adopt state majority-
855 verdict rules for diversity cases. The suggested reason is that
856 defendants commonly view majority-verdict rules as something that
857 favors plaintiffs. When an action that could be brought in federal
858 diversity jurisdiction is brought in a state court that has a
859 majority-verdict rule, a defendant has an incentive to remove for
860 the purpose of invoking the federal unanimity requirement. Cases
861 are brought to federal courts that would not come there if the

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862 federal courts adhered to the state-court majority-verdict rule.

863 The first issues raised by this proposal are whether majority-
864 verdict rules are better than a unanimity requirement, and, if so,
865 whether the Seventh Amendment permits a majority-verdict without
866 the parties' consent. If majority verdicts are better, and if the
867 Seventh Amendment permits – almost certainly a requisite even for
868 a rule limited to diversity cases – then Rule 48 should provide for
869 majority verdicts in all cases, or at least for all diversity and
870 supplemental jurisdiction cases. Otherwise, the question is whether
871 it is better to defer to state practice either from a pragmatic
872 desire to reduce removals or from an Erie-like sensitivity to the
873 prospect that majority verdicts are sufficiently "bound up" with
874 state substantive principles to deserve relief from the general
875 Rule 48 command for uniformity.

876 The majority-verdict question may intersect the question of
877 jury size. A couple of decades ago the Committee explored
878 restoration of the 12-person civil jury, expressly deferring
879 consideration of majority-verdict rules pending resolution of that
880 issue. That attempt failed. But the underlying questions remain:
881 how far do the dynamics of deliberation in a 12-person jury differ
882 from those in a 6-person jury? How far are the dynamics of
883 deliberation affected by allowing a majority verdict? How do these
884 effects interact if a verdict can be reached by a majority of a 6-
885 person jury?

886 Discussion began with the observation that many considerations
887 affect a defendant's decision whether to remove an action, whether
888 it is a diversity action or a federal-question action. "If we are
889 to start addressing the reasons defendants have for removing, it
890 will be a daunting task. The premise is troubling."

891 Agreement was expressed as to strategic concerns. A variety of
892 strategic factors may lead to removal. But "this one is
893 significant." Generally plaintiffs like majority verdicts, which
894 may facilitate horsetrading between damages and liability. There
895 are sound Erie-like reasons to honor state rules on jury size and
896 unanimity. "We should not distrust state policymaking on this."
897 There is no important federal policy to be served by deferring to
898 defendants' strategic choices. The proposal can be drafted easily.
899 But it will generate a lot of controversy. It is not clear whether
900 the value of the change will be worth enduring the controversy.

901 The problem of supplemental jurisdiction was raised. Many
902 cases present federal questions and state-law questions that
903 involve many of the same issues of fact. There may be diversity
904 jurisdiction as well as federal-question jurisdiction, or there may
905 be only supplemental jurisdiction over the state-law questions, or

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906 - in a particularly convoluted area of jurisdiction - there may be
907 federal-question jurisdiction over a state-created claim that
908 centers on a federal question. Should the majority-verdict rule
909 that would apply to the state-law questions extend to the federal
910 questions as well, so as to avoid the grim spectacle of telling the
911 jury it must answer common questions unanimously as to part of the
912 case, but can answer the same questions by majority verdict as to
913 other parts?

914 Professor Coquillette recalled an article he wrote with David
915 Shapiro on the fetish of jury trials. The majority-verdict question
916 is a complicated one.

917 Another member agreed with the view that clear drafting can be
918 achieved. She also agreed with the view that it is a good thing to
919 reduce the strategic use of diversity jurisdiction. Courts and
920 others are interested anew in the importance of jury trials. Any
921 proposal will be controversial, but this is a matter of genuine
922 interest to the present and future of jury trials. We ask juries to
923 apply different standards of persuasion to different issues in a
924 single trial, and expect them to perform this feat. They could
925 likewise manage to apply majority-verdict rules to some elements,
926 and a unanimity requirement to others. Or we could draft a
927 compromise rule that gives the court discretion whether to apply a
928 majority-verdict rule.

929 Brief discussion found no confident answer to the question of
930 how many states permit majority verdicts.

931 Doubts about adopting state practice were expressed by noting
932 that "this is not like service of process," a purely technical
933 matter. There may be substantial federal interests involved in the
934 unanimity requirement.

935 The question turned to other aspects of jury practice. Some
936 states are beginning to follow Arizona, which has been a leader in
937 relaxing many traditional practices. Jurors can ask questions. They
938 can take notes. They can deliberate throughout the trial. Should a
939 federal court follow these practices in diversity cases that would
940 be tried in such a state, even if it would not do so in a federal-
941 question case? Or, to take a nonjury example, cases have been
942 removed by defendants because they like the expert-witness report
943 requirements of Rule 26(a)(2), or because they like the Daubert
944 approach to expert witnesses. Do we want to eliminate all federal
945 practices that may affect the outcome?

946 A similar question asked whether the federal court should be
947 required to draw the jury from the same area that would supply
948 jurors to the state court. An example was offered of experience in

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949 criminal cases, where state authorities may cede the lead to
950 federal prosecutors in order to draw the jury from a broader area
951 than would supply the state-court jurors. There are areas where it
952 is appropriate to follow federal-court jury practices; it is
953 difficult to see why the unanimity issues should be different.

954 Turning back to reasons that may support the proposal, it was
955 noted that a defendant's hope for a unanimity requirement may be
956 different from other strategic concerns. Majority-verdict rules
957 reflect long-held state policies. The federal unanimity requirement
958 can be seen as archaic, even odd.

959 A related phenomenon was noted. A case is removed, dismissed
960 by the plaintiff, then filed again in state court with an added
961 defendant that destroys diversity. If removal is attempted again,
962 the federal court does not evaluate the plaintiff's strategic
963 choices; it asks only whether the new party is properly joined.

964 A judge observed that under Rule 81(c), federal procedures
965 apply after removal. We should adhere to that principle here.

966 Discussion turned to the policies that underlie the grant of
967 diversity jurisdiction in § 1332. It would be difficult to
968 attribute any intent to Congress with respect to jury unanimity –
969 § 1332 goes back to the First Judiciary Act, and its perpetuation
970 by successive Congresses in confronting periodic attempts to revise
971 or eliminate the jurisdiction leaves too many uncertainties to
972 support any attribution of relevant intent. Nor does it seem that
973 the question can be usefully approached as an attempt to rebalance
974 strategic motivations. The purpose of § 1332 "is to alleviate
975 perceived unfairness." The change "would be a large move."

976 A related suggestion was that diversity jurisdiction was
977 established "to avoid hometown advantage." This purpose is
978 difficult to apply across the wide range of practices that can
979 affect outcome. Maryland, for example, does not have individual
980 judge case assignments. The District of Maryland does. That can
981 have a strong influence on the cost and speed of bringing the case
982 to a conclusion. Or, for a different example, the summary-judgment
983 rules in state and federal court look the same on paper. But there
984 are significant differences in actual practice.

985 The question whether to take up this proposal was put to a
986 voice vote. A clear majority voted to remove it from the docket.

987 *Rule 56: Summary-Judgment Standards: Dkt. 14-CV-E*

988 Professor Suja A. Thomas submitted for the docket her article
989 on Rule 56, "Summary Judgment and the Reasonable Jury Standard," 97

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990 Judicature 222 (2014). The article suggests that it is not really
991 possible for a single trial judge, nor even a panel of three
992 appellate judges, to know or imagine what facts a reasonable jury
993 might find with the benefit of reasoning together in the dynamic
994 process of deliberation. That part of it ties to her earlier
995 writing, which casts doubt on the constitutionality of summary
996 judgment under the Seventh Amendment. The conclusion, however, is
997 that the standard for summary judgment "is ripe for reexamination.
998 The rules committee, if so inclined, would be an appropriate body
999 to engage in this study with assistance from the Federal Judicial
1000 Center, and such study would be welcome."

1001 The suggestion for study goes beyond work of the sort the
1002 Federal Judicial Center has already done. A broad study of pretrial
1003 motions is now underway. But these studies count such things as the
1004 frequency of motions; the rate of grants, partial grants, and
1005 denials; variations along these dimensions according to categories
1006 of cases; variations among courts; and other objective matters that
1007 yield to counting. There has not been an attempt to evaluate the
1008 faithfulness of actual decisions to the announced standard.
1009 Consultation with the Federal Judicial Center staff suggests that
1010 there are good reasons for this. The only way to appraise the
1011 actual operation of the summary-judgment standard in the hands of
1012 judges would be to provide an independent redetermination of a
1013 large number of decisions. To be fully reliable, the
1014 redetermination would have to be made by judges believing they were
1015 actually resolving a real motion in a real case – a determination
1016 made without that pressure might be reached casually because it is
1017 only for research, not real life. Substituting lawyers or scholars
1018 or other researchers would lose not only the reality but also the
1019 training and experience of judges. It has not seemed possible to
1020 frame such a study.

1021 Discussion began with a statement that Professor Thomas
1022 believes that summary judgment violates the Seventh Amendment. "The
1023 idea that judges cannot determine the limits of reasonableness is
1024 wrong." Even in a criminal case, a judge may refuse to submit a
1025 proffered defense to the jury if it lacks evidentiary support.

1026 Another judge observed that experience with Professor Thomas
1027 while she was in practice showed her to be a wonderful lawyer. Rule
1028 56 is a subject that has concerned the plaintiff's bar because of
1029 the ways in which it is administered. Professor Arthur Miller is
1030 another who thinks that summary judgment is at times granted
1031 unreasonably, leading to dismissal without trial. "There are too
1032 many Rule 56 motions that should not be made." "I try to discourage
1033 some of them in pre-motion conferences, but they get made." But it
1034 is difficult to know what could be done to improve application by
1035 changing the rule language.

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1036 Still another judge suggested that "the problem is with
1037 judges, not the rule." Motions invoking qualified immunity provide
1038 an example – we regularly entrust to judges the determination of
1039 what a reasonable officer would know. No doubt judges bring their
1040 own biases to bear. "We can educate judges about this, but we
1041 cannot dehumanize judges."

1042 Similar observations were offered by another judge. Judges
1043 make determinations of reasonableness all the time. They decide
1044 motions for judgment as a matter of law. They decide motions for
1045 acquittal in criminal cases. They make determinations under the
1046 Evidence Rules.

1047 A member said that the article was entertaining, but left an
1048 uncertain impression as to what the Committee should do, apart from
1049 undertaking a study.

1050 This discussion turned to the question whether judgment as a
1051 matter of law violates the Seventh Amendment. The summary-judgment
1052 standard is anchored in judgment as a matter of law. The 1991
1053 amendments of Rule 50, indeed, were undertaken in part to emphasize
1054 the continuity of the standard between Rules 50 and 56. But if we
1055 were to take literally the general statement that the Seventh
1056 Amendment measures the right to jury trial by practice in 1791, it
1057 would be difficult to support judgment as a matter of law. In 1794,
1058 a unanimous Supreme Court instructed a jury in an original-
1059 jurisdiction trial that although the general rule assigns
1060 responsibility for the law to the court and responsibility for the
1061 facts to the jury, still the jury has lawful authority to determine
1062 what is the law. If a jury can determine that the law is something
1063 different from what the judges think is the law, it would be nearly
1064 impossible to imagine judgment "as a matter of law." But by 1850
1065 the Supreme Court recognized the directed verdict, and the standard
1066 has evolved ever since. Professor Coquillette added that there were
1067 many differences among the colonies-states in jury-trial practices
1068 as of 1791. A member added that it is clear a court may direct
1069 acquittal in a criminal case, a power that exists for the
1070 protection of the defendant.

1071 The Committee unanimously agreed to remove this proposal from
1072 the agenda.

1073 *Rule 68: Dockets 13-CV-B, C, D. 10-CV-D, 06-CV-D, 04-CV-H, 03-CV-B,*
1074 *02-CV-D*

1075 Rule 68, dealing with offers of judgment, has a long history
1076 of Committee deliberations followed by decisions to avoid any
1077 suggested revisions. Proposed amendments were published for comment
1078 in 1983. The force of strong public comments led to publication of

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1079 a substantially revised proposal in 1984. Reaction to that proposal
1080 led the Committee to withdraw all proposed revisions. Rule 68 came
1081 back for extensive work early in the 1990s, in large part in
1082 response to suggestions made by Judge William W Schwarzer while he
1083 was Director of the Federal Judicial Center. That work concluded in
1084 1994 without publishing any proposals for comment. The Minutes for
1085 the October 20-21 1994 meeting reflect the conclusion that the time
1086 had not come for final decisions on Rule 68. Public suggestions
1087 that Rule 68 be restored to the agenda have been considered
1088 periodically since then, including a suggestion in a Second Circuit
1089 opinion in 2006 that the Committee should consider the standards
1090 for comparing an offer of specific relief with the relief actually
1091 granted by the judgment.

1092 Although there are several variations, the most common feature
1093 of proposals to amend Rule 68 is that it should provide for offers
1094 by claimants. From the beginning Rule 68 has provided only for
1095 offers by parties opposing claims. Providing mutual opportunities
1096 has an obvious attraction. The snag is that the sanction for
1097 failing to better a rejected offer by judgment has been liability
1098 for statutory costs. A defendant who refuses a \$80,000 offer and
1099 then suffers a \$100,000 judgment would ordinarily pay statutory
1100 costs in any event. Some more forceful sanction would have to be
1101 provided to make a plaintiff's Rule 68 offer more meaningful than
1102 any other offer to settle. The most common proposal is an award of
1103 attorney fees. But that sanction would raise all of the intense
1104 sensitivities that surround the "American Rule" that each party
1105 bears its own expenses, including attorney fees, win or lose.
1106 Recognizing this problem, alternative sanctions can be imagined -
1107 double interest on the judgment, payment of the plaintiff's expert-
1108 witness fees, enhanced costs, or still other painful consequences.
1109 The weight of many of these sanctions would vary from case to case,
1110 and might be more difficult to appraise while the defendant is
1111 considering the consequences of rejecting a Rule 68 offer.

1112 Another set of concerns is that any reconsideration of Rule 68
1113 would at least have to decide whether to recommend departure from
1114 two Supreme Court interpretations of the present rule. Each rested
1115 on the "plain meaning" of the present rule text, so no disrespect
1116 would be implied by an independent examination. One case ruled that
1117 a successful plaintiff's right to statutory attorney fees is cut
1118 off for fees incurred after a rejected offer if the judgment falls
1119 below a rejected Rule 68 offer, but only if the fee statute
1120 describes the fee award as a matter of "costs." It is difficult to
1121 understand why, apart from the present rule text, a distinction
1122 should be based on the likely random choice of Congress whether to
1123 describe a right to fees as costs. More fundamentally, there is a
1124 serious question whether the strategic use of Rule 68 should be
1125 allowed to defeat the policies that protect some plaintiffs by

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1126 departing from the "American Rule" to encourage enforcement of
1127 statutory rights by an award of attorney fees. The prospect that a
1128 Rule 68 offer may cut off the right to statutory fees, further, may
1129 generate pressures on plaintiff's counsel that might be seen as
1130 creating a conflict of interests with the plaintiff. The other
1131 ruling is that there is no sanction under Rule 68 if judgment is
1132 for the defendant. A defendant who offers \$10,000, for example, is
1133 entitled to Rule 68 sanctions if the plaintiff wins \$9,000 or \$1,
1134 but not if judgment is for the defendant. Rule 68 refers to "the
1135 judgment that the offeree finally obtains," and it may be read to
1136 apply only if the plaintiff "obtains" a judgment, but the result
1137 should be carefully reexamined.

1138 The desire to put "teeth" into Rule 68, moreover, must
1139 confront concerns about the effect of Rule 68 on a plaintiff who is
1140 risk-averse, who has scant resources for pursuing the litigation,
1141 and who has a pressing need to win some relief. The Minutes for the
1142 October, 1994 meeting reflect that "[a] motion to abrogate Rule 68
1143 was made and seconded twice. Brief discussion suggested that there
1144 was support for this view * * *." Abrogation remains an option that
1145 should be part of any serious study.

1146 Finally, it may be asked whether it is better to leave Rule 68
1147 where it lies. It is uniformly agreed that it is not much used,
1148 even in cases where it might cut off a statutory right to attorney
1149 fees incurred after the offer is rejected. It has become an
1150 apparently common means of attempting to defeat certification of a
1151 class action by an offer to award complete relief to the putative
1152 class representative, but those problems should not be affected by
1153 the choice to frame the offer under Rule 68 as compared to any
1154 other offer to accord full relief. Courts can work their way
1155 through these problems absent any Rule 68 amendment; whether Rule
1156 23 might be amended to address them is a matter for another day.

1157 Discussion began with experience in Georgia. Attorney-fee
1158 shifting was adopted for offers of judgment in 2005, as part of
1159 "tort reform" measures designed to favor defendants. "It creates
1160 enormously difficult issues. Defendants take advantage." And it is
1161 almost impossible to frame a rule that accurately implements what
1162 is intended. Already some legislators are thinking about repealing
1163 the new provisions. If Rule 68 is to be taken up, the work should
1164 begin with a study of the "enormous level of activity at the state
1165 level."

1166 Any changes, moreover, will create enormous uncertainty, and
1167 perhaps unintended consequences.

1168 Another member expressed fear that the credibility of the
1169 Committee will suffer if Rule 68 proposals are advanced, no matter

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1170 what the proposals might be. Debates about "loser pays" shed more
1171 heat than light.

1172 A judge expressed doubts whether anything should be done, but
1173 asked what effects would follow from a provision for plaintiff
1174 offers? One response was that the need to add "teeth" would likely
1175 lead to fee-shifting, whether for attorneys or expert witnesses.

1176 It was noted that California provides expert-witness fees as
1177 consequences. But expert fees are variable, not only from expert to
1178 expert but more broadly according to the needs for expert testimony
1179 in various kinds of cases.

1180 The value of undertaking a study of state practices was
1181 repeated. "I pause about setting it aside; this has prompted
1182 several suggestions." State models might provide useful guidance.

1183 Another member agreed - "If anything, let's look to the
1184 states." When people learn he's a Committee member, they start to
1185 offer Rule 68 suggestions. Part 36 of the English Practice Rules -
1186 set in a system that generally shifts attorney fees to the loser -
1187 deals with offers in 22 subsections; this level of complication
1188 shows the task will not be easy. There is ground to be skeptical
1189 whether we will do anything - early mediation probably is a better
1190 way to go. Still, it is worthwhile to look to state practice.

1191 A member agreed that "studies do little harm. But I suspect a
1192 review will not do much to help us." It is difficult to measure the
1193 actual gains and losses from offers of judgment.

1194 One value of studying offers of judgment was suggested:
1195 Arguments for this practice have receded from the theory that it
1196 increases the rate of settlement - so few cases survive to trial
1197 that it is difficult to imagine any serious gain in that dimension.
1198 Instead, the argument is that cases settle earlier. If study shows
1199 that cases do not settle earlier, that offers are made only for
1200 strategic purposes, that would undermine the case for Rule 68.

1201 Another member suggested that in practice the effect of Rule
1202 68 probably is to augment cost and delay. In state courts much time
1203 and energy goes into the gamesmanship of statutory offers.
1204 "Reasonable settlement discussion is unlikely. The Rule 68 timing
1205 is wrong; it's worse in state courts."

1206 It also was observed that early settlement is not necessarily
1207 a good thing if it reflects pressure to resolve a case before there
1208 has been sufficient discovery to provide a good sense of the
1209 claim's value. This was supplemented by the observation that early
1210 mediation may be equally bad.

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1211 Another member observed that a few years ago he was struck by
1212 the quagmire aspects of Rule 68, by the gamesmanship, by the fear
1213 of unintended consequences from any revision. There is an analogy
1214 to the decision of the Patent Office a century ago when it decided
1215 to refuse to consider any further applications to patent a
1216 perpetual motion machine. "The prospect of coming up with something
1217 that will be frequently utilized to good effect is dim." There is
1218 an unfavorable ratio between the probability of good results and
1219 the effort required for the study.

1220 A judge responded that the effort could be worth it if the
1221 study shows such a dim picture of Rule 68 that the Committee would
1222 recommend abrogation.

1223 The Department of Justice reported little use of Rule 68,
1224 either in making or receiving offers. When it has been used, it is
1225 at the end, when settlement negotiations fail. In two such cases,
1226 it worked in one and not the other.

1227 A member observed that if Rule 68 is little used, is
1228 essentially inconsequential, "we don't gain much by abrogating it."
1229 He has used it twice.

1230 The discussion closed by concluding that the time has not come
1231 to appoint a Subcommittee to study Rule 68, but that it will be
1232 useful to undertake a study of state practices in time for
1233 consideration at the next meeting.

1234 *Rule 4(c)(1): "Copy" of Complaint: Dkt. 14-CV-C*

1235 Rule 4(c)(1) directs that "[a] summons must be served with a
1236 copy of the complaint." Rule 10(c) provides that "a copy of a
1237 written instrument that is an exhibit to a pleading is a part of
1238 the pleading for all purposes." A federal judge has suggested that
1239 it may be useful to interpret "copy" to allow use of an electronic
1240 copy, on a CD or other computer-readable medium. The suggestion was
1241 prompted by a case brought by a pro se prisoner with a complaint
1242 and exhibits that ran 300 pages and 30 defendants. The cost of
1243 copying and service was substantial.

1244 The suggestion is obviously attractive. But there will be
1245 defendants who do not have access to the technology required to
1246 read whatever form is chosen, no matter how basic and widespread in
1247 general use. This practice might be adopted for requests to waive
1248 service, and indeed there is no apparent reason why a plaintiff
1249 could not request waiver by attaching a CD to the request. Consent
1250 to waive would obviate concerns for the defendant's ability to use
1251 the chosen form.

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1252 A more general concern is that this proposal approaches the
1253 general question of initial service by electronic means, although
1254 it seems to contemplate physical delivery of the storage medium.
1255 These issues may be better resolved as part of the overall work on
1256 adapting the Civil Rules and all other federal rules to ever-
1257 evolving technology.

1258 A practical example was offered. In the Southern District of
1259 Indiana, the court has an agreement with prison officials who agree
1260 to accept e-copies on behalf of multiple defendants. It works. But
1261 it works by agreement, a simpler matter than drafting a general
1262 rule.

1263 It was concluded that no action should be taken on this
1264 matter.

1265 *Rule 30(b)(2): Adding "ESI": 13-CV-F*

1266 Rule 30(b)(2) addresses service of a subpoena duces tecum on
1267 a deponent, and provides that the notice to a party deponent may be
1268 accompanied by a request under Rule 34 to produce "documents and
1269 tangible things at the deposition." This suggestion would add
1270 "electronically stored information" to the list of things to
1271 produce at a deposition.

1272 This suggestion revisits a question that was deliberately
1273 addressed during the course of developing the 2006 amendments that
1274 explicitly recognized discovery of electronically stored
1275 information. It was decided then that ESI should not be folded into
1276 the definition of "document," but should be recognized as a
1277 separate category in Rule 34. At the same time, it was decided that
1278 references to ESI might profitably be added at some points where
1279 other rules refer to documents, but that other rules that refer to
1280 documents need not be supplemented by adding ESI. Rule 30(b)(2) was
1281 one of those that was not revised to refer to ESI.

1282 Professor Marcus noted that there may be room to argue that it
1283 would have been better to add references to ESI everywhere in the
1284 rules that refer to documents, or at least to add more references
1285 to ESI than were added. But those choices were made, and it might
1286 be tricky to attempt to change them now. Rule 26(b)(3), protecting
1287 trial materials, is an example: on its face, it covers only
1288 documents and tangible things. Surely electronically generated and
1289 preserved work product deserves protection. But any proposal to
1290 amend Rule 26(b)(3) might stir undesirable complications. So for
1291 other rules.

1292 There is no indication that the omission of "ESI" from Rule
1293 30(b)(2) has caused any difficulties in practice.

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1294 Discussion began with the observation that the 2006 amendments
1295 have created a general recognition that "documents" includes ESI.
1296 This judge has never seen a party respond to a request to produce
1297 documents by failing to include ESI in the response. An attempt to
1298 fix Rule 30(b)(2) would start us down the path to revising all the
1299 rules that were allowed to remain on the wayside in generating the
1300 2006 amendments. This concern was echoed by another member, who
1301 asked whether undertaking to amend Rule 30(b)(2) would require an
1302 overall effort to consider every rule that now refers to documents
1303 but not to ESI.

1304 Another judge suggested that rather than refer to documents,
1305 ESI, and tangible things, Rule 30(b)(2) could be revised to refer
1306 simply and generally to "a request to produce under Rule 34."

1307 A lawyer observed that the 2006 Committee Note says that a
1308 request to produce documents should be understood to include ESI.
1309 Most state courts have followed the path of defining "documents" to
1310 include ESI.

1311 Discussion concluded with the observation that no problems
1312 have been observed. There is no need to act on this suggestion.

1313 *Rule 4(e)(1): Sewer Service: Dkt. 12-CV-A*

1314 This proposal arises from Rule 4(e)(1), which provides for
1315 service on an individual by following state law. State law may
1316 provide for leaving the summons and complaint unattended at the
1317 individual's dwelling or usual place of abode. The suggestion is
1318 that photographic evidence should be required when service is made
1319 by this means. Apparently the photograph would show the summons and
1320 complaint affixed to the place.

1321 The proposal does not address the more general problem of
1322 deliberately falsified proofs of service. Nor does it explain how
1323 a server intent on making ineffective service would be prevented
1324 from removing the summons and complaint after taking the picture.
1325 The picture requirement might serve as an inducement to actually go
1326 to the place, alleviating faked service arising from a desire to
1327 avoid that chore, but that may not be a great advantage.

1328 Discussion began with a suggestion that this proposal is
1329 unnecessary.

1330 Another member agreed that the suggestion should not be taken
1331 up. But he recounted an experience representing a pro bono client
1332 who had lost a default judgment in state court and who could not
1333 remember having been served or having learned about the lawsuit by
1334 any other means. State court records were of no avail, because the

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1335 state practice is to discard all records after judgment enters. The
1336 matter was eventually resolved without needing to resolve the
1337 question whether service had actually been made, but he remains
1338 doubtful whether it was.

1339 Another member said that "the problem is very real. It bothers
1340 me a lot. Paper service can be difficult and costly. Process
1341 servers cut corners." But it is difficult to do anything by rule
1342 that will correct these practical shirkings. What we need is a
1343 technology for cost-effective service. "I don't know that this
1344 Committee is the body to fix it." Another member agreed that
1345 advancing technology may eventually provide the answer. That is
1346 better suited to the agenda of the e-rules subcommittee.

1347 This proposal was set aside.

1348 *Rule 15(a)(3): Any required response: Dkt 12-CV-B*

1349 Rule 15(a)(3) sets the time for "any required response" to an
1350 amended pleading. Before the Style Project, the rule directed that
1351 "a party shall plead in response" within the designated times. The
1352 question is whether an ambiguity has been introduced, and whether
1353 it should be fixed.

1354 The earlier direction that a party "shall plead in response"
1355 relied on the tacit understanding that there is no need to plead in
1356 response to an amended pleading when the original pleading did not
1357 require a response. A plaintiff is not required to reply to an
1358 answer absent court order, and is not required to reply to an
1359 amended answer. The same understanding should inform "any required
1360 response," but that may not end the question. What of an amendment
1361 to a pleading that does require a response? If there was a response
1362 to the original pleading – the most common illustration will be an
1363 answer to a complaint – must there always be an amended responsive
1364 pleading, no matter how small the amendments to the original
1365 pleading and no matter how clearly the original responsive pleading
1366 addresses everything that remains in the amended pleading?

1367 There is something to be said for a simple and clear rule that
1368 any amendment of a pleading that requires a responsive pleading
1369 should be followed by an amended response, even if the only effect
1370 is to maintain a tidy court file. But is this always necessary?

1371 A judge opened the discussion by stating that the need for an
1372 amended responsive pleading depends on the nature of the amendment
1373 to the original pleading. If it is something minor, it suffices to
1374 put it on the record that the answer stands. There is no need for
1375 a rule that requires that there always be an amended answer. But
1376 generally he asks for an amended answer to provide a clear record.

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1377 Another judge noted that when lawyers are involved in the
1378 litigation, they virtually always file an amended response.

1379 A lawyer recounted a current case with a 400-page complaint
1380 and, initially, 27 defendants. "One defendant has been let out. We
1381 reached a deal that our 45-page answer would stand for the
1382 remaining 26 defendants. Everyone was happy."

1383 It was agreed that no further action should be taken on this
1384 suggestion.

1385 *Rule 55(b): Partial Default Judgment: Dkt. 11-CV-A*

1386 This proposal arises from a case that included requests for
1387 declaratory, injunctive, and damages relief on a trademark. The
1388 defendant defaulted. The apparent premise is that the clerk is
1389 authorized to enter a default judgment granting injunctive and
1390 declaratory relief, while the amount of damages must be determined
1391 by the court. And the wish is for a way to make final the judgment
1392 for declaratory and injunctive relief, in the expectation that if
1393 the defendant does not take a timely appeal the plaintiff may
1394 decide to abandon the request for damages rather than attempt to
1395 prove them. The problem is that Rule 55(b)(1) allows the clerk to
1396 enter judgment only if the claim is for a sum certain or a sum that
1397 can be made certain by computation. The court must act on a request
1398 for declaratory or injunctive relief. Since it is the court that
1399 must act, the court has whatever authority is conferred by Rule
1400 54(b) to enter a partial final judgment. Since Rule 54(b) requires
1401 finality as to at least a "claim," there may be real difficulty in
1402 arguing that the request for damages is a claim separate from the
1403 claim for specific relief. But that question is addressed by the
1404 present rule and an ample body of precedent.

1405 It was concluded without further discussion that this
1406 suggestion should not be considered further.

1407 *New Rule 33(e): 11-CV-B*

1408 This suggestion would add a new Rule 33(e) that would embody
1409 specific language for an interrogatory that would not count against
1410 the presumptive limit of 25 interrogatories and that would ask for
1411 detailed specific information about the grounds for failing to
1412 respond to any request for admission with an "unqualified
1413 admission." The suggestion is drawn from California practice.

1414 Brief discussion suggested that adopting specific
1415 interrogatory language in Rule 33 seems to fit poorly with the
1416 current proposal to abrogate Rule 84 and all of the official forms
1417 that depend on Rule 84. Apart from that, there are always risks in

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1418 choosing any specific language.

1419 The Committee decided to remove this proposal from the docket.

1420 *Rule 8: Pleading: Dkt. 11-CV-H*

1421 This proposal would amend Rule 8 to establish a general format
1422 for a complaint. There should be a brief summary of the case, not
1423 to exceed 200 words; allegations of jurisdiction; the names of
1424 plaintiffs and defendants; "alleged acts and omissions of the
1425 parties, with times and places"; "alleged law regarding the facts";
1426 and "the civil remedy or criminal relief requested."

1427 Pleading has been on the Committee agenda since 1993. The
1428 Twombly and Iqbal cases, and reactions to them, brought it to the
1429 forefront. Active consideration has yielded to review of empirical
1430 studies, particularly those done by the Federal Judicial Center,
1431 and to anticipation of another Federal Judicial Center study that
1432 remains ongoing. There has been a growing general sense that
1433 pleading practice has evolved to a nearly mature state under the
1434 Twombly and Iqbal decisions. The time may come relatively soon to
1435 decide whether there is any role that might profitably be played by
1436 attempting to formulate rules amendments that might either embrace
1437 current practice or attempt to revise it.

1438 The Committee concluded that the time to take up pleading
1439 standards has not yet come, and that this specific proposal does
1440 not deserve further consideration.

1441 *Rule 15(a)(1): Dkt. 10-CV-E, F*

1442 These proposals, submitted by the same person, address the
1443 time set by Rule 15(a)(1) for amending once as a matter of course
1444 a pleading to which a responsive pleading is required. The present
1445 rule allows 21 days after service of a responsive pleading or 21
1446 days after service of a motion under Rule 12(b), (e), or (f),
1447 whichever is earlier. The concern is that the time to file a motion
1448 may be extended. The nature of the concern is not entirely clear,
1449 since the time to amend runs from actual service. The initial
1450 proposal sets the cutoff at 21 days before the time to respond to
1451 any of the listed Rule 12 motions. The revised proposal sets the
1452 cutoff at 21 days after the time to respond after service of one of
1453 the Rule 12 motions.

1454 It was agreed that no action need be taken on this proposal

1455 *Rule 12(f): Motion to strike from motion: Dkt 10-CV-F*

1456 This proposal would expand the Rule 12(f) motion to strike to

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1457 reach beyond striking matters from a pleading to include striking
1458 matters from a motion.

1459 The Committee agreed that there is no apparent need to act on
1460 this proposal. It will be removed from the docket.

1461 *Discovery Times: Dkt. 11-CV-C*

1462 This proposal, submitted by a pro se litigant, suggests
1463 extension of a vaguely described 28-day time limit to 35 days. It
1464 touches on the continuing concerns whether the rules should be
1465 adapted to make them more accessible to pro se litigants. Those
1466 concerns are familiar, and until now have been resolved by
1467 attempting to frame rules as good as can be drawn for
1468 implementation by professional lawyers. This proposal does not seem
1469 to provide any specific occasion to rethink that general position.

1470 The Committee agreed that there is no need to act on this
1471 proposal. It will be removed from the docket.

1472 *e-Discovery: Dkts. 11-CV D, E, G, I*

1473 All of these docket items address questions that were
1474 thoroughly examined in preparing the discovery rules amendments
1475 that are now pending in the Supreme Court. They were carefully
1476 evaluated, and were often helpful, in that process. Only one issue
1477 was raised that was put aside in that work. That issue goes to "the
1478 current lack of guidance as to reasonable preservation conduct (and
1479 standards for sanctions) in the context of cross-border discovery
1480 for U.S. based litigation." That issue was found complex,
1481 difficult, and subject to evolving standards of privacy in other
1482 countries, particularly within the European Union. The time does
1483 not seem to have come to take it up.

1484 The Committee agreed that there is no need to act further on
1485 these proposals. They will be removed from the docket.

1486 **Rule 23 Subcommittee**

1487 Judge Dow presented the report of the Rule 23 Subcommittee.
1488 The Subcommittee is in the stage of refining the agenda for deeper
1489 study of specific issues. All Subcommittee members appeared for a
1490 panel at the ABA National Class Action Institute in Chicago on
1491 October 23 to seek input on the subjects that might be usefully
1492 concluded in ongoing work. It was emphasized at the outset that the
1493 first question is whether it is now possible to undertake changes
1494 that promise more good than harm. Many interesting suggestions were
1495 advanced and will be considered.

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1496 The Appellate Rules Committee is considering proposals to
1497 address the problems of settlement pending appeal by class-action
1498 objectors. The Subcommittee will continue working with the
1499 Appellate Rules Committee in refining those efforts.

1500 A miniconference will be planned for some time in 2015.

1501 It may prove too ambitious to attempt to present draft
1502 proposals for discussion in 2015. The target is to present polished
1503 proposals for discussion in the spring meeting in 2016.

1504 The Chicago discussions helped to give a better sense that
1505 some potential problems "are not real, or are evolving in ways that
1506 may thwart any opportunity for present improvement."

1507 One broad category of issues surround settlement classes. Not
1508 even Arthur Miller could have predicted in 1966 what could emerge
1509 as settlement-class practices. The questions include the criteria
1510 for certifying a settlement class as compared to certification of
1511 a trial class, and whether the rule text should include specific
1512 criteria for evaluating a settlement.

1513 Cy pres recoveries have generated a lot of interest. A
1514 conference of MDL judges this week prompted many questions on this
1515 topic.

1516 The Chicago discussion also reflected widespread objections to
1517 objectors among lawyers who represent plaintiffs, lawyers who
1518 represent defendants, and academics.

1519 Discussions of notice requirements regularly raise questions
1520 whether more efficient and effective notice can be accomplished by
1521 electronic means.

1522 And there has been a lot of attention to issues classes, and
1523 the relationship between Rule 23(c)(4) and Rule 23(b)(3).

1524 Beyond these front-burner issues, a few side-burner issues
1525 remain open. Can anything be done to address consideration of the
1526 merits at the certification stage? There has been a lot of concern
1527 about the newly emerging criterion of the "ascertainability" of
1528 class membership, focused by recent Third Circuit decisions. The
1529 use of Rule 68 offers of judgment to moot individual
1530 representatives has prompted a practice that may be specific to the
1531 Seventh Circuit's views - plaintiffs file a motion for
1532 certification with the complaint to forestall a Rule 68 offer
1533 designed to moot the representatives, and then ask that
1534 consideration of the motion be deferred. Courts in the Seventh
1535 Circuit work around the problem; perhaps it need not be addressed

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1536 in the rules.

1537 What other questions might offer promising opportunities for
1538 consideration? What is missing from this tentative set of issues?

1539 Professor Marcus noted that the work will either desist, or
1540 will proceed down the paths that seem promising. It is important to
1541 identify those paths now, because it becomes increasingly difficult
1542 to forge off in new directions after traveling a good way along the
1543 paths initially chosen.

1544 The Administrative Office will establish some form of
1545 repository to gather and retain suggestions from all sources.

1546 A Subcommittee member suggested that the ABA group showed a
1547 good bit of agreement that it will be useful to consider objectors,
1548 notice, and settlements. There is a lot of disagreement on other
1549 issues.

1550 A Committee member suggested that settlement-class issues are
1551 difficult. We know that the standard for certification is
1552 different, but we do not know how or why.

1553 This suggestion was followed by the observation that one set
1554 of settlement issues goes to how many criteria for reviewing a
1555 proposed settlement might be written into the rule. Another goes to
1556 certification criteria, a question addressed by advancing and then
1557 withdrawing a "Rule 26(b)(4)" settlement-class provision in 1996.
1558 A Federal Judicial Center study undertaken after the Amchem
1559 decision asked whether settlement classes had been impeded.
1560 Settlement classes seem to continue, but there may be complicated
1561 relationships to the continually growing number of MDL
1562 consolidations.

1563 Another Subcommittee member noted that settlement-class issues
1564 had presented real challenges to the ALI Principles of Aggregate
1565 Litigation work, but that they managed to work through to unanimous
1566 agreement.

1567 Another suggestion was that partial settlements should be part
1568 of the process. In MDL consolidations, some defendants settle on a
1569 class basis. Does that pre-decide class certification as to other
1570 defendants? Some settlements include a most-favored-nations clause
1571 that expands the definition of the class with respect to the
1572 settling defendant upon each successive settlement with another
1573 defendant.

1574 A new issue was suggested by the observation that the 14-day
1575 time limit to seek permission for an interlocutory appeal under

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1576 Rule 23(f) is not long enough for the Department of Justice. The
1577 rule should be amended to provide a longer period in cases that
1578 include the United States (etc.) as a party.

1579 The question of cy pres settlements came on for discussion.
1580 The issues include the perception that an increasing number of
1581 cases settle on terms that provide only cy pres recovery; other
1582 cases where cy pres recovery is a significant part of the original
1583 settlement terms; and still others where cy pres recovery is
1584 provided only for a residuum of funds that cannot be effectively
1585 distributed to class members. Another issue asks whether the
1586 recipient of a cy pres award should be closely aligned in interest
1587 with the class members. Cy pres seems a useful option. Some
1588 defendants like it because it supports a fixed dollar limit on
1589 liability, and a way to distribute the dollars.

1590 The ALI proposal on cy pres recovery is linked to the proposal
1591 on settlement classes. The Principles collapse the criteria for
1592 reviewing a proposed settlement from the 14 or 16 factors that can
1593 be identified in the cases to a shorter, more manageable number.
1594 For certification, they establish that there is no need to consider
1595 either manageability (as recognized in the Amchem decision) or
1596 predominance. The Principles that address cy pres recovery have
1597 been more often cited and relied on by courts than any other of the
1598 Principles. They establish an order of preference: first,
1599 distribute to as many class members as possible; second, if funds
1600 remain, make a second distribution to class members who have
1601 already participated in the first distribution; and finally, when
1602 that is exhausted, try to distribute to a recipient that is closely
1603 aligned with class interests.

1604 The ALI cy pres provisions were said to have gained traction
1605 in the early going. "But there are problems with views of what
1606 class actions are designed to do." Different states have different
1607 policies. California, with its civil-law heritage, is predisposed
1608 to embrace cy pres awards more eagerly than most states.

1609 A related suggestion was made: it is important to seek real
1610 value through the claims process. The defendant may have an
1611 incentive to have undistributed settlement funds revert to the
1612 defendant. Cy pres recovery can address that.

1613 California practice provides a means of avoiding review of cy
1614 pres recipients by approving distribution of unclaimed settlement
1615 funds to Legal Aid. "There is a cycle that relates cy pres to the
1616 question of undistributed funds." And this ties to settlement
1617 review: will the defendant actually wind up paying what seems to be
1618 a fair amount, or will the fair amount provided by the overall
1619 figure be diminished by reversion to the defendant. There can be a

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1620 surprise surplus. But usually that is dealt with in the settlement
1621 agreement. And it can be resolved in proceedings to approve the
1622 settlement. But there may be a growing problem when, in response to
1623 increasing uneasiness about cy pres recoveries, the parties seek to
1624 avoid the issue by not addressing cy pres in the settlement terms.
1625 There may, moreover, be suits in which only a group remedy is
1626 appropriate – it may be enough that the amount is fair, reasonable,
1627 and adequate even though none of it goes to individual class
1628 members.

1629 Cy pres recoveries also figure in determining attorney fees.
1630 The question is whether cy pres distributions should be counted in
1631 the same way as actual distributions to class members.

1632 It was urged that cy pres issues can be profitably addressed
1633 through rules amendments.

1634 An observer suggested that cy pres practices depend on the
1635 jurisdiction. It is common to address it in general terms in the
1636 settlement, but delaying identification of the recipient until
1637 distribution to class members has been accomplished. This is
1638 appropriate because the choice of recipient may depend on how much
1639 money is left for cy pres distribution.

1640 Turning to objectors, it was asked whether there is "a bar of
1641 objectors." If there is, the Committee should learn their views
1642 before framing rules for objections. A response was that there are
1643 objectors who seek to improve the settlement, and to gain a share
1644 of the fee in return, while other objectors act for principle –
1645 Public Citizen is an example. We do not want to discourage useful
1646 objections. It was noted again that the Appellate Rules Committee
1647 has been considering the subset of issues that arise from
1648 settlement with an objector pending appeal. That work included
1649 hearing from two professors "who had different views." No objectors
1650 appeared at that meeting. It also was noted that the 2013 ABA
1651 National Institute had a panel that featured a "repeat objector."

1652 An observer suggested that the question of awarding damages
1653 incident to a (b)(2) class deserves consideration. Rule 23(b)(2) is
1654 a perfect vehicle for certifying low-dollar consumer claims, but it
1655 is tied to "equitable relief. There is no real reason to maintain
1656 this tie to equity. Due process is satisfied by adequate
1657 representation. We could establish a mandatory class without the
1658 cost of notice. The origins of class actions are very practically
1659 oriented."

1660 A response noted that a professor at the recent ABA National
1661 Institute said that she would be making suggestions on other (b)(2)
1662 issues. The question of the "ascertainability" of class membership

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1663 ties to this. The Carrera case in the Third Circuit is an
1664 illustration of small-stakes consumer classes. But it should be
1665 remembered that (b)(2) speaks of injunctive relief or corresponding
1666 declaratory relief, not equity. It can be invoked for traditional
1667 legal claims. A further response suggested that due process may
1668 require notice and an opportunity to opt out when money damages are
1669 at issue. But the observer rejoined that the Committee should study
1670 this question – he believes that due process allows a no opt-out
1671 class, and that individual notice can be discarded when there is no
1672 opportunity to act on it by opting out.

1673 A look to the past recalled that in 2001 the Committee
1674 proposed mandatory notice for (b)(1) and (b)(2) classes, but
1675 retreated in face of protests that the cost would defeat some
1676 potential civil-rights actions before they are even brought. But
1677 the ABA National Institute reflected the growing sense that due
1678 process may allow notice by social media and other internet means
1679 that work better, at lower cost, than mail or newspaper
1680 publication. "Perhaps we should remember there are a lot of balls
1681 in the air."

1682 Judge Campbell expressed thanks to the Subcommittee for its
1683 ongoing work.

1684 **Pilot Projects**

1685 Judge Campbell opened the discussion of pilot projects by
1686 praising the panelists and papers at the Duke Conference for
1687 teaching many good lessons about current successes and failures of
1688 the Civil Rules. But these lessons were based on the experience of
1689 the participants more often than solid empirical measurement. And
1690 some empirical work that looks good still may not be complete
1691 enough to support heavy reliance. Carefully structured pilot
1692 projects may be a better means of providing information. The
1693 employment protocols are a good example. So what would a pilot
1694 project look like if it is to provide reliable information?

1695 Emery Lee began by observing that "'Data' is a plural that we
1696 use a lot. No one uses 'datum.' A datum is a piece of information.
1697 Data are plural pieces of information." What we need to do is to
1698 organize pieces of information into useful information. That task
1699 has to be addressed during the design phase of a project. The first
1700 question is what information can be collected that will be helpful
1701 in considering reforms? What will the end product look like? What
1702 are the questions to be answered? It can be important to enlist the
1703 help of the Federal Judicial Center at this initial point. "Call
1704 me. I can get the ball rolling."

1705 Lee further observed that he met with some of the architects

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1706 of the SDNY Complex Case pilot project at its inception. That is
1707 helpful. For the Seventh Circuit e-discovery project, the FJC did
1708 two surveys. "Judges always evaluate a program higher than the
1709 attorneys do." The world is complicated. Attorneys see a lot more
1710 of the case than the judges see. And "parties have interests. Cases
1711 that go to trial are weird cases - someone does not want to
1712 settle." And a pilot project cannot address differences that arise
1713 from the level of litigation resources available to the parties.
1714 Nor can a pilot project tamper with the law.

1715 Surveys can be a really useful way of gathering information.
1716 But the FJC has become concerned that too many surveys from too
1717 many sources may have worn out the collective welcome, particularly
1718 from judges. "Surveys will be dead in 10 years. No one wants to
1719 respond."

1720 Docket-level data are available in employment cases. That may
1721 provide a secure foundation for evaluating the employment
1722 protocols.

1723 Turning to pilot projects, the first question was whether they
1724 should be voluntary. If parties have a choice whether to
1725 participate on the experimental side of the project, is there a
1726 risk that self-selection will skew the results? But if cases are
1727 assigned on a random but mandatory basis, is the implementation
1728 invalid whenever the terms of the pilot are inconsistent with the
1729 national rules?

1730 Emery Lee replied that opt-out programs are a problem. IAALS
1731 did a survey of a Colorado program for managed litigation and found
1732 that parties represented by attorneys tended to opt out. So a large
1733 percentage of the cases involved in the first round wound up as
1734 defaults. And the lawyers opted out because they thought the
1735 program unattractive.

1736 Judge Dow noted that there are 35 judges in the Northern
1737 District of Illinois. Many are dead set against cameras in the
1738 court room. But they agreed to participate in a pilot program "so
1739 we could be heard, not because we like it."

1740 Another suggestion was that it is possible to imagine pilot
1741 programs on such things as cameras in the courtroom or initial
1742 disclosure. But is it possible to have a pilot that addresses
1743 "standards"? Emery Lee replied that it is possible to do empirical
1744 work on standards, but not in the form of a pilot project. It would
1745 take the form of comparing different regimes. And there are
1746 different problems. With the survey of final pretrial conferences,
1747 for example, the FJC found only a small number of cases that
1748 actually had final pretrial conferences. That makes it difficult to

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1749 draw any sustainable conclusions.

1750 A different form of research was brought into the discussion
1751 by asking whether interviews establish data? The FJC closed-case
1752 survey of discovery relied on interviews. Is it possible to get
1753 hard data? Emery Lee replied that the question can be viewed
1754 through the prism of Rule 1. It is easy to measure speed. So for
1755 cost, it is easy enough to measure cost, and to measure costs
1756 incurred by different parties and in different types of cases. But
1757 how do you count "just"? "We can count motions filed. We can look
1758 at discovery disputes in a broad swath of discovery cases. We can
1759 compare protocol data with cases that do not use the protocol." But
1760 for other things, we need interviews. The greater the number of
1761 sources, the better. "Interviews can shed light on the numbers." In
1762 like fashion the Committee looks at the numbers and helps the
1763 researchers understand what the numbers mean, or may mean.

1764 Judge Koeltl described three projects.

1765 The employment discovery protocols developed out of the Duke
1766 Conference. A group of lawyers engaged for plaintiffs or for
1767 defendants in individual employment cases worked to define core
1768 discovery that should be provided automatically in every case. The
1769 protocol directs what information plaintiffs should provide to
1770 defendants, and what defendants should provide to plaintiffs, 30
1771 days after the defendant files a response. For this initial stage
1772 there is no need for Rule 34 requests, or initial disclosures under
1773 Rule 26(a)(1). The Southern District of New York has mandatory
1774 mediation in employment cases; lawyers say the protocols are
1775 helpful for that. Some 14 judges in the District have adopted the
1776 protocol; nationwide, some 50 judges use it. It is hard to imagine
1777 a more attractive way of beginning an employment case than by
1778 providing automatic disclosure of information that otherwise will
1779 be dragged out through costly and time-consuming discovery. Judge
1780 Koeltl implements it by a uniform order entered in each case to
1781 which the protocols apply; that seems suitable. He has never had an
1782 objection. Some judges incorporate the protocols as part of their
1783 individual rules so that parties are aware of them and use the
1784 protocols in applicable cases.

1785 SDNY also has a pilot project for § 1983 cases that involve
1786 false arrest, unreasonable use of force, unlawful searches, and the
1787 like. Mandatory disclosure of core discovery is required. The
1788 plaintiff is required to make a settlement demand and the defendant
1789 is required to respond. The case goes automatically to mediators;
1790 this ties to settlement. Either plaintiff or defendant can opt out
1791 of the program; parties often opt out in cases that are unlikely to
1792 settle. And judges can remove a case from the program, as may be
1793 done when they think a case will settle early. This program is

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1794 established by local rule. 70% of the cases in the program have
1795 settled without any intervention by the assigned judge. It is not
1796 clear whether a judge can override a party's choice to opt out of
1797 the program. Plaintiffs may opt out if they think the process takes
1798 too long. The City opts out when it takes the position that it will
1799 not settle a particular case.

1800 Finally, SDNY has a complex case pilot project. After the Duke
1801 Conference the Judicial Improvements Committee put together a set
1802 of best practices for complex cases. It was adopted by the court as
1803 a whole. It was designed to last for 18 months. It was renewed for
1804 an additional 18 months. Now it has met its sunset limit. But it is
1805 on the SDNY website, and the court has a resolution encouraging
1806 attorneys and judges to consider the best practices. "It covers all
1807 steps." There is a detailed checklist for what should be discussed
1808 at the parties' conferences. There is an e-discovery checklist. And
1809 a checklist for the pretrial conference itself. It includes a limit
1810 of 25 requests to admit, not counting requests to admit the
1811 genuineness of documents. Furthermore, a request to admit can be no
1812 longer than 20 words. There are procedures for motion conferences,
1813 and encouragement for oral argument on motions. The local rules
1814 call for a "Rule 56.1 statement" and a response in similar form,
1815 like the published but then withdrawn proposal to add a "point-
1816 counterpoint" procedure to Rule 56 itself. Some SDNY lawyers think
1817 the Rule 56.1 statement is more trouble than it is worth; so the
1818 best practices provide that the parties can ask the judge to let
1819 them dispense with this procedure. It has proved hard to define
1820 what is a complex action. Class actions are included, for example,
1821 in terms that reach collective actions under the Fair Labor
1822 Standards Act, but those cases are less complex than most class
1823 actions; some judges take FLSA cases out of the project

1824 Thirty-six months is not a long time to study complex cases.
1825 It is hard to say that there has been enough experience to evaluate
1826 the best practices. "But there is a value in generating experiences
1827 to discuss even if their actual effect cannot be measured
1828 statistically." As a small and unrelated illustration, one judge of
1829 the court came back from a conference enthusiastic about what he
1830 had heard about the "struck juror" procedure for selecting a jury.
1831 "We tried it, and most of us came to prefer it even without any
1832 empirical data."

1833 Judge Dow reported on the Seventh Circuit e-discovery project.
1834 All districts in the Circuit are covered. It is "an enormous,
1835 ongoing project." The first year recruited a few judges and
1836 magistrate judges to attempt to identify cases that would involve
1837 extensive e-discovery. The second phase drew in many more judges.
1838 The third phase is ongoing. The web site includes a lot of reports,
1839 and orders, and protocols. "This changed the culture in our

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1840 Circuit." Great expertise in e-discovery has developed, especially
1841 among the magistrate judges. The early focus on complex cases
1842 helped. Judge Dow was led to introduce proportionality, aiming to
1843 first discover the important 20% of information as a basis for
1844 planning further discovery. One particularly successful idea is to
1845 require each side to appoint a "technology liaison." These
1846 technologists work together to solve problems, not to try to spin
1847 problems to partisan advantage as lawyers do. Getting them in to
1848 deal with the judge as problem solvers has been a great change in
1849 culture. The program has anticipated many of the provisions in the
1850 discovery rules amendments that are now pending in the Supreme
1851 Court. "Judges love it. The lawyers do the work and may not love it
1852 as much. The culture change is very valuable." The work has been
1853 sustained by volunteers: all sorts of people "wanted in." A
1854 Committee member who has participated in some parts of developing
1855 the Seventh Circuit program, although he does not practice there,
1856 agreed. The initial work of drafting principles was done by
1857 volunteer lawyers – he was one of them. No cost was involved.

1858 Discussion turned to more general approaches that might
1859 advance the cause of more effective procedure.

1860 A historic note was sounded by quoting from an article by
1861 Charles Clark written in 1950, appearing a 12 F.R.D. 131. He noted
1862 that the 1938 Federal Rules, drawing from many sources, established
1863 a discovery regime more detailed and sweeping than anything that
1864 had been before. But he also noted that as of 1950, there was not
1865 yet any clear picture of its actual operation, not even in all
1866 experience and with 1948 surveys and interviews in five circuits.
1867 Nothing has really changed.

1868 The Seventh Circuit pilot project was noted as something
1869 designed to enforce cooperation, to urge lawyers to work together
1870 and to authorize sanctions when they agree to the principles. This
1871 is of a piece with the current proposals to emphasize in Rule 1
1872 that the parties are charged with construing and administering the
1873 rules to achieve the goals of Rule 1.

1874 It also may be useful to expand the Seventh Circuit approach
1875 to technology liaisons by establishing a position for technology
1876 experts on court staffs. These experts could come to the help of
1877 parties who need it.

1878 Other suggestions will be submitted for Committee
1879 consideration.

1880 It was observed that there are categories of cases that may
1881 have discrete characteristics that yield to routinized discovery.
1882 Individual employment cases seem to have these characteristics. The

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1883 same may be true of police-conduct cases under § 1983. But it
1884 should be asked how many more such categories of cases can be
1885 identified. It is not clear how many will fit this paradigm. It was
1886 agreed that the issue is to get plaintiffs and defendants to work
1887 together to establish a protocol acceptable on all sides. It has
1888 been suggested that employment class actions may be suitable, but
1889 work has not started. "It takes enthusiasm and impetus to bring
1890 them together." It was suggested that other categories of cases
1891 that would be ideal candidates include actions under the
1892 Individuals with Disabilities Education Act and actions under the
1893 Fair Credit Reporting Act.

1894 The nationwide pilot project for patent cases was noted. It
1895 was established by Congress, and is designed to last for 10 years.
1896 Without knowing a lot about it, it can be described as relying on
1897 designating judges who are willing to do patent cases, and
1898 providing them with training packages and model local rules that
1899 can be used as orders. But patent cases are still assigned at
1900 random; the assigned judge can transfer the case to a designated
1901 patent judge, but some assigned judges do not give up their cases.
1902 The idea of identifying judges who volunteer to learn and develop
1903 best practices is intriguing.

1904 A judge asked how do you get buy-in from lawyers for
1905 experimental programs? The employment protocol experience was
1906 described as an example. The plaintiff side was led by Joseph
1907 Garrison, a past president of the National Employment Lawyers
1908 Association. The defense side was led by Chris Kitchel, the liaison
1909 from the American College of Trial Lawyers to the Civil Rules
1910 Committee. Encouragement was provided by Judges Kravitz, Rosenthal,
1911 and Koeltl. The IAALS promoted it. "It almost fell apart." It was
1912 like a labor negotiation, in which the sides took turns at walking
1913 out of the negotiations and then returning to the table. The judges
1914 who were involved then actively promoted the protocols in their own
1915 courts.

1916 A judge suggested that many judges revel in being generalists,
1917 and believe that they can do anything. Programs to provide special
1918 training to some judges may not work if they depend on voluntary
1919 transfer by judges who draw cases by random selection. But it was
1920 noted that one benefit of the pilot project for patent cases is
1921 that the specialized judges become a resource for other judges on
1922 the same court.

1923 The IAALS is tracking innovative practices in the states,
1924 mostly innovations in discovery. Their report will be available for
1925 consideration at the April meeting.

1926 Discovery problems may be affected by the observation offered

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1927 by many participants at the Duke Conference. "We live in a
1928 discovery-centered world." Lawyers do not ask – indeed, too often
1929 do not know how to ask – for information that will be needed at
1930 trial. They think about, and get paid for, vast discovery. Criminal
1931 trials without discovery of this kind seem to be just as effective
1932 as civil trials, at about a tenth of the cost. "Surely there must
1933 be cases where the parties want trial." But an experiment to test
1934 this failed. In every case this judge offered a trial within 4
1935 months, with minimal or no discovery and no motions for summary
1936 judgment. The order directed the lawyers to discuss this option
1937 with their clients, and to provide a budget for proceeding with
1938 this option and an alternative budget for proceeding without taking
1939 it up. The experiment was abandoned after using the order in more
1940 than 1,100 cases. The option was picked up in 3 cases, and then
1941 rejected within a week in one of them. Neither of the other 2 went
1942 to trial. "How is it that we have come to depend so much on
1943 discovery"?

1944 It was noted that the same fate had met the expedited trial
1945 project in the Northern District of California. It died for want of
1946 takers. And it was wondered whether perhaps these outcomes could be
1947 changed by getting "buy-in" from insurers who bear the costs of
1948 defending.

1949 A judge suggested that "lawyers are trained to do discovery,
1950 and get paid for it. It has got to the point of too much."

1951 Another judge observed that "we don't have a chance to talk to
1952 the clients. Should I require them to come to the Rule 16
1953 conference? If not to require attendance, to invite them"?

1954 Another observation was that most young lawyers do not get any
1955 training in trial, unlike earlier days when many were given many
1956 small trials to develop trial competence.

1957 The comparison to criminal cases was taken up by the
1958 observation that the prosecution has "discovery" through
1959 investigators and then a grand jury. Some or all of this
1960 information makes its way to the defendant at some point. And
1961 criminal lawyers have more trial experience. Together, these
1962 phenomena may help to explain the relative success of criminal
1963 trials as compared to civil trials that follow vast civil
1964 discovery. But another judge countered that federal prosecutors on
1965 average try less than one case per year per lawyer in the office.
1966 On the state side, however, there are trials in low-dollar, low-
1967 significance cases. A young lawyer who wants trial experience can
1968 go to a district attorney's office, or a solicitor's office for
1969 misdemeanor cases, or a 2-person personal injury firm trying low-
1970 dollar cases.

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1971 A lawyer suggested that it is premature to despair of
1972 expedited trial programs. In MDL cases there are bellwether trials
1973 that are expensive and protracted, in part because they are
1974 symbolic. But the post-bellwether trials tend to be much more
1975 compact; they can be tried in a few days or even hours.

1976 These problems will continue to be part of the Committee
1977 agenda.

1978 **Pending Rules Amendments**

1979 Important amendments are now pending in the Supreme Court. If
1980 the Court decides to adopt them, and if Congress allows them to
1981 proceed, they will go into effect on December 1, 2015. "We as a
1982 Committee should try to spearhead an effort to get word out about
1983 what they are intended to do, and what not."

1984 Judge Fogel has brought the Federal Judicial Center on board
1985 with efforts to educate judges in the new rules should they take
1986 effect. Experience shows that simply adopting new rules does not
1987 automatically transfer into prompt implementation in practice.
1988

1989 Beyond FJC programs aimed at judges, the word can be got out
1990 through conferences, articles, and related efforts. Circuit
1991 conferences seem to be reviving – they would be a good focus. Inns
1992 of Court will be another good forum. A prepared packet of materials
1993 for use by these and other groups, such as Federal Bar
1994 Associations, could be useful.

1995 An observer noted that programs are already being offered to
1996 explore the proposed amendments. She attended one in which
1997 discovery hypotheticals were presented to magistrate judges with
1998 arguments on both sides. The judges then addressed the outcome
1999 under present rules and under the proposed rules. It was effective.

2000 Once it becomes clear that the proposed rules will go into
2001 effect – a desirable outcome that cannot be presumed – the
2002 Administrative Office may find some role to play in getting out the
2003 word.

2004 **Subcommittee Projects**

2005 Judge Campbell noted ongoing Subcommittee work in addition to
2006 the Rule 23 Subcommittee.

2007 The Appellate and Civil Rules Committees have formed a joint
2008 subcommittee to explore two topics. Judge Matheson and Virginia
2009 Seitz are the Civil Rules members. The Subcommittee will study
2010 manufactured finality devices that are treated differently by the

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2011 circuits. It also will study a number of problems that seem to
2012 affect stays and appeal bonds under Rule 62.

2013 The Discovery Subcommittee will begin work on a proposal that
2014 it expand the use of "requester pays" in discovery.

2015 **Future Meetings**

2016 The next meeting will be on April 9-10, 2015, at the
2017 Administrative Office. The fall meeting will be at the University
2018 of Utah Law School.

Respectfully submitted,

Edward H. Cooper
Reporter

November 20, 2014

TAB 5

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TAB 5A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

To: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

From: Hon. Reena Raggi, Chair
Advisory Committee on Criminal Rules

Subject: Report of the Advisory Committee on Criminal Rules

Date: December 11, 2014

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Committee”) met on November 4-5 in Washington, D.C. This report discusses briefly the following information items:

- (1) the Committee’s decision not to pursue suggested amendments to Rules 11 and 52 of the Federal Rules of Criminal Procedure and Habeas Rule 5;
- (2) the appointment of new subcommittees to review the issues raised by the work of the Standing Committee’s CM/ECF Subcommittee and to consider a proposal to amend Rule 35; and
- (3) the first public hearing on the proposed amendment to Rule 41 regarding venue for applications to conduct remote electronic searches.

II. Action on Suggested Amendments to Rules 11 and 52 of the Federal Rules of Criminal Procedure and Rule 5 of the Habeas Rules

After discussion, the Committee decided not to pursue further three possible amendments that had been proposed by judges.

A. Rule 11

The Committee heard the report of the Rule 11 Subcommittee, chaired by Judge Morrison England, which considered a proposal by Chief Judge Claudia Wilken to amend Rule 11. Chief Judge Wilken sought an amendment that would allow trial judges to refer criminal cases to other judicial officers for the purpose of exploring settlement. At least six districts in the Ninth Circuit had employed this procedure before the Supreme Court's decision in *United States v. Davila*, 133 S.Ct. 2139 (2013), which indicated that the practice violated Rule 11. Judge Wilken reported that although the procedure was employed only rarely, it had great value in those cases, saving resources for the courts, the prosecution, and the defense.

After extended discussion, the Committee decided, by a divided vote, not to pursue the proposed amendment. Although judges in several districts (including the Northern District of California, Chief Judge Wilken's district) have found the procedure to be helpful, the Committee was not persuaded there was an urgent need for an amendment. Since guilty plea rates exceed 95% both nationwide and in the districts that had employed this procedure, there is no problem of courts being overwhelmed by trials. Additionally, members of the Committee identified a variety of serious concerns raised by the proposal. These included concerns that judges engaged in settlement discussions might intrude into the authority allocated to the executive branch or the attorney-client relationship, be unequipped to make sound sentencing recommendations, or compromise their neutrality when proposing a particular disposition. Additionally, the proposal would require the Committee to grapple with a variety of legal and ethical concerns, and might generate collateral challenges.

B. Rule 52

The Committee heard the report of the Rule 52 Subcommittee, chaired by Judge Raymond Kethledge, which considered a proposal by Judge Jon Newman to amend Rule 52. Judge Newman proposed an amendment to allow for appellate review of unpreserved sentencing errors without satisfying the requirements of plain error if the error caused prejudice and correction would not require a new trial. The Subcommittee concluded that there was not enough of a problem to warrant an amendment. Most defaulted Guidelines calculation errors that increase a defendant's sentence are now being corrected on plain error review. Although there may be a limited number of cases in which relief is not now being granted, the Subcommittee concluded that the benefit of the proposed amendment would probably be outweighed by additional litigation about the exception's reach, including determining when a judge would have imposed a lesser sentence but for the Guidelines error. The Subcommittee also noted that the proposed amendment could reduce the incentives to raise issues in a timely fashion, and would work a change in a Rule that the Supreme Court has cited with approval and relied upon.

The Committee unanimously accepted the Subcommittee's recommendation not to pursue the suggested amendment.

C. Rule 5 of the Habeas Rules

The Committee also voted unanimously not to pursue the suggestion of Judge Michael Baylson that it amend Rule 5 of the Rules Governing 2255 Proceedings. Judge Baylson proposed that the rule not require the state to serve a petitioner with the exhibits that accompany the state's answer unless the district judge so orders. Committee members emphasized that there is presently no disagreement among the courts of appeals on this issue, and that the proposed change would generate less uniformity. Other members noted that it was accepted practice to serve petitioners with all materials filed with the court. The states' attorneys have not requested a change, suggesting that the current rule is not posing a problem requiring amendment. In light of the other matters already under consideration, the Committee decided not to appoint a subcommittee to pursue this issue.

III. Electronic Filing

After discussion of the work of the Standing Committee's CM/ECF Subcommittee and the need for coordinated action by all of the advisory committees, Judge Raggi announced the appointment of a new subcommittee to be chaired by Judge David Lawson. Judge Lawson was also appointed to serve as the Criminal Rules liaison to the Standing Committee's CM/ECF Subcommittee. The new subcommittee will consider the issues raised by the Civil Rules Advisory Committee's approval of a proposed rule requiring e-filing (subject to exceptions) in civil cases.

The proposed change in the Civil Rule requires reconsideration of subdivisions (b) and (e) of Rule 49 of the Federal Rules of Criminal Procedure. Subdivision (b) presently provides that service "must be made in the manner provided for a civil action," and subdivision (e) provides that a local rule may allow (not require) electronic filing if reasonable exceptions are allowed. The proposed changes in the Civil Rule raise several issues: whether it is time for a national rule on electronic filing in criminal cases; whether the Criminal Rules should now require (rather than permit) electronic filing; and, if so, what exceptions should be made.

The subcommittee will also address two other proposals by Professor Dan Capra, the reporter for the Standing Committee's CM/ECF Subcommittee. Professor Capra has proposed a template rule providing that (1) all references in the rules to information include electronically stored information and (2) any reference to filing or sending papers includes transmission by electronic means.

IV. Rule 35

Judge Raggi appointed a new subcommittee, chaired by Judge James Dever, to consider a proposal from the New York Council of Defense Lawyers to amend Rule 35 to afford judges additional discretion to reduce sentences after they become final. The proposal would allow a

district judge, upon defense motion, to reduce the sentence of a defendant who had served two thirds of his term in three circumstances: (1) newly discovered scientific evidence casting doubt on the validity of the conviction; (2) substantial rehabilitation of the defendant; or (3) deterioration of defendant's medical condition (providing an alternative compassionate release). Members noted that the proposal raised many issues, including how it would operate in light of statutory limits on collateral review under §§ 2241 and 2255, as well as statutorily mandated minimum sentences.

V. Public Hearing on Proposed Amendment to Rule 41

At the conclusion of its regular business, the Committee held the first of two scheduled public hearings on the amendments published for public comment. The Committee heard eight witnesses, most of whom had also provided written comments. All of the witnesses focused on the proposed amendment to Rule 41, which provides venue for remote electronic searches outside the district where the application is made in two situations: (1) when technology has been used to conceal the location of the media to be searched, and (2) in an investigation into violation of the Computer Fraud and Abuse Act, 18 U.S.C. 1030(a)(5), when the media to be searched are damaged computers located in five or more districts.

Seven of the eight witnesses opposed the proposed amendment. In general, these witnesses focused on the policy and constitutional concerns raised by remote electronic searches generally, rather than the new venue provisions. Some witnesses argued that remote electronic searches raise a host of policy decisions that should be resolved by Congress before further rule-making action. Witnesses argued that remote electronic searches raise a variety of Fourth Amendment problems including the inability to comply with particularity and notice requirements, the reasonableness of the proposed surreptitious entry into electronic devices, and the types of information that may be seized. Although the draft Committee Note states that the proposed amendment does not address the Fourth Amendment issues and leaves the application of constitutional standards "to ongoing case law development," the witnesses who opposed the proposed amendment found this disclaimer insufficient to address their concerns. Some viewed the proposed amendment as an endorsement of the constitutionality of such searches despite the disavowal in the Committee Note. Others expressed concern that litigation would not be able to satisfactorily address the constitutional issues, pointing to inadequate notice, and the dearth of decisions evaluating remote electronic searches to date. Several witnesses also expressed concern for the practical consequences and unintended effects that may be caused by remote electronic searches. These serious consequences may affect not only the target device but other devices, including those that are part of the same network, that are hosted on the same server, or that visit the same web sites. Additionally, several witnesses expressed concern that the proposed amendment would necessarily involve the federal courts in authorizing extraterritorial searches in some cases in which technology has been used to hide the location of the target device. The execution of such warrants could violate international law as well as particular treaties and mutual legal assistance agreements, they argued.

Committee members actively questioned witnesses throughout, seeking clarification and potential avenues for addressing the problem that prompted the proposed amendment while also avoiding the concerns raised.

Judge Raggi thanked all of the witnesses for their statements and testimony, noting that they had been extremely helpful and had provided this information early in the process to give the Committee ample time to consider their views. She encouraged the witnesses to provide any further comments in writing as soon as possible. Judge Raggi also reminded Committee members that the second hearing date is January 30, 2015, in Nashville at Vanderbilt Law School.

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TAB 5B

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**ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 4-5, Washington D.C.**

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee (“Committee”) met Washington D.C. on November 4-5, 2014. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Hon. Leslie Caldwell¹
Judge Morrison C. England, Jr.
Judge James C. Dever
Judge Gary Feinerman Mark
Filip, Esq. (Nov. 5 only)
Chief Justice David E. Gilbertson
Professor Orin S. Kerr
Judge Raymond Kethledge
Judge David M. Lawson
Judge Timothy R. Rice
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Laural L. Hooper, Federal Judicial Center
Jonathan C. Rose, Rules Committee Officer
Julie Wilson, Rules Office Attorney

II. CHAIR’S REMARKS AND OPENING BUSINESS

A. Chair’s Remarks

Judge Raggi introduced new members Judge James C. Dever, Judge Gary Feinerman, Judge Raymond Kethledge, and Leslie Caldwell, the new Assistant Attorney General for the Criminal Division. She welcomed observers Peter Goldberger of the National Association of

¹ The Department of Justice was represented at various times throughout the meeting by Leslie Caldwell, Assistant Attorney General for the Criminal Division; Marshall Miller, Principal Deputy Assistant Attorney General for the Criminal Division; David Bitkower, Deputy Assistant Attorney General for the Criminal Division; and Jonathan Wroblewski, Director, Office of Policy and Legislation in the Criminal Division.

Criminal Defense Lawyers and Catherine Recker of American College of Trial Lawyers. Judge Raggi noted that Jonathan Rose had indicated he might not be able to attend the March meeting and she therefore wished to thank him for his service now in the event she could not do it then. She also thanked all of the staff members who made the arrangements for the meeting and the hearings.

For the benefit of new members, Judge Raggi reviewed the process by which the Committee considered new or amended rules of procedure and how its recommendations then proceeded to the Standing Committee on the Federal Rules, the Judicial Conference of the United States, the Supreme Court, and Congress.

B. Review and Approval of Minutes of April 2014 Meeting

A motion to approve the minutes of the April 2014 Committee meeting in New Orleans, having been seconded:

The Committee unanimously approved the April 2014 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Jonathan Rose reported that the proposed amendments to the following Criminal Rules were approved by the Supreme Court and transmitted to Congress and will take effect on December 1, 2014, unless Congress acts to the contrary:

- Rule 12. Pleadings and Pretrial Motions
- Rule 34. Arresting Judgment
- Rule 5. Initial Appearance
- Rule 58. Petty Offenses and Other Misdemeanors
- Rule 6. The Grand Jury

D. Proposed Amendments Published for Comment

The comment period for the proposed amendments to the following rules concludes February 17, 2015. Committee action on these amendments will be deferred until the spring meeting, following the close of the comment period.

- Rule 4. Arrest Warrant or Summons on a Complaint
- Rule 41. Search and Seizure
- Rule 45. Computing and Extending Time; Time for Motion Papers

Judge Raggi reported that the only comment received to date on the proposed amendment to Rule 4 was supportive. A member reported that those to whom he had spoken about the amendment were satisfied that their earlier expressed concerns were addressed by the language

of the published rule. Many comments have been received on Rule 41, and the Committee would conduct a hearing on that rule on November 5. No comments have been received to date on the proposed amendment to Rule 45.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 11

Judge Raggi asked Judge England, Chair of the Rule 11 Subcommittee, to report on the Subcommittee's review of the proposal from Chief Judge Claudia Wilken of the Northern District of California to amend Rule 11 to state that it did not prevent trial judges from referring criminal cases to other judicial officers for the purpose of exploring settlement.

Judge England summarized the proposal and the Subcommittee's work, also described in the memorandum to the Committee in the agenda book. He reported that at least six districts had engaged in settlement conferences before the Supreme Court's decision in *United States v. Davila*, 133 S.Ct. 2139 (2013), indicated that this practice violated Rule 11. He noted that the Committee had already considered, and not acted favorably on, three prior proposals to approve judicial participation in settlement conferences or plea bargaining. He summarized concerns raised by the proposal, including (1) judicial intrusion on the prosecutorial role of the executive, (2) adverse effects on judicial impartiality if a judge is privy to plea negotiations, and (3) the risk of coercing defendants into plea dispositions that they would otherwise not accept.

Judge England reported that the Subcommittee met twice by telephone, and on the second occasion heard directly from Chief Judge Wilken. The Subcommittee also considered memoranda from the Committee's Reporters and from the Department of Justice. The Subcommittee was unable to reach consensus as to how to proceed and sought full Committee discussion to learn whether the proposal should be pursued.

Subcommittee members were then invited to comment.

A subcommittee member reported on an informal survey of eight federal defenders from the districts where judicial officers had participated in settlement conferences. These defenders unanimously thought the practice was valuable and should be permitted. They reported that it was used very rarely, and they did not feel judicial pressure or interference. They mentioned its most frequent use in three types of cases: (1) large, complex cases, particularly those in which the government was seeking a global disposition by all defendants; (2) cases in which parties were close to agreement on disposition but could not quite get there on their own; and (3) cases where parties wanted a plea disposition but were far apart. Judicial involvement was also helpful in rare cases when a defendant was not heeding his attorney and needed to hear the reality of his situation from a neutral third party. The surveyed defenders reported no cases in which a settlement conference failed to produce an acceptable plea agreement. To the extent defenders feel that circumstances such as mandatory minimum sentences and the Sentencing Guidelines slant the "playing field" in favor of the government, they view judicial involvement in plea negotiations as something that helps level the field. The subcommittee member characterized judicial involvement in plea negotiations as a useful tool that each district could

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Criminal Rules Meeting
November 4-5, 2014
Page 4

decide if and how to use.

Another subcommittee member reported that surveyed prosecutors in the districts where judges participated in settlement discussions had mixed reactions, with the vast majority opposed, mostly because they felt the process was designed to put pressure on both the defendant and the prosecution to come to an agreement and to avoid trial. In some cases this is uncomfortable for all parties, and not a healthy dynamic. The member emphasized that the vast majority of cases are already disposed of by plea, so there is no urgent need for the procedure to ensure efficient use of court resources.

A third subcommittee member also expressed concern about the potential for coercion on both parties. When there is a global plea offer that one defendant is reluctant to accept, judicial involvement could exert tremendous pressure on that defendant. This concern can be minimized somewhat by not allowing the trial judge to become involved in the plea negotiation. But a referral judge will not be as familiar with the evidence and the strengths or the weaknesses of the case. The effort necessary for the referral judge to familiarize herself with the case will reduce the efficiencies cited to support the process. The member also agreed with concerns about separation of powers, judicial neutrality, and the perception that this is more a docket management tool than one focused on securing a “right outcome.”

A subcommittee member reported that the practice is not followed in this member’s district. Despite the government’s concerns, this member was of the opinion that if the procedure is limited to cases where there has been a joint request by parties who agree that they need help, it is a good idea for a judge not involved in the case to provide help. State courts have been doing this for years, and the Committee can build sufficient safeguards into a rule to avoid possible abuse.

Another subcommittee member opposed the proposal on three grounds. First, the need for a rule change had not been demonstrated. If there is no significant difference in guilty plea rates as between districts that do and do not involve judges in plea bargaining, why amend the Rule? If defendants now feel coercion to plead from the prosecutor, exposing them to pressure from a judge is not a good idea. Second, although judges routinely mediate civil cases to encourage settlement, criminal cases are different. The former can often be resolved with monetary compensation, while what is at stake in the latter is liberty. The role played by the judiciary in the criminal process thus needs to be purely neutral. Third, there may be troubling consequences if dissatisfied defendants challenge convictions based on judicial conduct in plea negotiations. Will judges have to testify regarding what was said at the conference? Must there be a transcript of what goes on? If there is a transcript, will people speak as freely about offers and demands, and, if they do not, will that compromise the process? In sum, even if judicial

involvement in plea bargaining might increase dispositions in some cases, the member concluded that efficiency should not drive the decision to adopt an amendment.

Another subcommittee member stated that even if there is no constitutional prohibition on judicial involvement in the plea process, a risk remains that, at some point, judicial participation can cross the line and interfere with the voluntariness of the plea. How will the judge accepting the plea know whether that line was crossed in the settlement conference?

A subcommittee member saw no need for this procedure, which no court in his circuit employs. The clarity of the present rule is beneficial; judges know what they can and cannot do. Even a true joint request does not eliminate concerns about the independence of the executive's prosecutorial role. This member was also concerned about how the process might work. In cases in which the plea is not pursuant to an agreed-upon Rule 11(c)(1)(C) sentence, any defendant who receives a more severe sentence than that discussed with the settlement judge will be upset and likely try to challenge his conviction. A Magistrate Judge might say a certain sentence would be fair based on the information available at the settlement conference, but later at sentencing the District Judge who received the presentence report (PSR) would have more information and might impose a higher sentence. This will result in an appeal or a 2255 motion. There are also practical issues about either transcribing the conferences or later requiring a Magistrate Judge to submit an affidavit stating what he or she said.

Judge Raggi then reminded the Committee of the specific language of Judge Wilken's proposal and opened the floor for discussion by all Committee members. She noted that it would be particularly helpful to hear whether members who favored the proposal thought the Committee should set safeguards in a rule or whether that should be left to each district that chose to involve judges in plea bargaining. Specifically, should a rule require that settlement conferences be recorded and that the defendant be present? Should a rule indicate whether statements made during negotiations can or cannot be used at any subsequent proceeding?

A Committee member stated that defense attorneys did not have a problem with Judge Wilken's proposal. He noted that the dynamic in criminal cases is different from that in civil cases, where the dispute is often about money, and the parties are eager to have a neutral intermediary help them reach a reasonable settlement. Nevertheless, in criminal cases, defendants often have difficulty accepting the reality of what they have done and what they are facing. At the point of charging and plea, counsel is sometimes helping a defendant pass from someone with no record and a good self-image, to someone who admits he has been guilty of a criminal offense. It is a very emotional and trying experience. Having a third party assist with that transition can be very helpful. There are times when the defense wants help, and if the government consents, why not make this process available to help some defendants with this transition? Maybe the practical difficulties are too difficult to overcome, but the Committee should consider the proposal further.

When another Committee member asked what a judge could do in this situation to help, other than suggest a better offer for the defense, the member responded that when a client has a crisis of confidence in his attorney, just hearing counsel's position reiterated by someone else helps.

A Committee member asked how the referral judge will be sufficiently educated about a case to make an informed plea recommendation. A Subcommittee member responded that some federal defenders write memos for the judge laying everything out. The member was not sure whether that memo also goes to the prosecution, but assumed it does. The settlement judge's main contribution is not providing sentencing information. Defenders reported that the Magistrate Judges conducting these sessions were prior defense attorneys or prosecutors, and are able to comfort the defendant in a way that his attorney cannot. The member emphasized that settlement conferences are not used for clients who are maintaining their innocence; no attorney would agree to it in that situation. It is helpful for a client who has authorized plea discussions, or who says, "I want to see what is out there, but I don't know how."

Another Committee member expressed concern and skepticism, noting how simple it was for a judge to telegraph a preference for plea negotiations, thereby overcoming the safeguard of joint consent. Counsel appearing frequently before the court would be motivated to conform to the apparent wish of the referring judge for a settlement conference or to the recommendation of the referral judge. The member stated that he did not understand how judges are supposed to help with the "transition" defense counsel are talking about.

A Subcommittee member stated that there is already tremendous pressure under the Guidelines to plead guilty in order to get acceptance of responsibility consideration.

A Committee member reported that in state court, judges have long participated in plea negotiations, and it did not produce more appeals or habeas petitions perhaps because the process is initiated by the lawyers, the defendant has bought into the process, and it is always about sentencing.

A Subcommittee member noted a significant difference between state and federal criminal proceedings. The member expressed concern about cases in which a District Judge did not agree with the Magistrate Judge who conducted the settlement conference. The member also voiced concern about conferences at which the defendant was not present or that were not on the record. Acknowledging that judges in some districts had used the practice and favored it, the member nevertheless stated that he did not see the need for it.

Another Subcommittee member stated that the point of negotiating an agreement is to come to an agreement. But the sentencing judge has to be part of the process for there to be a true agreement. In the courts of the member's state it is common for the parties to have a conversation with the judge about sentence and to get an indication from the judge about the likely sentence. This process works because the parties are dealing directly with the decision

maker. In the proposal for the federal system, however, the ultimate decision maker would not conduct the conference, and the member opined that will not work.

Judge Raggi advised the Committee that District Judge Jed Rakoff of the Southern District of New York had recently published an article (copies of which were circulated to the Committee) that, inter alia, also advocated judicial involvement in plea bargaining. But unlike the N.D. Cal. proposal, which emphasized that such involvement facilitated guilty pleas, Judge Rakoff urged judicial involvement to counter what he perceived as too many guilty pleas, including guilty pleas from “innocent” persons, which he attributed in part to the inadequate plea allocutions conducted by “most judges.” Judge Raggi noted her own disagreement with the last assertion and observed that, even if such a concern were warranted, it was not apparent that the solution to that problem was to get another judicial officer involved in plea negotiations.

Judge Raggi then suggested that the Committee consider whether to pursue the pending proposal by reference to two questions, focusing first the threshold inquiry for all rules amendments -- Is there a problem that needs to be addressed by a rule?—and second, Would the benefits of the proposed rule outweigh any concerns?

As to need, the N.D. Cal. proposal urged an amendment to Rule 11 to facilitate plea dispositions, particularly in complex cases. Judge Raggi noted that the national guilty plea rate is over 95% (a number that had climbed steadily in recent decades), and that districts urging judicial involvement in plea negotiations were right in the mainstream. So there appears to be no problem of courts being overwhelmed with trials that needs to be addressed by amending Rule

Thus, the benefits of the amendment would seem to apply in only a small number of cases.

Turning to concerns, Judge Raggi attempted to summarize the concerns raised in memoranda received by the Committee and in the Committee discussions.

1. Separation of Powers. The responsibility for prosecuting crimes---which includes discretion to decide what crimes to charge and the pleas satisfactory to dispose of the charges---vests in the Executive branch, just as the responsibility for sentencing vests in the judiciary. Should the judiciary assign itself a role in the former area?

2. Competency. How equipped are judicial officers to make sound plea recommendations, given the need for a thorough knowledge of the case and its context? Acquisition of such knowledge may require a substantial expenditure of resources (both by judges and probation departments). Thus, predictions that judicial plea bargaining will save resources in an area of judicial competence (trials) must be considered in light of increased demands on resources in an area of lesser competence (crafting plea bargains).

3. Transforming Judicial Role. The neutrality that characterizes the judicial rule is nowhere more important---as a matter of fact and of perception---than in criminal cases. That neutrality must be manifested by every judicial officer whom the defendant encounters. Will that

neutrality by undermined once any judicial officer is seen as urging a particular disposition? Will that concern be aggravated if the judicial recommendation matches that of the prosecution?

4. Intrusion on Attorney-Client Relationship. This may be mitigated by the parties' consent. Nevertheless, having judges reinforce or undermine the recommendation made by counsel intrudes on the attorney-client relationship in a way that warrants pause. Further, to the extent it has been suggested that judicial involvement in plea bargaining is helpful because many defendants do not "trust" court-appointed lawyers and will be more inclined to accept recommendations from a neutral judge, query how likely it is that a defendant who does not trust his appointed attorney will trust the judge who appointed his attorney?

5. Legal and Ethical Considerations.

- Does defendant have a right to be present for plea negotiations. It had not been N.D. Cal. practice to require.
- What protections should be afforded defendant for statements he or counsel make to the judicial officer in settlement discussions?
- Are there limits on what the judge can say? Can the judge ask about guilt?
- If defendant or counsel maintains innocence, can a judge ever recommend a guilty plea?
- If defendant later testifies contrary to what he or counsel said during conference what are the referral judge's responsibilities regarding perjury?
- Although the N.D. Cal. had not required settlement conferences to be recorded, query whether any contact between a judicial officer and a criminal defendant should be "off the record." Does a record of the conference stifle candor?

6. Accepting a Guilty Plea. To the extent proponents contemplate that plea negotiations are not revealed to the trial judge, does this apply only if the case proceeds to trial? If negotiations result in a guilty plea, can a trial judge responsibly conclude that the plea is knowing and voluntary without reviewing the record of proceedings before the referral judge? Consider this in light of the error in Davila, which rendered the plea involuntary.

7. Increased Litigation. Will defendants who now invariably bring collateral challenges to conviction based on the ineffective assistance of counsel likely find fault with the conduct of judicial officers during plea negotiations, giving rise to increased litigation about judicial promises or coercion?

Judge Raggi indicated that she herself thought that these concerns, along with the advantages of uniformity, far outweighed the benefits of the proposed amendment.

The Committee's Liaison member opined that having a judge than the sentencing judge

making recommendations about sentencing is asking for trouble. The referral judge will not have the benefit of the PSR, an important document to give a full picture of the defendant. Sometimes the PSR raises criminal history points that the parties may not know about, and the settlement judge would not have the benefit of that information. In addition, judges have different views of sentencing, and may not agree with one another on the appropriate sentence. Plus, whatever efficiency you get on the front end, you will lose on the 2255 end. The member did not want to see judges having to submit affidavits. Finally, the member expressed concern with allowing diverse district practices respecting guilty pleas. The Standing Committee has traditionally favored uniformity on major issues.

Professor Coquillette agreed that the Standing Committee has been concerned about local rules on matters where judicial procedures should be uniform throughout the courts. Congress has also expressed concern that local rules might be used to evade its power to review rules pursuant to the Rules Enabling Act. Thus, local rules may be appropriate when they reflect real demographic or geographic differences between districts, but nothing has been said about why certain districts have a special need for the proposed settlement procedure.

A Committee member questioned how the process would work. Would the defendant be promised a particular sentence during the settlement conference? At the plea colloquy, before the defendant says “yes I am guilty,” does the judge accept the agreement reached at the conference, including the sentence expected by defendant? Members agreed that the process would play out differently in cases in which the parties agreed to an 11(c)(1)(C) plea. Some thought judicial involvement would pose fewer problems in such cases because the sentencing judge would not need to know about the give and take during the negotiation. On the other hand, any 11(c)(1)(C) plea must be accepted by the sentencing judge, and injecting a second judge into this process could create problems. A member noted that in one district in New York, 11(c)(1)(C) pleas are unusual, disfavored, and subject to a special review in the U.S. Attorney’s Office. That USAO has a committee that reviews all 11(c)(1)(C) proposals before submitting them for approval by the United States Attorney. This process ensures uniformity within a large office, something that could be adversely affected if a judge were to participate in the plea process, and make a recommendation before committee and U.S. Attorney review.

Another member observed that under current practice the District Judge would be telling only the United States Attorney that she is not prepared to accept the plea agreement, but with the proposed amendment, that judge could be telling another judicial officer she is not prepared to accept what that referral judge had agreed to.

With discussion concluded, Judge Raggi asked the Committee to vote on the question of whether the Rule 11 Subcommittee should be asked further to consider Chief Judge Wilken’s proposal to amend Rule 11.

The question of whether to pursue further the proposal to amend Rule 11 was put the Committee; it failed with 4 in favor and 6 opposed to continued consideration.

B. Proposed Amendment to Rule 52

Judge Raggi invited Judge Kethledge, Chair of the Rule 52 Subcommittee, to report the Subcommittee's recommendation regarding the proposal from Judge Jon Newman of the Second Circuit Court of Appeals to amend Rule 52 to allow for review of defaulted sentencing errors without satisfying the requirements of plain error if the error caused prejudice and correction would not require a new trial.

Judge Kethledge summarized the proposal and the questions addressed by the Subcommittee and detailed in the Reporters' Memorandum to the Committee included in the agenda book. These questions focused on the frequency with which sentencing errors are not being corrected under the present rule; the scope of the proposal, particularly which types of error would be included; and the extent to which the proposal would generate additional litigation in circuit and district courts. Judge Kethledge noted the Subcommittee's receipt of a memorandum from the Department of Justice responding to the proposal, and that the deliberations of the Subcommittee were informed by the perspective of trial judges and defense attorneys, as well as the government. At the end of its first telephone meeting, the Subcommittee was skeptical of the proposal, but scheduled a second telephone meeting to hear from Judge Newman. Before that call, Judge Newman provided the Subcommittee with a memorandum responding to the points raised by the Department of Justice and revising his proposal to apply only to sentencing errors that increased a defendant's sentence. After hearing from Judge Newman, the Subcommittee discussed the proposal further, and ultimately voted unanimously to recommend that the Committee not take any action on the proposal.

Judge Kethledge explained that the Subcommittee determined that there was not enough of a problem to warrant an amendment. Judge Newman identified a handful of cases in which, he argued, his proposal would have changed the outcome. The Subcommittee was not convinced it would have made a difference in all those cases. As to Guidelines calculation errors increasing sentences, most of those are being corrected on plain error review. Even if there are a small number of cases where this is not happening, the Subcommittee considered the benefit of a rule amendment outweighed by the additional litigation regarding the exception's reach and the causation question of whether a judge would have imposed a lesser sentence but for the Guidelines error. The Subcommittee also discussed whether the proposed amendment could create incentives for counsel to be less vigilant in raising sentencing errors in the district court. Finally there were questions about how receptive the Supreme Court would be to the proposed amendment in light of its decision in *Puckett v. United States*, 556 U.S. 129 (2009), applying the plain error test of *United States v. Olano*, 507 U.S. 725 (1993) and Rule 52(b) to errors in the plea process.

Thus, after extensive discussion, the Subcommittee unanimously agreed to recommend no further action on the proposal.

The Committee then voted unanimously not to pursue the proposal to amend Rule 52.

Judge Raggi thanked both the Rule 11 and Rule 52 Subcommittees and the reporters for the work they had put into considering both proposals for amendment. She also noted that Chief Judge Wilken and Judge Newman seemed appreciative of the opportunity to be heard orally and in writing by the Subcommittees.

C. Proposal to Amend Habeas Rule 5

Professor Beale described a request received from District Judge Michael Baylson of the Eastern District of Pennsylvania for the Committee to consider amending Rule 5 of the Rules Governing 2254 Proceedings to provide that the state is not required to serve a petitioner with the exhibits that accompany an answer unless the District Judge so orders. A discussion ensued regarding whether the proposal should go to a subcommittee.

A member expressed the view that the creation of a subcommittee and further consideration was not warranted. There is no disagreement in the courts on this issue, which expect the state to serve petitioner with all documents accompanying an answer, and the proposed change would generate different practices and less uniformity.

Another member noted that if this proposal is referred to a subcommittee the Department of Justice would want to consider recognizing judicial discretion to order that certain documents not be provided to habeas petitioners, either because they are voluminous or because there is a special concern about releasing certain documents within a correctional facility.

Another member who had worked in the office of a state attorney general stated that it would never have occurred to the attorneys in that office that they could send something to the court that wouldn't also go to the petitioner.

Judge Raggi asked Professor King for her views in light of her extensive scholarship in the area of 2254 motions. Professor King opined that the current rule is not posing a problem. She noted that no concern about the present Rule was being raised by the states' attorneys, who would be the logical ones to complain if there was a problem.

The Committee then voted unanimously not to pursue the proposal to amend Rule 5 of the Rules Governing 2254 Proceedings.

D. CM/ECF

Professor Beale described the work of the CM/ECF Subcommittee of the Standing Committee, on which Judge Lawson is now the Committee's Liaison (replacing Judge Malloy whose term on the Committee has expired). She reported that this Committee will have to decide whether it is time for a uniform, national rule for electronic filing in criminal cases. Criminal Rule 49(e) (which was based on the Civil Rules) presently leaves the question whether to permit

e-filing to local rules. At its October 2014 meeting, the Civil Rules Committee approved a national rule requiring e-filing in all civil cases (with exceptions). Thus, this Committee might create a subcommittee to consider whether to amend Rule 49. Professor Coquillette explained that with the courts moving to the next generation system for electronic filing, there is a lot of experimentation. But it is difficult to get districts to give up a local rule once they have tried it.

Judge Lawson, the liaison to the CM/ECF effort, noted that Criminal Rule 49(b) incorporates the civil rules. If those rules are amended to require e-filing and electronic signatures, that may no longer work for the Criminal Rules. He noted that his district created a set of CM/ECF policies and procedures that can be changed quickly without going through the local rule changing process, in order to adapt to changes in technology more quickly. He also noted it will be important to address these issues in conjunction with the other advisory committees.

Judge Raggi reported she had asked Judge Lawson to chair a new subcommittee that will consider whether the civil rule adequately addresses the concerns in criminal cases to support this Committee's adoption of an identical criminal rule or whether a different electronic filing rule is necessary to address the distinctive needs of criminal cases.

Professor Coquillette stated that the Department of Justice looks at these issues closely, in the past expressing concern about the use of electronic signatures in certain contexts. The views of defense counsel will also be important to defining where carve outs are necessary.

A member responded that the Criminal Division expects to work on this with the entire Justice Department, including investigative agencies, as it did when considering electronic warrants.

E. New Proposal to Amend Rule 35.

Judge Raggi reported that, after the agenda book closed, the Committee received a proposal from the New York Council of Defense Lawyers to amend Rule 35 to afford judges' discretion to reduce sentences after they became final. She asked a member familiar with the proposal to describe it.

The member explained that the proposal would allow a district judge, upon motion, to reduce the sentence of a defendant who had served two thirds of his term in three circumstances: (1) newly discovered scientific evidence cast doubt on the validity of the conviction; (2) substantial rehabilitation of the defendant; or (3) deterioration of defendant's medical condition (providing an alternative compassionate release). Another member expressed support for the proposal, noting that this would provide another means for reducing the prison population.

Another member questioned how the proposal would operate in light of temporal statutory limits on collateral review under §§ 2241 and 2255. The member also questioned the Committee's ability to use a procedural rule to authorize sentence reductions below statutorily mandated minimums. At the same time, the member acknowledged that judges with experience

under the old Rule 35 (prior to the Sentencing Reform Act) thought that version of the Rule was beneficial.

Professor Beale reported that the American Law Institute is also considering including a “second look” provision in its draft model sentencing law.

Professor Coquillette stated that the Rules Enabling Act’s supersession clause does permit the adoption of rules that supersede existing statutes. But injudicious invocation of that clause may prompt Congress to reconsider it. Thus, the Rules Committees have often pursued a different approach, *i.e.*, sponsored legislation.

A member noted that the proposal intersects with many statutes and policies as well as current pending legislation. For example, a bill just approved by the Senate Judiciary Committee includes a “second look” provision that would apply earlier than the timing of the proposal.

F. New Subcommittees

The Committee adjourned for lunch, and when it reconvened Judge Raggi announced the membership of two new subcommittees:

Rule 35 Subcommittee

Judge Dever, Chair
Ms. Brook
Judge Feinerman
Judge Lawson
Mr. Siffert
Mr. Wroblewski

CM/ECF Subcommittee

Judge Lawson, Chair
Ms. Brook
Judge England
Prof. Kerr Judge
Judge Rice
Mr. Wroblewski

Judge Raggi also announced that Judge Dever would serve as the Committee’s liaison to the Evidence Committee, a position formerly held by Judge Keenan, whose term on the Committee expired.

G. Preparation for the Committee’s Public Hearing

Judge Raggi then asked the Reporters to provide the Committee with an overview of issues raised in public comments to Rule 41 in preparation for the next day’s hearing.

Professor Beale said the issues fell into three categories: (1) whether an alternate venue for remote access searches should be established by rule or by legislation; (2) Fourth Amendment issues as to particularity, the reasonableness of the proposed surreptitious entry into electronic devices, adequate notice, the types of information seized, the nature of the intervention and potential damage to targets and non-targets; and (3) concerns about the unintended effects of remote searches, including unintended damage to both the device to be searched and third parties.

Professor King added that some comments voiced concern that even if Rule 41 is amended only to expand venue, once such an amendment took effect, it would be difficult to litigate the identified constitutional issues.

Judge Raggi asked Professor Kerr to share his views. Professor Kerr stated that every remote access search raised numerous interesting questions beyond the venue issue addressed in the amendment. Some of these questions fall outside the Committee's authority. He noted that the proposed amendment does not affirmatively approve remote access searches, the constitutional status of which is presently unsettled. As for concerns about the adequacy of suppression motions to address all concerns, he observed that not all Title III issues could be raised in a motion to suppress. Some could be litigated only in collateral civil litigation. He thought the comments most helpful to the Committee's work were those that addressed (1) the adequacy of the proposed language about reasonable notice in cases in which a computer is affected by a botnet and the government has obtained a warrant to obtain the IP address, and (2) whether the "concealing" language could be applied more broadly to scenarios beyond those envisioned by the Committee. He also hoped that at the hearing commenters would expand on their concerns about applications of the Computer Fraud and Abuse Act. Professor Kerr observed that although the Justice Department's original proposal had been narrowed considerably by the Committee in the published rule, some of the comments appeared to address the original proposal, not the published rule, or were raising concerns to remote access searches generally. Commenters generally assume that the Committee has approved remote access searches, but the amendment does not do so.

Judge Raggi then asked the Department of Justice member for his views. She noted for the Committee that she had discouraged the Department of Justice from filing a written response to each critical public comment received, urging it to do so only after the November hearing.

Mr. Wroblewski stated that the government acknowledges commenters' legitimate concerns about particularity, nature of entry, ability to find vendors, nature of the procedure, and delayed notice. But those concerns are not implicated by the proposed rule, which only establishes venue. On the question of notice, he indicated that the government provides notice electronically, which when it has only an IP address, is all it can possibly do. He indicated that the government may still have to struggle with notice issues. He also acknowledged that some cases may raise Title III issues. But he noted that a well-established process exists for dealing with these issues if they arise. The government is not trying to avoid those issues, but they are

not part of this proposal. Most of the comments presented interesting questions about the use of various techniques; the use of these techniques is also not really raised by the proposed rule amendment.

A member asked about the Electronic Communications Privacy Act (ECPA), referenced by some commenters. Professor Kerr responded that the ECPA regulates access to remotely stored information, text messages, email, and cloud data. The original proposal presented a possible conflict with the statute because it might have allowed government to go around the provider and, instead, access email accounts directly. But the narrower published rule poses no such concern. If the government does not know where the data is located, the search would not involve data known to be controlled by the provider, so it could not use the ECPA process. And the second prong of the proposed amendment applies to damaged computers.

Professor Beale stated that some of the comments seemed not to understand that the proposed venue amendment did not relieve the government of its constitutional obligation to demonstrate probable cause for a warrant regardless of venue. Thus, the use of technology such as virtual private networks (VPNs) would not support a remote search under the proposed amendment absent probable cause.

Responding to some commenters' concerns that, when a company uses a VPN, the government could get remote access warrant without endeavoring to determine the location of the server, Professor Kerr suggested that the concern was not likely to be a significant issue in practice because it would be easier to find the server location than to do a remote search under the proposed amendment.

Professor Beale added that commenters had also raised concerns about the possible extraterritorial application of warrants issued under the published rule. Is it predictable that the computers to be searched will be outside the U.S.? If so, would this violate MLATs specifically or international law generally? If the foreign country in which the computer is located defines unauthorized access as a crime, could agents carrying out the remote search be charged with crimes by those countries?

Judge Raggi asked whether the government expected to advise United States judges of the possibility that a remote access search could reach beyond this country's borders.

Professor Beale noted that commenters' concern about collateral damage to non-targets, for example, in "watering hole" operations. Might the government exploit vulnerabilities in security protections, affecting computers networked to target computers?

A member observed that these and other concerns about do not seem to be generated by the proposed rule amendment itself, but from a concern that the amendment would increase the likelihood techniques having such effects would be used. In sum, the problems already exist, but the concern is that an amendment would exacerbate them.

Professor Beale also noted that although the proposed rule authorizes searches but not remediation, the government may want to do more than just search. The amendment may make it possible for government to do this in a greater number of cases.

Professor King noted that other rule amendments had established procedures for government conduct whose constitutionality had not yet been conclusively determined. For example, Rule 15 establishes procedures for depositions outside the U.S. where the defendant is not present, even though the admissibility of such a deposition at trial is not established under the Confrontation Clause. Rule 11 requires advice about appellate waivers that might not be deemed valid. Rule 41 established procedures for tracking devices, though at the time of the amendment it was unsettled whether such installations constituted searches subject to the Fourth Amendment. So there are some precedents for the Committee approving a rule of procedure for a process whose constitutionality is not yet settled.

A member noted that the examples just cited were distinguishable in that injury depended on later action (such as the admission of evidence). The injury of concern in the published rule would occur when the search and seizure authorized by the judge in the alternate venue occurs.

Another member noted that the details needed to address the myriad concerns identified by commenters may be more than a procedural rule can handle. But such detail is not needed if we are not attempting to legitimate remote access searches, but merely to provide a procedural framework addressing venue. This might even provoke legislative activity on the larger issues. Perhaps this could be made clearer by having the proposed rule say something such as “a magistrate can issue extraterritorial warrant according to law.”

A member suggested that the Committee Note might flag issues raised by commenters, and note that the Committee is not taking any position on them.

Professor Beale responded that the Standing Committee does not want elaborate Committee Notes and generally discourages the citation of cases therein. But she agreed the Committee should be as clear as possible in communicating that the amendment does not foreclose or prejudge any constitutional challenges to remote access searches.

Professor Coquillette added that the philosophy has always been to have each Advisory Committee draft the best rule possible and let the Standing Committee worry about reactions from Congress or the Supreme Court. The Standing Committee has adopted new procedures for previewing rules amendments for the Supreme Court in advance of formal approval by the Judicial Conference, thereby giving the Court more time to consider amendments. He noted two rules philosophies on the Court. One views the Court’s promulgation of a rule as a signal of its general constitutionality. The other views promulgation as simply sending the rule forth for application and review on a case-by-case basis. Professor Coquillette observed that the Court now seems to want unanimity on rules it approves. In short, one justice’s reservations can defeat a rule.

Professor Beale agreed that although, in the past, some rules were adopted over a justice's dissent, the Supreme Court now generally approves proposed rules only by consensus.

Members agreed on the need for clarity in the Committee Notes. One emphasized the need to disavow any assessment of constitutional issues. Another noted that the Committee may be underestimating the concern about privacy, and public confusion about what the rule does and does not do. The Committee Note needs to make it clear what we are and are not doing.

At the conclusion of this discussion, the meeting adjourned for the day, with the Committee to reconvene on November 5 for public hearings, which were transcribed separately.

Judge Raggi announced that the next regular meeting of the Committee would take place on March 15-16, 2015 at the federal courthouse in Orlando, Florida.

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TAB 6

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TAB 6A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffery S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon William K. Sessions, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: November 15, 2014

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on October 24, 2014 in Durham, North Carolina, at Duke University School of Law. At the meeting, the Committee considered a number of proposals developed from its April, 2014 Symposium on the Challenges of Electronic Evidence. The proceedings from the Symposium will be published in the next edition of the Fordham Law Review.

The Committee also continues to monitor the need for rule changes necessitated by the Supreme Court’s decision in *Crawford v. Washington* and its progeny. The Committee is not proposing any action items for the Standing Committee at its January 2015 meeting.

II. Action Items

No action items.

III. Information Items

A. Proposal to Amend or Abrogate the Hearsay Exception for Ancient Documents in Response to Electronically Stored Information.

Rule 803(16) provides a hearsay exception for “ancient documents.” If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents, no matter how unreliable those contents may be. For the last year, the Committee has been investigating the possibility of amending or abrogating Rule 803(16), due to the risk that it will become a loophole for admitting unreliable electronically stored information, simply because that information has been stored for 20 years. The ancient documents exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can easily be retained for more than 20 years it is possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there will likely be significant amounts of *reliable* electronic data available to prove any dispute of fact.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment to Rule 803(16) would be appropriate to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen — whether the exception should simply be abrogated, or narrowed to exclude ESI, or amended to require a showing of necessity or reliability before an old document is admitted. The Committee ultimately determined to revisit the proposed amendment to Rule 803(16) at the next meeting. The Reporter was directed to work up a formal proposal for each of the alternatives discussed. If the Committee decides to propose any amendment to Rule 803(16), it will be held up until it can be proposed as part of a package of amendments.

B. Proposal to Add Hearsay Exceptions for Statements of Recent Perception, to Accommodate “eHearsay”

At the Advisory Committee’s Symposium on electronic evidence, held in April 2014, Professor Jeffrey Bellin proposed an amendment to the Evidence Rules that would add two new hearsay exceptions: one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify; the other to Rule 801(d)(1), for certain hearsay statements made by testifying witnesses. Both exceptions are intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. Professor Bellin

contends that the existing hearsay exceptions, written before these kinds of electronic communications were contemplated, are an ill-fit for them and will result in many important and reliable electronic communications being excluded.

To solve the perceived problem, Professor Bellin proposes a modified version of the hearsay exception for recent perceptions --- an exception that the original Advisory Committee approved but which was rejected by Congress. Professor Bellin contends that the proposal will allow most of the important and reliable tweets and texts to be admitted, while retaining sufficient reliability guarantees that will exclude the most suspect of this category of statements.

At the Fall meeting, the Committee considered the proposed amendments for recent perception in detail. It determined unanimously that an amendment to Rule 801(d)(1) was not warranted, most importantly because it would create problems in integrating with the other Rule 801(d)(1) exceptions. For example, the amendment would allow certain prior inconsistent statements to be admitted substantively even though they would not be admissible under the constraints imposed by Congress in Rule 801(1)(d)(1)(A) — the rule allowing only prior inconsistent statements made under oath to be admissible for their truth. The Committee decided that if any change to Rule 801(d)(1) were to be made, it should be done pursuant to a systematic review of whether prior statements of testifying witnesses should even be defined as hearsay and, if so, what exceptions are appropriate. Thus, a systematic review of the entire category of prior statements of testifying witnesses was thought preferable to adding another hearsay exception to that category without working through how it might affect the other exceptions. The Committee will begin that systematic review at the next meeting.

With regard to the proposal to amend Rule 804, the Committee was concerned that a recent perceptions exception would be likely to allow the admission of unreliable hearsay, and it determined that at least as of now, the existing hearsay exceptions appeared to be working adequately to allow admission of those texts, tweets and other personal electronic communications that are in fact reliable. The Committee directed the Reporter and its consultant Professor Ken Broun to monitor the state and federal case law on how personal electronic communications are being treated in the courts. If it appears that reliable statements are being excluded, or that they are being admitted but only through misinterpretation of existing exceptions, then that might justify a hearsay exception for recent perceptions conditioned on the unavailability of the declarant. The Committee will continue its consideration of a recent perceptions exception at the next meeting, and will review the original Advisory Committee's proposal to determine whether it might be an appropriate starting point if an exception is deemed necessary.

C. Proposal to Amend Rules 901 and 902 to Provide Specific Grounds for Authenticating Certain Electronic Evidence

At the Fall meeting, the Committee considered whether to develop and propose amendments to the Evidence Rules that would add specific provisions detailing how certain forms of electronic evidence (email, web pages, etc.) could be authenticated. There are of course many reported cases, both Federal and State, that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. The Committee considered whether amendments could usefully codify all this case law. The Committee eventually concluded that setting forth a detailed list of factors in an authenticity rule might do more harm than good. The result would be a highly detailed and complicated rule, when in fact authentication of electronic evidence is in many cases simple and straightforward. Moreover, listing authenticity factors in a rule might lose sight of the point that the factors must be weighed in each individual case, and that some factors might weigh more in some cases than others. That weighing process cannot be encapsulated easily in a rule. Finally, there is a danger that rulemaking would not be able to keep up with technological advances, so that specifically stated grounds of authenticity for electronic evidence might become outmoded, thus requiring constant amendment of those rules.

The Committee concluded that it would not proceed at this time with a rule amendment that would provide guidance on how to establish the authenticity of electronic evidence. But Committee members unanimously determined that it should develop a best practices manual that would assist courts and litigants in negotiating the difficulties of authenticating electronic evidence. The Committee will begin working on a best practices manual and will review possible materials and formats at its next meeting. Once the best practices manual is prepared and approved, the Committee will determine (after consultation with the Standing Committee) on the best way to have it published, whether under the auspices of the Committee or with some other designation.

D. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its Fall meeting the Committee considered a proposal for two additions to Rule 902, the provision on self-authentication. The first would allow self-authentication of machine-generated information (such as a web page) upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of an electronic device, media or file that would be authenticated by a digital process for identification. These proposals are analogous to Rule 902(11) of the Federal Rules of Evidence, which permits a foundation witness to establish the authenticity and admissibility of business records by way of

certification. The goal of the proposals is to make authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The contention behind the proposals is that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute, so the proponent should not have to go to the expense and inconvenience of producing an authentication witness. These self-authentication proposals, by following Rule 902(11)'s provision covering business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee unanimously agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Many Committee members remarked on the unnecessary expense, in the current practice, of having to call a witness to authenticate a web page or other machine-produced evidence, when it ordinarily ends up that the witness is not cross-examined or that authenticity is stipulated at the last minute.

The Committee unanimously decided to consider, at its next meeting, formal amendments to add Rule 902 (13) (for machine-generated evidence) and 902(14) (for copies of devices, storage media, etc.) to the Evidence Rules. The Committee discussed the possible Confrontation Clause problem posed by submitting certificates of authentication in criminal cases. But it determined that the proposals did not raise a confrontation issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Committee was also persuaded by the uniform lower court authority holding that certificates prepared under Rule 902(11) do not violate the right to confrontation — authority that relies on the Supreme Court's statement in *Melendez-Diaz*. The Committee resolved that if the proposals are approved, the Committee Notes would specifically caution that the certification would only establish authenticity --- not the evidentiary significance or reliability of the proffered evidence.

E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep

current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

IV. Minutes of the Fall 2011 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2014 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 24, 2014

Durham, North Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 24, 2014, at Duke University School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten
Hon. John A. Woodcock, Jr.
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Sidney A. Fitzwater, Former Chair of the Committee
Hon. Richard Wesley, Liaison from the Committee on Rules of Practice and Procedure
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Catherine R. Borden, Esq., Federal Judicial Center
Jonathan C. Rose, Chief, Rules Committee Support Office
Julie Wilson, Rules Committee Support Office
John K. Rabiej, Duke University Law School
David Levi, Dean, Duke University Law School
Donald Beskind, Duke University Law School

I. Opening Business

Welcoming Remarks

Judge Sessions welcomed everyone to the Committee meeting. He noted that it was his first meeting as Chair, and that he was grateful to the outgoing Chair, Judge Fitzwater, for doing so much to assure a smooth transition. He expressed his appreciation to Duke Law School, and especially to Dean David Levi and John Rabiej, for hosting the Committee.

Approval of Minutes

The minutes of the Spring 2014 Committee meeting were approved.

New Members

Judge Sessions introduced and welcomed the new Committee members, Judge Marten of the District of Kansas, and Daniel Collins, Esq., partner in the law firm of Munger, Tolles & Olsen.

Tribute to Judge Fitzwater

The Committee gave a well-deserved tribute to Judge Fitzwater, the departing Chair. The Reporter commented that Judge Fitzwater led the Committee with brilliance, dignity and grace, and that it was his guidance that let the Committee to sponsor three important Symposia — on the Restyling effort, Rule 502, and electronic evidence. The proceedings from all three Symposia have been published in law reviews, and the Electronic Evidence Symposium helped the Committee to establish its agenda for the current meeting and meetings going forward. The Reporter also noted that it was Judge Fitzwater who crafted the language for the amendment to Rule 801(d)(1)(A) that solved the problems that some had raised with the initial draft of the rule, and that led to the passage of the rule. Judge Sessions complimented Judge Fitzwater for his remarkable contributions to the rulemaking process and for his stellar qualities as a person and a leader.

Judge Fitzwater spoke and stated that being the Chair of the Evidence Rules Committee was the “best job” he ever had. He emphasized the importance of the Committee’s work and the brilliance and dedication of members of the Committee, who were “the best and the brightest.” He thanked the AO staff for their dedicated efforts on behalf of the Committee. Judge Fitzwater noted that he had worked with the Reporter on the egovernment project when he was a member of the Standing Committee and that he and the Reporter continued that productive partnership while working on the Evidence Committee. He complimented the Reporter for his efforts for the Committee. Finally, Judge Fitzwater stated that Judge Sessions was an outstanding selection for the new Chair, and that the appointment of a person as accomplished as Judge Sessions was a tribute to the Evidence Rules Committee and the importance of its work.

June Meeting of the Standing Committee

Judge Fitzwater reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Fitzwater reported to the Standing Committee on the Electronic Evidence Symposium held in April 2014, and told the Standing Committee that the Evidence Committee's agenda in the future would be influenced by the ideas expressed at the Symposium.

II. Possible Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Spring meeting, the Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be amended because of the development of electronically stored information. The rationale for the exception has always been questionable, for the simple reason that a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter's memorandum noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But if it is the case that electronically stored information can easily be retained for more than 20 years, it is then possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

The Reporter prepared three possible alternatives for amending the Rule: 1) abrogation; 2) limiting the rule to hardcopy; and 3) adding the necessity-based language from the residual exception, so that information could not be admitted under Rule 803(16) unless the proponent could show that it was more probative than any other reasonably available evidence that could be admitted under one of the reliability-based exceptions.

Committee members at the Spring meeting expressed interest in a proposed amendment but asked the Reporter to provide more information on the factual premises supporting the change — specifically, whether ESI that is more than 20 years old is and will be widespread (as opposed to deleted), and whether it is easily retrievable.

At the Fall meeting, the Reporter prepared a detailed memo indicating that old ESI in fact is and will become even more prevalent, and that much of it is easily retrievable. Examples include the materials from every posted web page, which can easily be found on and retrieved from the

Internet Archive; personal emails, texts, and social media postings; information in cloud storage; and databases of old books and public documents.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable — this is patently not the case. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

On the first question of whether an amendment is necessary at this point: Some members argued that the obscurity of the ancient documents exception will not last now that ESI either has reached or is reaching the 20-year-old point. They noted that litigation incentives will be bound to lead to proffers of old, unreliable ESI that could not be admitted under any other exception. As one member stated, “this is a time bomb.” But others, including the DOJ representative (after speaking with others at the Department) thought it appropriate to wait and monitor developments; the worst that could happen is that there would be a period of time in which old ESI would be admitted before an amendment would take effect. Another member observed that the time period required for admissibility provided at least some protection against widespread abuse, as it is unusual that a document more than 20 years old will be useful in a litigation; thus the risks involved in waiting were not overwhelming. But another member noted that especially in criminal cases, where statutes of limitation have been lengthened as to many crimes, the risk of admitting old and unreliable ESI was quite real — especially user-sourced information such as texts, tweets and social media postings. Another member stated that if the rule is wrong, something should be done about it — there is no reason to wait and have a rule that is wrong on the merits remain on the books.

Finally, members, as well as Judge Fitzwater, noted that in any case the proposal should be held up until it could be packaged with other amendments.

On the second question of which alternative to adopt: A number of Committee members felt that the rule should just be abrogated, as it is based on a fundamentally flawed premise that authenticity of a document means that its contents are reliable. One member argued that the exception was especially pernicious because if unreliable hearsay is admitted, it will be especially hard to rebut after the passage of so much time. Another member stated that if the Committee were drafting the rules from scratch, it should not propose an ancient documents exception, but that abrogating an exception was a somewhat radical step.

One member preferred the proposal that would distinguish between paper documents and ESI. That member worried about the growing volume of ESI that is in fixed form, and noted that people don't stockpile paper the way they stockpile ESI. But other members noted that there might be a problem in distinguishing between ESI and paper. For example, why is a printout of a

newspaper article on a website any different from the hardcopy of the newspaper? What rule would apply to a scan of an old hardcopy document?

One member suggested that the necessity-based alternative was preferable because abrogation seems extreme and it is appropriate to leave the matter of admissibility to the judge, with the instruction that the judge should be more careful in admitting old and potentially unreliable information. The necessity-based model is just telling the judge to be more careful.

Another member suggested yet another alternative, in the nature of burden-shifting. Under this alternative, hearsay could be admitted under the ancient documents exception unless the opponent could show that it was untrustworthy. The Reporter noted that this alternative could be effectuated by importing the untrustworthiness clause of the business records exception (Rule 803(6)) into the ancient documents exception. Another member argued, however, that this alternative would not be sufficiently protective, because with ancient documents, the very problem is that they are so old that it will be difficult to prove their untrustworthiness.

The Committee ultimately determined to revisit the proposed amendment to Rule 803(16) at the next meeting. The Reporter was directed to work up a formal proposal for each of the alternatives discussed. If the Committee decides to propose any amendments to other rules at that time, then any proposed change to Rule 803(16) might be part of a package.

III. Possible Addition of Hearsay Exceptions for Recent Perceptions (eHearsay)

At the Advisory Committee's Symposium on Electronic Evidence, Professor Jeffrey Bellin proposed amending the Evidence Rules to add two new hearsay exceptions: one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify; the other to Rule 801(d)(1), for certain hearsay statements made by testifying witnesses. Both exceptions are intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. Professor Bellin contended that the existing hearsay exceptions, written before these kinds of electronic communications were contemplated, are an ill-fit for them and will result in many important and reliable electronic communications being excluded.

To solve the perceived problem, Professor Bellin proposed a modified version of the hearsay exception for recent perceptions --- an exception that the original Advisory Committee approved but which was rejected by Congress. Professor Bellin contended that the proposal will allow most of the important and reliable tweets and texts to be admitted, while retaining sufficient reliability guarantees that will exclude the most suspect of this category of statements. And he contended that the proposal fits well within evidentiary doctrine because it derives from a hearsay exception that the Advisory Committee approved --- an exception that though rejected by Congress has actually been adopted and applied in a handful of states.

The Committee considered the recent perceptions proposal at the Fall meeting. Preliminarily, there was general agreement that one part of the proposal — amending Rule 801(d)(1) to add an exception for recent perceptions — should not be adopted. The Committee was concerned that admitting prior statements of a testifying witness, on the ground that they are based on a recent perception, would create problems in integrating with the other Rule 801(d)(1) exceptions. For example, the amendment would allow certain prior inconsistent statements to be admitted substantively even though they would not be admissible under the constraints imposed by Congress in Rule 801(1)(d)(1)(A) — the rule allowing only prior inconsistent statements made under oath to be admissible for their truth. The rule would also allow certain prior consistent statements to be admitted substantively even though they would not be admissible under the recently amended Rule 801(d)(1)(B). Moreover, the recent perceptions exception adopted by the original Advisory Committee was addressed to situations in which the declarant was unavailable. The Committee was not convinced that the reasons for admitting a recent perceptions statement when the declarant was unavailable were equally applicable to situations in which the witness *was* available for cross-examination.

The Reporter proposed that if the Committee were interested in revisiting the entire category of hearsay exceptions for prior statements of testifying witnesses, then he would provide the Committee with the necessary background for a systematic review of the subject at a future meeting. That review would include consideration of whether prior statements of testifying witnesses ought to be defined as hearsay in the first place, given the fact that by definition the person who made the statement is subject to cross-examination about it. The Committee agreed that a systematic review of the entire category of prior statements of testifying witnesses would be preferable to adding another hearsay exception to that category without working through how it might affect the other exceptions.

The Committee then turned its attention to the proposal to add a recent perceptions exception to Rule 804. One member found that the requirements that Professor Bellin proposed to add to the original Advisory Committee proposal were problematic. For example, Professor Bellin proposed to limit the exception to “communications” rather than any statement; but this member found that distinction to be unwarranted because private statements can be just as reliable, or unreliable, as communications. Thus the distinction resulted in line-drawing without any payoff in terms of differentiating reliability. This member concluded that if an exception for recent perceptions were found appropriate, then the Committee should propose the exception as it was proposed to Congress in the 1970's. As to that proposal, he wondered whether there should be deference to the Congressional decision to reject the proposed amendment back then.

On the question of deference, another member responded that times had changed since the 1970's, most particularly in the explosion of electronic communications such as texts, tweets, and Facebook status updates. If the proposed exception covers the most reliable of those statements — and those statements would not otherwise be covered by the existing exceptions — then that would be sufficient justification for revisiting the recent perceptions exception as the Advisory Committee had proposed it, to be revised as necessary.

Professor Broun, the consultant to the Committee, then reported on the research he had done into how the recent perceptions exception had been applied in the few states that had adopted it. His review of the reported case law led to the following conclusions: 1) the exceptions had not been subject to widespread abuse and in fact had been used relatively infrequently — most often in cases involving domestic abuse; 2) in many of the cases in which the exception was used, the hearsay statement might well have been admitted as a present sense impression or an excited utterance; 3) that said, the exception had been usefully applied in a number of cases where the statement was made a few hours or more after the event — more than would be permitted under the present sense impression exception — but appeared to be reliable under the circumstances.

Professor Broun acknowledged that a review of reported decisions does not provide a completely accurate account of how the exception is working, because the real work on the exception is done in trial courts, and a trial court's evidentiary rulings either admitting or rejecting the proffered hearsay are unlikely to be reviewed. A Committee member suggested that if the Committee decided to continue its work on the amendment, then it might be useful to call prosecutors and other litigators in the states using the exception to see how it has affected their practice.

Several members then expressed the concern that a recent perceptions exception would lead to the admission of unreliable evidence. One member noted that a written text or tweet might be difficult to interpret, given the lack of context that would exist with an oral communication. That member also noted that the more time that passes between the event and the statement, the more likely it is that the person who sends the text or tweet is relying not only on his own personal knowledge but also the texts or tweets of others about the event. Thus there is a risk that electronic communications well after the event are the result of crowdsourcing without any guarantee of reliability. Moreover, the nature of text messages and tweets is that they often describe an event that can't be verified as having occurred. This member suggested that if recent-but-not immediate statements are in fact reliable, they could be admitted under the residual exception. This member suggested that the residual exception might be more appropriate because it would focus the judge directly on questions of reliability — perhaps more effectively than the categorical requirements of a new exception.

Another member, in response, argued that the problem of determining whether a person who sends a text is relying on his personal knowledge as opposed to crowdsourcing is a question of foundation — adopting a recent perceptions exception would not mean that all statements made recently after an event would be admissible automatically, because the proponent would also have to establish a foundation of personal knowledge. This member also stated that the residual exception solution is problematic because the residual exception was intended to be used in only rare and exception circumstances; it would not be appropriate to essentially create a new exception for reliable texts and tweets in the residual exception, as that would lead to unpredictability and too much judicial discretion.

Another member contended that to the extent the recent perceptions exception was intended

to expand admissibility of personal electronic communications, it would lead to the collateral cost of more disputes on authenticity. Questions would abound on whether a particular text or tweet was actually made by a particular person. While courts are of course already deciding authenticity questions presented by electronic evidence, a new exception embracing this evidence would raise more authenticity questions.

Both the public defender and the DOJ representative reported that an informal survey of their respective constituencies indicated uniform opposition to a proposed exception for recent perceptions. The public defender found no shortage of hearsay being introduced in a criminal trial, particularly under the broad exception for coconspirator statements. He contended that there was no need for another potentially broad exception that would admit texts and posts made so far after the event that memory has faded. He argued that experience shows that texts and other electronic personal communications can be quite unreliable, and unverified. The DOJ representative reported that the prosecutors and bureau chiefs she had contacted were opposed to the exception because it might open up a Pandora's box, and that they had found no problem in admitting reliable hearsay under the existing exceptions.

Other members expressed concern that with all the volume of potentially low quality material being produced by text and tweet — with information misreported and then those misreports widely distributed.

Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter and Professor Broun to monitor both federal and state case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception? The Reporter also suggested that he could go back to the original Advisory Committee proposal for recent perceptions and try to refine it for consideration by the Committee at the next meeting. The Committee agreed with the Reporter's suggestion. The Committee resolved to continue its consideration of a recent perceptions exception at the next meeting.

IV. Proposal to Amend Rules 901 and 902 to Provide Specific Grounds for Authenticating Certain Electronic Evidence

At the Electronic Evidence Symposium in April, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases, both Federal and State, that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence

and texts; these draft rules are intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. Greg suggested that analogous standards could be set up for other forms of electronic evidence such as online chats.

At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose them, along with any revisions, as amendments to Rule 901 and 902. One member noted that the proposed rule on emails had been adapted from Rule 901(b)(6), governing authentication of phone calls. He argued that the telephone rule was different at least in part because the major purpose of that rule was to establish who it was that answered the call; in the email situation, there is rarely a question of who received the email. Another member noted that the question of receipt of an email is not really about authenticity but rather about a presumption, that something properly sent is received.

One member argued that the proposal was a very helpful compendium of factors that might go into the authenticity question, but that it was too detailed for a rule. In many cases, none of the details in the proposal would actually be applicable, because the evidence could be authenticated in a simpler manner. He noted that the telephone rule itself was not detailed — it did not lay out all the factors that could ever be relevant to the authenticity question.

Another Committee member noted that listing authenticity factors in a rule might lose sight of the point that the factors must be weighed in each individual case, and that some factors might weigh more in some cases than others. That weighing process cannot be encapsulated easily in a rule. Other Committee members noted that the deliberate nature of the rulemaking process raises the danger that specifically stated grounds of authenticity for electronic evidence will be outmoded before they are even enacted. Such rules would probably have to be constantly amended to keep up with technology — which does not appear to be a problem with the flexible and broadly stated standards in the existing rules.

Another Committee member observed that none of the other Evidence Rules provide a list of factors that are relevant in determining whether an admissibility requirement is met — much less text that would provide the court guidance on how to weigh those factors. And while such guidance might once have been provided in a Committee Note — such as the Committee Note to the 2000 amendment to Rule 702 — the Standing Committee has recently discouraged the use of Committee Notes to provide significant detail that is not covered by the text.

In the end, the Committee determined that it would not proceed at this time with a rule amendment that would provide guidance on how to establish the authenticity of electronic evidence. But Committee members unanimously determined that the Committee could provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual — along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It could include copious citations, which a rule could not. And it could be set forth in any

number of formats, such as draft rules with comments, or all text with no rule.

The Committee directed the Reporter to prepare a memorandum on how a best practices manual on authentication of electronic evidence might be developed and prepared. The Reporter will provide a sample format on one or more types of electronic evidence. Once the best practices manual is prepared and approved, the Committee will determine (after consultation with the Standing Committee) on the best way to have it published, whether under the auspices of the Committee or with some other designation.

Finally, the Committee considered, and rejected, a possible amendment to Rule 901 that would provide that production of an item in an action would constitute authentication of that item. The Reporter noted that the courts were divided on whether production equals authentication, and that it could be argued that the act of production of an item in discovery is tantamount to saying that the item is what the producer says it is. But several members of the Committee argued that a party to a litigation might produce a document knowing that it is inauthentic, e.g., a forged check. Thus it would be overbroad to conclude that all production concedes authenticity.

V. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At the Electronic Evidence Symposium in April, John Haried made a proposal for two additions to Rule 902, the provision on self-authentication. The first would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of an electronic device, media or file by its "hash value" or other indication of reliability. These proposals are analogous to Rule 902(11) of the Federal Rules of Evidence, which permits a foundation witness to establish the authenticity and admissibility of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. Mr. Haried argued that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute but that the proponent is nonetheless forced to produce an authentication witness, often at great expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following Rule 902(11)'s provision covering business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under Rule 902(11), a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record.

The proposals for a new Rule 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

The Committee engaged in discussion on the certification proposals. Members uniformly agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Many Committee members remarked on the unnecessary expense, in the current practice, of having to call a witness to authenticate a web page or other machine-produced evidence, when it ordinarily ends up that the witness is not cross-examined or that authenticity is stipulated at the last minute.

Discussion indicated three concerns about the proposal. First, in a criminal case, would admission of the certificates under the proposed rules violate the defendant's right to confrontation? As to this question, the Reporter commented that the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate prepared for litigation does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Reporter also stated that the lower courts had uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation, relying on the Supreme Court's statement in *Melendez-Diaz*. The problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is a copy of the original (Rule 902(14)).

One Committee member observed that any constitutional concern about the certification provisions would be satisfied by including a notice-and-demand provision in each of the proposed rules. Under a notice-and-demand provision, the government would provide pretrial notice of the intent to use the certification process, and authentication could then be proved by certificate unless the defendant timely demanded production of the foundation witness. But after consideration, the Committee unanimously determined that a notice-and-demand provision was unnecessary. Such provisions cure confrontation concerns because they are a means of obtaining a waiver of the defendant's confrontation rights — a means approved by the Supreme Court in *Melendez-Diaz*. But because the certification process itself does not appear to raise confrontation concerns (as all that is being done is certifying authenticity) there is no reason to provide for the notice-and-demand procedure. Moreover, adding a notice-and-demand procedure to proposed Rules 902(13) and (14) would raise a question about why similar provisions are not added to the rules permitting certification of business records in criminal cases: Rule 902(11) for domestic records and 18 U.S.C. § 3505 for foreign records.

The second expressed concern about the proposed certification provisions was related to the first: any proposed Rule would have to clarify that all that the certification is doing is establishing that the proffered evidence is authentic. That is, there can be no certification about the accuracy of the underlying information in the proffered item. Thus, when Rule 902(13) provides for certification of authenticity for records generated “by a process or system that produces an accurate result” the

certification would not mean that the specific results were indisputably reliable, only that the system described in the certificate produced the item that is authenticated. Similarly, a certificate offered as proof of authenticity of a web page does not dispose of a hearsay exception with respect to the content of the webpage. And a certification that the proffered item is a copy of the hard drive from the defendant's computer does not alleviate the government from having to prove that the defendant is the one who downloaded the information onto the original harddrive. Committee members resolved that the necessary clarification about the limits of the certification proposals should be set forth in the Committee Notes to the proposed rules.

The final expressed concern was about proposed Rule 902(14) specifically. That proposal would permit authentication of a copy of an electronic device or storage medium by way of certification where the copy is shown to be authentic by its "hash value or a similar process of digital identification." Committee members concluded that the use of the term "hash value" was problematic because that term would be unknown to many people, and more importantly it could become outmoded by technological advances. The Committee unanimously agreed that the proposal should be changed to allow certification of authenticity of a copy that is found to be authentic by a "process of digital identification."

The Committee unanimously determined to proceed with drafting a formal amendment and Committee Note for proposed Rules 902(13) and (14), for consideration at the Spring 2015 meeting. The Reporter was directed to prepare language to the Committee Note that would specifically address any concern that certification of a copy of an electronic device or storage medium might be misused as certification of content, or as proof of any underlying connection between the defendant and the item in a criminal case.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court has recently granted certiorari to review whether statements made by a victim of abuse to a teacher are testimonial, when the teacher is statutorily required to report such statements. The Court's activity, and the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring

developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VI. Next Meeting

The Spring 2015 meeting of the Committee is scheduled for Friday, April 17 at Fordham Law School.

Respectfully submitted,

Daniel J. Capra

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Inter-Committee CM/ECF Subcommittee

RE: Report to the Standing Committee

DATE: November 30, 2014

The CM/ECF Subcommittee (the “Subcommittee”) continues to develop and monitor a number of proposals for changes to the national rules to accommodate electronic case filing. What follows is a short description of the status of those changes. A more complete discussion can be found in the minutes of the Fall meetings of the respective Advisory Committees.

1. Abrogation of the Three-Day Rule as Applied to Electronic Service

The Subcommittee had previously determined that the rules adding three days to the time required to take action after receiving electronic service should be abrogated. The rules to be amended are Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6 and Criminal Rule 45. The Subcommittee had previously developed — with the assistance of the Reporters to the Advisory Committees — a template that would provide a uniform approach for these changes. This template had to be adjusted to accommodate special concerns in the Appellate Rules. The respective Committee Notes to the proposed amendments were prepared through a collective effort by the Reporters and are uniform to the extent possible. The proposed amendments have been released for public comment. The Subcommittee will review the public comments after the comment period is over, and work with the Advisory Committees to prepare the amendments for final approval.

2. *Electronic Signatures*

The Subcommittee has previously reported on suggestions it made regarding the proposed amendment to Bankruptcy Rule 5005, covering signatures on documents filed electronically. That proposal provided that (A) the username and password of a filing user would serve as that individual's signature on any electronically filed document, and (B) a scanned signature of a non-filing user would be considered a valid signature without any requirement that the filing user retain the original signature. After public comment, the Bankruptcy Committee withdrew the proposed amendment.

In light of the rejection of the proposed amendment, the Subcommittee has considered whether there was any further work to be done on the subject matter of electronic signatures. The Subcommittee noted that local rules now govern the use of electronic signatures. Most of the district and bankruptcy courts have local rules that track the model rules on electronic filing that have been promulgated by CACM and the Judicial Conference; but there are some differences in the local rules with respect to such details as retention requirements of wet signatures and whether to use an s/slash as opposed to a scanned signature. The question is whether it would be useful to propose national rules to provide for uniformity regarding the use of electronic signatures. But the concern is that any national rulemaking could end up being overrun by advances in technology — for example a move from electronic signatures to more high tech means of “signing” documents. Moreover, a nationwide solution may not be ideal because technological capabilities and customs may vary among the districts.

The Subcommittee has obtained the assistance of the Administrative Office, which conducted a survey on the local rules regarding signatures for electronically filed documents. That survey is attached to this Report. The survey indicates that, in general, there is uniformity among the local rules in providing that the use of the log-in and password of a Filing User constitutes a signature. There is some variation among the districts with regard to what constitutes the signature of a non-attorney, but most require the Filing User to obtain the ink signature of the signatory, then electronically file the document with a "/s/" and retain the wet signature. The Subcommittee will consider whether to make any recommendations for a national rule in light of these findings.

3. *Civil and Criminal Rules Requiring Electronic Filing*

The Subcommittee previously recommended that the Civil and Criminal Rules Committees should consider whether to amend their rules regarding electronic filing. Currently Civil Rule 5(d)(3) and Criminal Rule 49(e) both provide that a court “may, by local rule, allow” electronic filing. The question of a mandatory filing rule was considered by those Committees at their respective Fall meetings. The proposal for mandatory electronic filing, subject to appropriate exceptions, remains a work in progress. The Civil Rules Committee is also considering the possibility of amending Rule 5(b)(2)(E) to allow electronic service without requiring consent of the party served, and Rule 5(d)(1) to provide that a notice of electronic filing generated by the court’s filing system would constitute a certificate of service. (Any change to Rule 5 on issues of service will automatically apply to the

Bankruptcy Rules). Also, the Appellate Rules Committee is now considering proposed amendments that would require electronic filing and permit electronic service (both subject to exceptions), as well as a proposal to eliminate the certificate of service requirement where all parties were served by means of the notice of docket activity in CM/ECF. The Subcommittee will continue to monitor, assist, and integrate if possible the efforts of the Advisory Committees on issues of electronic filing and service.

4. *Consideration of a Uniform Approach to Amending Rules to Accommodate Electronic Filing and Information.*

The Subcommittee has prepared, for discussion purposes, a template that might be used to provide a “universal fix” for language in the current rules that does not appear to accommodate electronic filing and information. That template is as follows:

Information in Electronic Form and Action by Electronic Means

- a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
- b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

After discussion, the Subcommittee determined that a universal fix for electronic *information* is probably more viable than a fix for electronic *action*. But both fixes require careful consideration of necessary exceptions. Moreover, it may well be that certain actions might be universally electronic or nearly so and could be subject to an amendment of a particular rule — as opposed to a universal fix.

The template was on the agenda for the Fall meetings of the Appellate, Bankruptcy, Civil and Criminal Advisory Committees. (Subdivision (a) of the template is already incorporated into the Evidence Rules, and the Evidence Rules Committee has determined that a provision covering electronic actions is unnecessary in the Evidence Rules as those rules pertain to admissibility and not filing, submitting, etc.). The Bankruptcy and Criminal Rules Committees have submitted the template to subcommittees for further study. The Appellate Rules Committee expressed interest in subdivision (a), but concluded that equating paper and electronic actions would not be appropriate at this time. The Civil Rules Committee decided that it would not proceed any further with a universal fix at this time.

The Subcommittee will discuss these developments with the Reporters of the Advisory Committees and determine whether any kind of trans-rules proposal to equate paper with information in electronic form remains viable.

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APPENDIX

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MEMORANDUM

TO: Professor Daniel J. Capra
Reporter to the Intercommittee CM/ECF Subcommittee

FROM: Julie Wilson
Bridget Healy

DATE: November 10, 2014

RE: Survey of Electronic Signature Provisions Among the Federal Districts

I. Introduction

This memorandum is in response to the Subcommittee's request that the Rules Office conduct a survey of each federal district's local rules—including bankruptcy rules—for provisions on electronic signatures. Specifically, the Subcommittee asked for the following information:

1. Filing Users. Whether there are any variations to the "default rule" that registering as a CM/ECF user and filing is deemed a signature.
2. Non-Filing Users (i.e., a person who is not a Filer).
 - a. Whether the local rules provide for an "/s/" or do they instead require a scanned signature.
 - b. Whether the Filing User is required to retain the Non-Filing User's original signature.
 - c. If there is a requirement that the document containing the original signature be retained, for how long.

The accompanying spreadsheets contain information on all 94 federal judicial districts and bankruptcy courts. The spreadsheets indicate (1) where the signature provisions are located

(*e.g.*, Local Rule, Standing Order, or in the Electronic Procedures Manual); (2) provisions for Filing Users; and (3) provisions for Non-Filing Users.

II. Overview of Survey

A. District Courts

Federal Rule of Civil Procedure 5(d)(3) and Federal Rule of Criminal Procedure 49(e) provide, in part: “A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States.” However, the location of provisions regarding electronic signatures is not exclusively within the local rules. In fact, there is little uniformity among the federal districts with regard to the location of a district’s electronic signature provisions. Among the federal districts, 26 have electronic signature provisions in their local rules. In the remaining districts, the electronic signature provisions are located either in a standing or general order or in the CM/ECF Administrative Procedures Manual. In some districts, the electronic signature provisions are located in more than one of these locations.

Regarding what constitutes a signature, for Filing User’s (which most often does not include pro se litigants), the rule in an overwhelming majority of the federal districts is that the Filing User’s CM/ECF log-in and password constitute the Filing User’s signature. Most districts also have specific signature block requirements that must be included in the electronically filed document.

For Non-Filing Users, the electronic signature provisions address 3 different types of signatories: non-attorneys, criminal defendants, and parties or attorneys other than the Filing User (*e.g.*, a joint stipulation that requires the signatures of all counsel). There is some variation among the districts with regard to what constitutes the signature of a non-attorney, but most

require the Filing User to obtain the ink signature of the signatory and then electronically file the document with a “/s/” (or some variation thereof). Most districts require that a document requiring the signature of a criminal defendant be scanned and filed. With regard to documents requiring multiple signatures, most districts give the Filing User the option to file either a document that includes scanned signatures or a “/s/” (or some variation thereof) for each signatory.

Finally, almost all of the federal districts have provisions requiring the retention of original documents. Most districts also have provisions for challenging the authenticity of a signature.

B. Bankruptcy Courts

Federal Rule of Bankruptcy Procedure 5005(b)(2) applies in bankruptcy courts and provides: “A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.” For the various bankruptcy courts, the location of provisions regarding electronic signatures is not exclusively the local rules; electronic signature provisions are located in local rules, administrative procedures, and standing or general orders, or sometimes in more than one of these locations.

Regardless of their location, many of the local rules or procedures regarding electronic signatures are based on the Model Rules for Electronic Case Filing that were approved by the Judicial Conference of the United States in 2001 and modified in 2003 (specifically, Model Rule 8 (Signatures) and Model Rule 9 (Retention Requirements)). These local rules or procedures provide that a filer’s CM/ECF user name and password constitute an electronic signature and that a “/s/” (or some variation thereof) is to be used on the signature line of the filed document.

In addition, most bankruptcy courts have local rules or procedures that require the filing attorney to preserve original documents bearing the debtor's signature for a specified period of time and the retention periods vary. A few bankruptcy courts do not require retention of the original document so long as the attorney submits a declaration manually signed by the debtor attesting to the truth of the information electronically filed or, in other courts, files a scanned image of the signature page with the debtor's original signature.

In completing the survey of bankruptcy courts' requirements regarding electronic signatures, it was sometimes difficult to find the requirements. While most bankruptcy courts have local rules, administrative procedures or orders dealing with electronic signatures, these were located in varying places on courts' websites. In some cases, additional rules regarding signatures that were relevant to electronic signatures were in the local rules, but not in every case.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Alabama Middle	No. LR 5.3(b) refers to General Order(s) and the Civil and Criminal Administrative Procedures regarding Electronic Case Filing	Sets forth signature format requirements	Documents which must contain original signatures or which require either verification or an unsworn declaration under any rule or statute, shall be filed electronically with originally executed copies maintained by the filer. The pleading or other document electronically filed shall indicate a signature, e.g., "s/Jane Doe", or the original may be scanned and electronically filed in the ECF System. The filing party or attorney shall retain the hard copy of the document containing the original signatures for 2 years after final resolution of the action. Multiple signature documents: file either by submitting a scanned document containing all necessary signatures or by certifying within the document that all parties have agreed.	
Alabama Northern	No. LR 5.3 refers to General Order regarding Electronic Case Filing Policies and Procedures http://www.alnd.uscourts.gov/CM-CF/Administrative%20Procedure%20Manuals/Civil%20Administrative%20Procedures%20Manual%206-13.pdf and http://www.alnd.uscourts.gov/CM-CF/Administrative%20Procedure%20Manuals/Criminal%20Administrative%20Procedures%206-13.pdf	Same as M.D. Ala.	Same as M.D. Ala.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Alabama Southern	No. Standing Order 29 In Re Procedural Rules for Electronic Case Filing (February 25, 2003); Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents by Electronic Means http://www.alsd.uscourts.gov/documents/forms/AdminPro.pdf	Same as M.D. Ala.	Same as M.D. Ala.	
Alaska	Yes. LR 5.3(d)	Filing constitutes signature	Filing user may sign for a non-registered user by "s/ James Smith for Jane Doe"; must send proof of service to the person whose signature was affixed. All other documents require scanned copy with original signature.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Arizona	Yes. LR 5.5(g); Administrative Policies & Procedures Manual	Registered User's log-in and password constitute signature	Manual: original signature must be scanned, or in the case of multiple signatories, s/ may be used by filer for other parties with permission. Filer must keep hard copy for the duration of the case.	
Arkansas Eastern	No. LR 5.1 refers to CM/ECF Administrative Manual. Civil: http://www.are.uscourts.gov/sites/are/files/cvmanual.pdf and Criminal: http://www.are.uscourts.gov/sites/are/files/crmanual.pdf	Signature block requirements.	Non-Attorneys: filing party or clerk's office scans the original document and files electronically. Multiple Signatures: Filing Attorney shall file the document electronically indicating the signatories, (e.g., "/s/ Jane Doe," "/s/ John Smith," etc.) for each attorney's signature after confirming content of the document with all attorneys	
Arkansas Western	No. LR 5.1 refers to CM/ECF Administrative Manual. General Order 36 (Civil): http://www.arwd.uscourts.gov/sites/arwd/files/civilfilings_Manual.pdf and General Order 37 (Criminal): http://www.arwd.uscourts.gov/sites/arwd/files/criminalfilings_Manual.pdf	Signature block requirements.	Non-Attorneys: If the original document requires the signature of a nonattorney, the filing party or the Clerk's office will scan the original document, and then file it on the system electronically. Multiple Signatures: Filing Attorney shall file the document electronically indicating the signatories, (e.g., "/s/ Jane Doe," "/s/ John Smith," etc.) for each attorney's signature after confirming content of the document with all attorneys.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
California Central	Yes. L.R. 5-4.3.4	User log-in and password constitute signature; signature block requirements.	Non-Filing Users: original document with signature must be scanned and filed. Attorney must keep original signed document for 1 year following conclusion of the action, including appeals Multiple Signatures: Filing User should file, and use /s/ or digitized signature for other signatories	
California Eastern	Yes. LR 131	User log-in and password constitute signature; signature block requirements.	Non-Filing Users: may use /s/ form, and must retain a signed original for one year after exhaustion of appeals. Multiple Signature Documents: Filing Attorney may get permission from others and use "/s/ counsel's name (as authorized on __[date]__)." for such documents. May also have original signatures and scan in a signature page as attachment to the filed document. Certain non-attorney signatures in criminal cases can be scanned and filed electronically.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
California Northern	Yes. L.R. 5-1(i)	User log-in and password constitute signature.	"Other" Signatures: ECF user can file with agreement of all other signatories, and must either keep record of their agreement for a year after the conclusion of final appeal, or scan a signature page with all original signatures and attach it to the electronic filing. Criminal cases: documents requiring defendant's signature or multiple signature must be scanned and filed	
California Southern	No. LR 5.4(f) refers to CM/ECF Administrative Policies and Procedures Manual https://www.casd.uscourts.gov/CMECF/Lists/Policies%20and%20Procedures/Attachments/2/CASDPolicies.pdf . Also Gen. Order 550.	Registered User's log-in and password constitute signature; signature block requirements.	Non-Registered Signatories and Criminal Defendants: file and scan; retain for 5 years. Multiple Signatures: Filer must certify that the content of the document is acceptable to all persons required to sign the document by obtaining either physical signatures or authorization for the electronic signatures of all parties on the document. Physical, facsimile or electronic signatures are permitted.	
Colorado	No. LR 5.1 and LCR 49.1 refer to Electronic Case Filing Procedures. Civil: http://www.cod.uscourts.gov/Portals/0/Documents/CMECF/ECF-Rev_CP-V-6-0_Final_4-4-14.pdf and Criminal: http://www.cod.uscourts.gov/Portals/0/Documents/CMECF/ECF-Rev_CRIMINAL-FINAL_4-4-14.pdf	User log-in and password constitute signature; signature block requirements.	Required to sign copy in ink, with electronic version filed with "s/." Scanning and filing is discouraged; filer is to maintain original. Multiple Signature Documents: confirm acceptance of document by all signatories and use s/ signature for each.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Connecticut	No. Electronic Filing Policies and Procedures (Standing Order) http://ctd.uscourts.gov/sites/default/files/forms/PPADMIN-ORDER%20rev%2010.10.13.pdf	Login and password constitute signature; signature block requirements.	Other Signatures: counsel may either scan physically signed document, or use s/ for non-filing user and maintain the original signature copy. Criminal Defendants: a document containing the signature of a defendant in a criminal case may be filed either in paper form or in a scanned format that contains an image of the defendant's signature, upon approval by the Court. Multiple Signatures: counsel may file a scanned document with all signatures, a form representing consent of other attorneys on the document, or by filing a document noting the other parties necessary with those parties submitting a notice of endorsement no later than 3 days after the document is filed	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Delaware	No. LR 5.1 refers to Administrative Procedures Governing Filing and Service by Electronic Means (the "CM/ECF Procedures") http://www.ded.uscourts.gov/sites/default/files/cm-ecf/CMECF-DEAdminProc-Final-101614.pdf	Login and password constitute signature; signature block requirements	Affidavits: Affidavits shall be filed electronically; however, the electronically filed version must contain a "/s/_____" block indicating that the paper document bears an original signature. By submitting such a document, the filing attorney certifies that each of the other signatories has expressly agreed to the form and substance of the document and that the filing attorney has their actual authority to submit the document electronically. The filing attorney shall retain the original for future production, if necessary, for two (2) years after the expiration of the time for filing a timely appeal. Multiple Signatures: Filer electronically files document with "/s/" for each signatory; 2-year retention requirement.	
District of Columbia	Yes. L.R. 5.4(b)(4)	Use of log-in and password constitutes signature.	No.	Pro se litigants can obtain ECF log-in and password.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Florida Middle	No. CM/ECF Administrative Procedures http://www.flmd.uscourts.gov/CMECF/CM-ECF_ADMINISTRATIVE_PROCEDURES_03-15-07-FINAL.pdf	Signature block requirements.	Other Signatures: If the document requires the signature of a person who is neither an attorney of record nor an authorized pro se filer, the filer or the Clerk shall scan the document with original signatures and then file it electronically. Multiple Signatures: Filing Attorney must obtain all signatories' signatures and then file electronically with a signature block for each.	No retention requirements.
Florida Northern	Yes. L.R. 5.1(A)(7). Also CM/ECF Attorney User's Guide http://www.flnd.uscourts.gov/attorneys/cmecf/User_Manual/Ch9_Docs_Orig_Signatures_Joint_Filings_Sealed.pdf	Filing User log-in and password constitute signature. Guide specifies signature block requirements.	Guide has provisions, not local rules. Documents that must contain original signatures or require either verification or an unsworn declaration under any rule or statute shall be filed electronically in PDF format. The originally executed paper documents must be maintained by the filer for a period of two years or until the appeal time has expired, whichever is greater. Standard provisions regarding Multiple Signature documents.	
Florida Southern	No. LR 5.1 refers to CM/ECF Administrative Procedures	User log-in and password constitute signature; signature block requirements.	Documents that require original signatures or that require either a verification or a sworn declaration shall be filed electronically with the original signed document maintained by the Filer for 1 year. Standard provisions regarding multiple signature documents.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Georgia Middle	No. CM/ECF Administrative Procedures http://www.gamd.uscourts.gov/cm-ecf/Administrative%20Procedures%20Rev05-12.pdf	Participant's log-in and password constitute signature; signature block requirements.	Multiple Signatures: Filer should indicate those with "s/(name)" for each signature; retain records evincing concurrence of signatories 2 years after expiration of the time for filing a timely appeal. Affidavits: Filed electronically and original retained for 2 years. Non-Participant signatures: Filer must obtain actual signature and scan the original document to file	
Georgia Northern	No. LR 5.1 refers to Standing Order, In Re: Electronic Case Filing and Procedures, as contained in Appendix H	A pleading or other document requiring an attorney's signature shall be signed in the following manner, when filed electronically: "s/ (attorney name) ."	Standard provisions regarding multiple signature documents. If the original document requires the signature of a non-attorney, the filing party or the Clerk's Office shall scan the original document, then electronically file it on ECF.	No retention language.
Georgia Southern	No. LR 5.5 refers to Administrative Procedures http://www.gasd.uscourts.gov/pdf/EcfProcedures.pdf	Attorney's signature signed in the following manner: "s/(attorney name)"; signature block requirements.	Non-Attorney: If the original document requires the signature of a non-attorney, the filing party or the Clerk's Office shall scan the original document, then electronically file it on ECF. Standard provisions regarding multiple signature documents.	No retention language.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Guam	No. General Order No. 13-0003 http://www.gud.uscourts.gov/sites/default/files/orders/genord13-03.pdf	ECF User's log-in and password constitute signature; signature block requirements.	Non-Parties: original document must be scanned and filed electronically and retained for (2) years after all time periods for appeals expire. Multiple Signatures (civil): standard with 2-year retention requirement. Multiple Signatures (criminal): Documents requiring signatures of more than one party must be electronically filed by submitting a scanned document containing all necessary signatures in addition to standard provisions	
Hawaii	No. LR 5.3 refers to Administrative Procedures http://www.hid.uscourts.gov/ecf/guides/UserGuide2013_10.pdf	The electronic filing of any document by a Registered Participant shall constitute the signature of that person. Pleadings should indicate the signature by inserting a "/s/(attorney's name)."		
Idaho	No. LR 5.1 refers to ECF Procedures http://www.id.uscourts.gov/Content_Fetcher/index.cfml/ECF_Procedures_1972.pdf?Content_ID=1972	The electronic filing of a Registered User constitutes signature; signature block requirements.	Provisions for a Registered User to file Verified Documents; retention requirements. Documents in criminal cases that require certain third-party signatures must be scanned and filed.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Illinois Central	Yes. LR 11.4	Log-in and password constitute Electronic Filer's signature.	<p>Non-Electronic Filers: Filer must obtain signature of any Non-Filer, redact the original document, and then file redacted document electronically with a "s/(name)"; 1-year retention requirement.</p> <p>Multiple Signatures: Where multiple attorney signatures are required, such as on a joint motion or a stipulation, the filing attorney may enter the "s/" of the other attorneys to reflect their agreement.</p>	
Illinois Northern	No. LR 5.2 refers to General Order on Electronic Case Filing or other similar order. General Order 14-0009 http://www.ilnd.uscourts.gov/home/clerksoffice/rules/admin/pdf-orders/General%20Order%2014-0009%20-%20Electronic%20Case%20Filing%20General%20Order%20Redline.pdf	E-Filer's log-in and password constitute signature; signature block requirements.	<p>Non-Filers: None. Multiple Signatures: E-Filer may file a scanned document with signatures; represent consent of parties on the document; identify on the document whose signature is needed and submit an endorsement no later than 3 days after filing.</p>	No retention language.
Illinois Southern	No. E-Filing Rules http://www.ilsd.uscourts.gov/documents/ECFRules.pdf	Rule 8: Upon registration, Filing Users automatically endorse their electronic signature for purposes of the Local Rules, Federal Rules, etc.	None.	Retention requirements: manually signed original documents must be retained for 5 years after final resolution of the action.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Indiana Northern	No. LR 5-1(a) refers to CM/ECF User Manual http://www.innd.uscourts.gov/docs/CM/ECF/User%20Manual.pdf	Attorney's/participant's log-in and password constitute signature. (p.2)	Signatures of those other than Participating Attorney, or for unsworn declarations and those documents requiring verification: Filer files electronically and maintains original (no time period specified). In criminal cases, such documents must also be filed in paper form with original signature.	
Indiana Southern	Yes. LR 5-7. See also LCrR 49.1	A pleading, motion, brief, or notice filed electronically under an attorney's ECF log-in and password must be signed by that attorney. Can be an "s/."	Non-Attorney Signature: must be an original handwritten signature and must be scanned into .pdf format for electronic filing. Standard provisions for multiple signature documents. LR 5-9 states a 2-year retention period for documents requiring an original signature. Documents requiring signature of criminal defendant must be scanned and filed.	
Iowa Northern	Yes. LR 5.2(h)-(i). Also refers to ECF Procedures Manual http://www.iand.uscourts.gov/e-web/Documents.nsf/0/9F37CD9E4A0332AF862573C000017FDB/\$File/ECF+Procedures+Manual+April+17+2013+-+Fillable+Form.pdf	Filer's log-in and password constitutes signature; signature block requirements	Non-Lawyer Signatures: Manual states that the signature of a non-lawyer must be scanned and filed. LR 5.2 specifies retention period of (5) years for hard copy of original document signed by non-lawyer after filing of document electronically. Multiple Signatures: standard provisions.	Inconsistencies between LR and Manual. 5-year retention for non-lawyer signed documents in the LR, but the Manual only specifies a time period for documents in criminal cases.
Iowa Southern	Same as N.D. Iowa			

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Kansas	Yes. LR 5.4.8. Civil Administrative Procedures http://www.ksd.uscourts.gov/civil-cases-administrative-procedure-for-filing-signing-and-verifying-pleadings-and-papers-by-electronic-means/ Criminal Administrative Procedures http://www.ksd.uscourts.gov/ecf-administrative-procedures-criminal/	Filing User's log-in and password constitute signature; signature block requirements	Non-Filing User signatures must be filed electronically either as a scanned image or with the signature represented by an "s/" and the name typed in the space where the signature would otherwise appear. Multiple signature documents must be electronically filed by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document as permitted by the administrative procedure governing multiple signatures; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than 7 days after filing; or (4) in any other manner the court approves.	Differences in LR and Administrative Procedures?

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Kentucky Eastern	No. LR 5.4 directs to General Order 05-03; ECF Manual http://www.kywd.uscourts.gov/sites/kywd/files/court_docs/ECF_User_Manual.pdf	A filing user is an individual who has a court-issued login and password. The user login and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They serve as a signature for purposes of Fed. R. Civ. P. 11, all other Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Joint Local Rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. . . . An electronically filed document must include a signature block in compliance with Joint Local Rule 5.2(a), and must set forth the name, address, telephone number, fax number and e-mail address. In addition, the name of the Filing User under whose login and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear. (ECF Manual, p. 11)	No provision per se; however, the ECF Manual states that "A document containing the signature of a defendant in a criminal case shall be electronically filed as a scanned document in PDF format containing an image of the defendant's original signature. The Filing User is required to verify the scanned document is legible before filing it electronically." (ECF Manual, p. 11)	Also, there is a provision for "non-filing signatory or party who disputes the authenticity of an electronically filed document with a non-attorney signature, or the authenticity of the signature on that document" etc. (ECF Manual, pp. 11-12)
Kentucky Western	Same as E.D. Ky.			

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Louisiana Eastern	No. LR 5.1 refers to the Administrative Procedures for Electronic Case Filings and Unique Procedures and Practices for Electronic Filings http://www.laed.uscourts.gov/case-information/procedures-and-practices-e-filing	Admin. Procedures R 8: Filing User's log-in and password constitute signature; signature block requirements	Multiple signature documents must list all the names of other signatories by means of a "s/ [Name of Signatory]" for each. By submitting such a document, the Filing User certifies that each of the other signatories has expressly agreed to the form and substance of the document and that the Filing User has the actual authority of each other signatory to submit the document electronically.	
Louisiana Middle	No. LR 5.5 Filing by Electronic Means refers to Administrative Procedures for Filing Electronic Documents http://www.lamd.uscourts.gov/sites/default/files/pdf/adminprocedurescivilandcriminal%20REVISED%20MAY%202014.pdf	Attorney signatures: user log-in and password constitute signature; signature block requirements.	Non-Attorney signatures, generally: Filing User may scan and file electronically (includes notarized documents); must retain for 1 year after time to appeal expires. Criminal Defendants: may scan and file or file paper copy with original signature. Multiple signature documents: file the document electronically indicating the signatories, (e.g., "s/Jane Doe," "s/John Smith," etc.) for each attorney's signature or by scanning the document containing the original signatures and uploading the scanned PDF document; 1-year retention requirement	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Louisiana Western	No. LR 5.7.01 refers to Administrative Procedures http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/Administrative_Procedures-8th_REVjuly_2013.pdf	The user login and password constitute the User's signature "for all purposes." (LR 5.7.08 Signatures) Signature of filing attorney indicated on document with "/s." Provision for challenging authenticity. Id.	None. However, there are provisions for documents requiring multiple signatures (can submit scanned document or indicate consent by "s/"; retention requirements imposed on the filing attorney. (Administrative Procedures, p. 14)	Provisions for documents requiring signatures of more than one party and retention requirements for the filing attorney. (LR 5.7.08 Signatures) Exceptions to electronic filing: (1) documents filed by pro se litigants; (2) oversized objects or documents and color photographs; (3) documents filed by attorneys exempted by the court for filing in the CM/ECF system. (Administrative Procedures, p. 6) Provisions for challenging authenticity of documents with multiple signatures or signatures themselves. (Administrative Procedures, p. 14)
Maine	No. But Administrative Procedures Governing the Filing and Service by Electronic Means are incorporated into Appendix IV of the Local Rules	For Attorney Users, the login and password serve as that user's signature. All electronically filed documents must include a signature block and their name must be preceded by a "/s/."	None; however, there are provisions for documents requiring multiple signatures. Such documents must list all the names of other signatories, preceded by a "/s/" in the space where the signatures would otherwise appear. Provisions regarding challenges to authenticity as well as retention requirements imposed on the filing attorney.	Attorneys and non-prisoner pro se litigants can register as filing users. Electronic filing is mandatory for attorneys, but optional for pro se litigants. Some types of documents are exempted from ECF requirements and must be filed in paper and then scanned and uploaded by the clerk's office. Some other types of documents are wholesale exempted from ECF.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Maryland	Yes. LR 102	Filing attorney's login and password constitute signature. Attorneys may, but are not required to, place an electronic signature on documents and papers (i.e., "/s/")	None; however, there are provisions for documents requiring multiple signatures. Such documents must list all the names of other signatories, preceded by a "/s/" in the space where the signatures would otherwise appear. Provisions regarding challenges to authenticity as well as retention requirements imposed on the filing attorney	Some types of cases are exempt from ECF
Massachusetts	No. LR 5.4(B) refers to ECF Administrative Procedures http://www.mad.uscourts.gov/caseinfo/pdf/ECFAdminProc.pdf	For Attorney User's, the login and password serve as that user's signature. All electronically filed documents must include a signature block and their name must be preceded by a "/s/."	None; however, there are provisions for documents requiring multiple signatures. Such documents must list all the names of other signatories, preceded by a "/s/" in the space where the signatures would otherwise appear. Provisions regarding challenges to authenticity and retention requirements for the filing attorney. There are also provisions regarding affidavits -- the electronically filed version must contain a "/s/ name of signatory" block indicating that the paper document bears an original signature. Retention of 2 years after the expiration of time to appeal. Court will also accept a scanned version of the original, signed document.	Certain documents are exempted from electronic filing; others are categorized as "need not be" filed electronically. (LR 5.4)

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Michigan Eastern	No. Electronic Filing Policies and Procedures are an appendix to the local rules http://www.mied.uscourts.gov/CMECF/Policies/policies_procedures.pdf	User login and password serve as the filing user's signature on all papers filed electronically with the Court. (ECF Procedures, R9(a)) Electronically filed paper must include a signature block of the filing user represented by "s/", "/s/" or a scanned signature. (ECF Procedures, R9(b))	A paper containing the signature or a criminal defendant must be scanned and filed by a filing user or court personnel; an affidavit, declaration, or paper containing the signature of a non-attorney must be scanned and filed electronically; a paper requiring signature of more than one party must be filed electronically by submitted scanned paper with all signatures or representing consent with separate signature blocks and "s/ with consent of [name]" (ECF Procedures R9(c)-(e))	
Michigan Western	Yes. LCR 5.7 http://www.miwd.uscourts.gov/sites/miwd/files/local_civil_rule_5_7.pdf ; and LCR 49.10 http://www.miwd.uscourts.gov/sites/miwd/files/local_criminal_rule_49_10.pdf	A registered attorney's use of the assigned login name and password to submit an electronically filed document serves as the registered attorney's signature; must indicate identity with an "s/" signature block. Provisions for signatures of court reporters, judges, court officials and officers, U.S. Marshal, etc. For all, login and password serve as signature. Multiple attorney documents filed with "s/" for each attorney with filing attorney certifying.	Filers who are not registered attorneys, must file paper.	Authenticity may be challenged for multiple signature documents; retention requirements for the filing attorney.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Minnesota	No. LR 5.1 refers to Electronic Case Filing Procedures Guides http://www.mnd.uscourts.gov/cmecf/reference_guides.shtml	s/ name constitutes signature	Rule regarding non-attorney/third party signatures is that filing attorney must obtain original ink signature of the signatory before filing, and then sign the electronic version with an "s/." The filing attorney then files electronic version; the filing of which certifies that the original is available for inspection. There are also the "standard" provisions for multiple signature documents.	
Mississippi Northern	No. LR 5(c) refers to Administrative Procedures for Electronic Case Filing http://www.msnd.uscourts.gov/sites/msnd/files/forms/Doc_Adm_Proc_ECF_12-1-12.pdf	A pleading or document requiring an attorney's signature will be signed "s/Jane Doe"	All documents which must contain original signatures, other than those of a participating attorney, or which require either verification or an unsworn declaration under any rule or statute, will be filed electronically, with originally executed copies maintained by the filer until all time periods for the appeal have expired	Documents that require signature by two or more attorneys may require a Notice of Endorsement
Mississippi Southern	Same as N.D. Miss.			
Missouri Eastern	No. Administrative Procedures for Case Management/Electronic Case Filing (CM/ECF) http://www.moed.uscourts.gov/sites/default/files/CMECF_AdminProcedures.pdf	The attorney's electronic filing login and password constitutes the signature on that documents for purposes of Fed. R. Civ. P. 11. However, every document must include an attorney signature block and a representation of the filing attorney's signature; a facsimile signature can also be submitted.	None. ECF Procedures only refer to filing attorney's signature and no provisions on multiple signatures. Certain types of cases are exempted from electronic filing, including pro se litigants.	Failure to include signature block or faxed copy of signature can result in the document being stricken by the Court.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Missouri Western	No. General Order (Electronic Filing Procedures) http://www.mow.uscourts.gov/district/rules/go.pdf	Attorney's login and password constitutes the attorney's signature for all purposes. It is preferred that any document containing original signatures indicated on the electronically filed document a signature by "s/Jane Doe." Retention of originally executed copy by filer (2 years). Provisions to disputes authenticity.	None.	
Montana	Yes. LR 11.1	Registered user's log-in and password constitute signature; signature block requirements.	All other signatures must be "hand signatures." When it's a document requiring multiple signatures, all must use "/s/" or hand signatures (cannot be a combination).	
Nebraska	Yes. LCR 11.1; LCrR 49.2	User login and password constitute the filer's signature. Pro se litigants can obtain user login and passwords too. Documents that require an attorney's signature must have a signature block and "s/[Name]" and there is a provision to challenge authenticity.	Documents that require a non-attorney's signature, the filer may either scan and upload or electronically file the document with the non attorney signature represented by an "s/" and then retain original signed document. Similar provisions for documents requiring several signatures.	Pro se litigants can be "filers" for ECF purposes
Nevada	No. LR 5-3 states that documents "may be filed and signed by electronic means" The website contains a "Recommended Best Practices" http://www.nvd.uscourts.gov/CMECFBestPractices.aspx	Filers have a choice of scanning an original signature and filing, or use an "/s/" on the signature line.	None.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
New Hampshire	No. But appended to the local rules are Supplemental Rules for Electronic Case Filing http://www.nhd.uscourts.gov/book/export/html/1265	Filing user's log in and password serve as the signature. All electronically filed documents must include a signature block and must set forth the Filing User's name, bar registration number, address, telephone number, and e-mail address. The name of the Filing User under whose log-in and password the document is submitted must be preceded by a "/s/ [Insert Signatory's Name]" and typed in the space where the signature would otherwise appear.	Provisions for multiple signature documents. For non-filing user signatures, preexisting documents must be filed in a scanned PDF format. Other documents are filed in electronic format and shall contain a "/s/name" block indicating that the paper document bears an original signature.	
New Jersey	Yes. LR 5.2	Username and login constitute signature; documents should also contain a "/s"	None. Pro ses must file paper documents. Standard provisions for documents requiring multiple signatures. Signatures of non-attorneys are scanned and filed; retention requirements	
New Mexico	No. LR 5.2 refers to the CM/ECF Administrative Procedures Manual http://www.nmcourt.fed.us/web/DCDOCS/dcindex.html	Filing constitutes signature; requirements for signature block	Provisions for filing and retention of "verified documents" (e.g., documents requiring a 3rd party signature)	
New York Eastern	No. LR 5.2 states that CM/ECF instructions should be followed			

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
New York Northern	No. LR 5.1.1 incorporates General Order #22 http://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO22_0.pdf	Attorney login and password constitute signature; signature block requirements	Non-attorney signatures can be scanned and filed, or can contain "/s" with the filing attorney retaining the document. Order also contains provisions for multiple signature documents as well as ways to challenge authenticity	
New York Southern	No. Electronic Case Filing Rules and Instructions http://www.nysd.uscourts.gov/ecf/ECF%20Rules%20Revision%20031714.pdf	Filing User's log-in and password constitute signature; signature block requirements	Document requiring the signature of a defendant in a criminal case must be a scanned signature; provisions for multiple signature documents (all scanned signatures or indicate consent of all signatories)	Retention Requirements: Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until one year after all time periods for appeals expire, except that affidavits, declarations and proofs of service must be maintained in paper form by the Filing User until five years after all time periods for appeals expire. On request of the Court, the Filing User must provide original documents for review.
New York Western	No. LR 5.1(a) refers to CM/ECF Administrative Procedures Guide http://www.nywd.uscourts.gov/sites/default/files/Administrative%20Guide%20-%20amended%20April%202014_1.pdf	Username and password serve as signature. Pleadings, certificates of service, affidavits, affirmations, and declarations require a signature block.	Non-attorney signatures: if original document requires signature, the filing party must obtain the non-attorney's signature on that document, then file the document electronically with an "s/(name)." Provisions regarding challenges to authenticity. For a defendant in a criminal case, the scanned signature must be filed. Standard provisions for multiple signature documents and for retention requirements.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
North Carolina Eastern	No. Standing Order 06-PLR-2 (Jan. 30, 2006); Electronic Case Filing Administrative Policies and Procedures Manual http://www.nced.uscourts.gov/pdfs/cmecfPolicyManual.pdf	¶ 7 states that the electronic filing by a registered user constitutes the signature of that user ; p. 13 of Manual states that user log-in and password constitute an attorney's signature. Signature block requirements (including requirement that criminal defense attorney must state whether appointed or retained).	p. 16 of Manual states that "if the document requires the signature of a non-attorney, the filing party or the cler's office shall scan the original document, then electronically file it." There are also provisions for multiple signatures (all signatories listed with "/s/" and filing attorney's submission constitutes certification)	
North Carolina Middle	No. Electronic Filing Policies and Procedures Manual http://www.ncmd.uscourts.gov/sites/ncmd/files/ecfprocman.pdf	Attorney login and password constitute signature; signature block requirements	p. 12 of the Manual states that "if the document requires the signature of a non-attorney, the filing party or the Clerk's Office shall scan the original document, and then electronically file it on the system." Retention requirement if an attorney believes the document has "intrinsic value." Standard provisions for multiple signature documents.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
North Carolina Western	No. LR 5.2 authorizes and refers to Administrative Procedures http://www.ncwd.uscourts.gov/ECFDocs/ADMINORDER.pdf	p. 8 of Administrative Procedures states that "a pleading or other document requiring an attorney's signature shall be signed in the following manner, whether filed electronically or submitted on disk to the Clerk's Office: "s/(attorney name)."	p. 8 of Administrative Procedures states that "if the original document requires the signature of a non-attorney, e.g., an affidavit, the filing party shall scan the original document . . .then electronically file it on the System." Retention requirements. Standard provisions for multiple signature documents. Criminal defendants must sign and the original document is then scanned and filed electronically. Procedures also address Probation Officers and other documents filed in criminal cases requiring the signature of a non-attorney filer.	
North Dakota	No. LR 5.1(A) refers to Administrative Policy Governing Electronic Filing and Service http://www.ndd.uscourts.gov/ecf/cm_ecf_policy.pdf	Attorneys and pro se users - user log-in and password serve as the user's signature; must also have a signature block.	Criminal defendants must actually sign documents requiring their signature. Probation and pretrial services officers may submit an /s/ if they retain the original signature of a probationer. Standard provisions for multiple signature documents. Affidavits must be filed electronically and the original retained by the user. Provisions for clerk's office and probation and pretrial services staff: they may use /s/.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Northern Mariana Islands	No. LR 5.1a refers to the Administrative Procedures for Electronic Filing and Electronic Service, located in Appendix A	User log-in and password serve as Filing Users signature; must also have a signature block. However, In criminal cases, the charging documents shall have an original signature on paper or an imaged signature.	Documents requiring signature of a non-Filing User are to be filed electronically with a /s/ and the name, with the original retained by the Filing User. May also filed a scanned image of the original document.	
Ohio Northern	No. LR 5.1(b) and LCrR 49.2 refer to Electronic Filing Policies and Procedures Manual, located in Appendix B http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixB.pdf	User log-in and password serve as Filing Users signature; must also have a signature block.	None. Standard provisions for multiple signature documents	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Ohio Southern	No. LR 5.1 refers to ECF Manual http://www.ohsd.uscourts.gov/sites/ohsd/files/Electronic%20Filing%20Policies%20and%20Procedures.%202013.0222.pdf ; LCrR 49.1 addresses signatures of criminal defendants	Signature block requirement for documents with attorney signatures	LCrR 49.1(b) states that a document containing the signature of a criminal defendant may be filed in either paper form or in a scanned format that contains an image of the defendant's signature. Counsel must retain the signed original. Manual requires that other signatures in criminal cases (e.g., probation officer, grand jury foreperson) must be scanned and electronically filed. Manual also states that for documents signed by non-attorneys and affidavits, the filing party or clerk's office shall scan the original document and then electronically file. Standard provisions for multiple signature documents	
Oklahoma Eastern	No. LR 5.1 and LCrR 49.1 refer to the CM/ECF Administrative Guide of Policies and Procedures	User log-in and password function as the Filing User's signature; signature block requirements	Provisions for non-Filing Attorney signatures: s/ electronically filed and Filing Attorney must retain proof of how and when permission was obtained; Filing Attorney may also scan the signature page and file as an attachment. Provisions for Non-User signatures: Manual provides options for electronically filing as long as the Filing User maintains the signed original until all appeals have been exhausted or the stime for seeking appellate review or any other post conviction relief has expired.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Oklahoma Northern	No. LR 5.1 and LCrR 49.3 refer to the CM/ECF Administrative Guide of Policies and Procedures http://www.oknd.uscourts.gov/docs/08906891-22d0-4806-9544-b574b9932935/CMECFAdminManual.pdf	User log-in and password serve as the User's signature; signature block requirements	Non-Filing Attorney or Non-Filing Pro Se Party Signature: efiler is responsible for maintaining record (including original documents) until all appeals have been exhausted or time for seeking appellate review has expired. Non-User Signature: Manual provides options for electronically filing as long as the efiler maintains the signed original until all appeals have been exhausted or the time for seeking appellate review has expired.	
Oklahoma Western	No. LR 5.1 and LCrR 49.1 refer to Electronic Case Filing Policies and Procedures Manual (ECF Policy Manual) http://www.okwd.uscourts.gov/files/ecfmanual_2_13.pdf	A document requiring an attorney's signature must be signed by attorney of record above signature block. Signature can be scanned, electronic, or s/.	Standard provisions for multiple signature documents. Non-Attorney signatures: several options but filer must maintain original. In criminal cases, the Clerk will scan all documents signed by non-attorneys (e.g., grand jury foreperson, defendant, Marshal).	Requires attorney's ink signature.
Oregon	No. LR 5.2 and LCrR 3001 refer to the CM/ECF User Manual http://www.ord.uscourts.gov/index.php/about-cmecf-and-pacer/user-manual . Signature Requirements in LR 11	Log-in and password constitute Registered User's signature. Format for Registered Users and pro se litigants authorized to file documents electronically must include their name preceded by an "s/" and signature block.	Multiple signature documents must be electronically filed by submitting a scanned document containing all signatures; representing the consent of all parties; identifying necessary signatures and submitted written confirmation within 7 days of the filing.	Registered User can include pro se litigants.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Pennsylvania Eastern	Yes. LR 5.1.2 "Electronic Case Filing Procedures"	User log-in and password function as the Filing User's signature; signature block requirements	No instructions regarding non-Filing User signatures except that Filing User must retain original for 3 years. Multiple signature documents must be electronically filed by submitting a scanned document containing all signatures; representing the consent of all parties; identifying necessary signatures and submitted written confirmation within 7 days of the filing.	
Pennsylvania Middle	No. LR 5.6 refers to Standing Order and to ECF User Manual http://www.pamd.uscourts.gov/sites/default/files/ecf_manualv2.pdf	User log-in and password function as the Filing User's signature; signature block requirements	Document requiring the signature of a defendant in a criminal case must be a scanned signature. Multiple signature documents must be electronically filed by (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Pennsylvania Western	No. LR 5.5 and LCrR 49 refer to the Court's Standing Order regarding Electronic Case Filing Policies and Procedures and the ECF User Manual	User log-in and password function as the Filing User's signature; signature block requirements	Retention requirements for documents that are electronically filed and require an original signature other than that of the Filing User. A document requiring signatures of more than one party must be filed electronically either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; or (3) in any other manner approved by the court.	
Puerto Rico				
Rhode Island	Yes. L Gen. 308	User log-in and password function as the Filing User's signature; signature block requirements.	Standard provisions regarding multiple signature documents	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
South Carolina	No. LR 5.02 and LCrR 49.02 refer to ECF Policies and Procedures Manual http://www.scd.uscourts.gov/AttorneyResourceManuals/ECF/ECF_Policy_and_Procedures.pdf	The Filing User's login, password, and s/ [typed name] or digital signature serve as the Filing User's signature on all electronically filed documents. Documents submitted under a Filing User's login and password must include a digital signature or s/ followed by the Filing User's name typed in the space where the Filing User's signature would otherwise appear. Signature block requirements.	Documents containing the signature of persons other than Filing Users are to be filed electronically as a scanned image. Retention requirements. Multiple signature documents can be filed by: (1) the Filing User who files the document may obtain original signatures on a paper copy of the document to be filed. The Filing User will then electronically file the document, representing the consent of the signatories by an s/ and the name typed in the space where a signature would appear; or (2) the Filing User who files the document may obtain digital signatures on the document and electronically file the document with the digital signatures.	
South Dakota	Yes. LR 5.1(B)(4) and (5); LCrR 49.1(B)(2)c, (B)(4)-(5)	The user login and password required to submit documents to the CM/ECF System serve as the filing user's signature on all electronic documents filed with the court.	Documents requiring signatures of more than one party may be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; and (b) in any other manner approved by the court. Not permissible to insert a "/s/" for another person's signature. Any document requiring the signature of a criminal defendant must be filed in original delivered to the clerk of court.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Tennessee Eastern	No. LR 5.2 refers to Electronic Filing Rules and Procedures http://tned.uscourts.gov/docs/ecf_rules_procedures.pdf	§ 6: log-in and password of Filing User constitutes signature; signature block requirements	Documents containing the signature of persons other than Filing Users are to be filed electronically as a scanned image. Retention requirements. Documents requiring criminal defendant's signature may be filed in paper form with original signature, or scanned and filed electronically. Multiple signature documents may be scanned and filed with all signatures, or electronically with representation by Filing User that consent was obtained	
Tennessee Middle	No. LR 5.03 refers to Administrative Order No. 167, Administrative Practices and Procedures for Electronic Case Filing (ECF) http://www.tnmd.uscourts.gov/files/AO%20167%20Practices%20Procedures-revised%206-27-12.pdf	Filing User's log-in and password constitutes signature; signature block requirements.	A document requiring the signature of a person other than Filing User must be scanned and filed electronically. A document containing the signature of a defendant in a criminal case may, at the option of the presiding judge be filed: (1) in paper form with the original signature; or (2) in electronic form with scanned signature. Standard provisions regarding multiple signature documents.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Tennessee Western	No. Electronic Case Filing Policies and Procedures Manual located in Appendix A to the Local Rules	E-Filing User's log-in and password constitutes signature; signature block requirements.	Documents with signatures other than the E-Filing User's must be scanned and electronically filed; retention requirements. For multiple signature documents, E-Filing User must submit one document with "/s/" for each signatory and it is strongly recommended that the E-Filing User indicate date and time of consent of other signatories.	
Texas Eastern	Yes. LR CV-5(5). LCrR CR-49 states that criminal cases should generally conform to LR CV-5.	User log-in and password constitute signature; signature block requirements.	No.	
Texas Northern	Yes. LR 11.1 and LCrR 49.5	Attorney's log-in and password constitute signature. ECF Administrative Procedures Manual specifies signature block requirements.	Yes, attorney must either file a scanned image of the other person's signature or indicate consent was obtained; retention requirements.	
Texas Southern	No. Administrative Procedures for Electronic Filing http://www.txs.uscourts.gov/attorneys/cmecf/district/admcvcrproc.pdf	Filing User's log-in and password constitutes signature; signature block requirements.	Standard provisions regarding multiple signature documents. A document requiring the signature of a criminal defendant must be scanned and electronically filed.	LR 11 addresses signature requirements of attorney in charge but not in context of ECF

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Texas Western	No. LR 5 refers to Administrative Policies and Procedures for Electronic Filing in Civil and Criminal Cases ("Electronic Filing Procedures") LCR 49 incorporates LR 5.	A Filing User's log-in and password constitute signature; signature block requirements.	Unless otherwise required by law, a Filing User who electronically files any document requiring the signature of other individuals must either: (1) submit a scanned document containing the necessary signatures; or (2) use "/s/" to indicate original was signed. A document requiring signature of a criminal defendant must be scanned and electronically filed. Retention requirements.	
Utah	No. LR 5-1 refers to ECF Procedures http://www.utd.uscourts.gov/documents/utahadminproc.pdf LCR 49 incorporates LR 5-1.	A Filing Attorney's log-in and password constitute signature; signature block requirements.	When a document requires signature of attorneys other than Filing Attorney, the Filing Attorney may file scanned signatures, indicate permission, or indicate original is in Filing Attorney's possession. A document requiring signature of a non-attorney can be filed by Filing User indicating permission, with a "/s/" and scanned signature as attachment, or scanned and then filed electronically. A document requiring signature of a criminal defendant must be scanned and electronically filed.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Vermont	No. LR 5 refers to Administrative Procedures for Electronic Case Filing http://www.vtd.uscourts.gov/sites/vtd/files/ECFAdminProc.pdf	An attorney's log-in and password constitute signature; signature block requirements.	For multiple signature documents, Filing Attorney must put a "/s/" for each signatory which indicates that each signatory consents. Filing attorney must retain proof of consent for 2 years after expiration of time to file an appeal. Affidavits and other documents requiring non-attorney signature may be filed electronically using the signature block indicating the paper document bears an original signature. Filing Attorney must retain document for two (2) years after the expiration of the time for filing a timely appeal.	Electronic filing is voluntary.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Virgin Islands	Yes. LR 5.4	Filing User's log-in and password constitutes signature; signature block requirements.	Documents containing the signature of non-Filing Users are to be filed electronically with the signature represented by an "s/" and the name typed in the space where a signature would otherwise appear, or a scanned image. Multiple signature documents must be electronically filed either by: (i) submitting a scanned document containing all necessary signatures; (ii) representing the consent of the other parties on the document; (iii) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (iv) in any other manner approved by the Court.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Virginia Eastern	No. E-Filing Policies and Procedures Manual http://www.vaed.uscourts.gov/ecf/documents/ECF%20Procedures%20Manual/Chapter%20Three/15%20-%20Policies%20and%20Procedures-Signatures.pdf	Filing User's log-in and password constitutes signature; "9 element" signature block required.	Filing User's filing documents with a non-Filing User's signature must obtain the non-user's actual signature on a paper version of the document, scan and file the document electronically, and retain the signed paper version of the document for the duration of the case, including any period of appeal. Multiple signature documents are filed by the Filing User by obtaining the signatures, creating an electronic version of the document with the filing user's regular signature block, as well as a typed signature block for all other parties/signatories, creating a PDF of the electronically signed version of the document, and then filing the electronically signed document; retention requirements.	
Virginia Western	Yes. LR 7(c). More rules in the Administrative Procedures for Filing, Signing and Verifying http://www.vawd.uscourts.gov/media/3355/ecfprocedures.pdf	LR 7(c): The electronic filing of a petition, pleading, motion, or other paper by an attorney who is a registered user shall constitute the signature of that attorney. Manual specifies signature block requirements	Manual specifies that Filing Attorney must obtain signatures of all signatories and then file electronically with correct signature blocks for all signatories.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Washington Eastern	No. LR 5.1 refers to Administrative Procedures for Electronic Case Filing. Civil: http://www.waed.uscourts.gov/sites/default/files/court%20documents/ECF_Civil_Procedures-20140625.pdf Criminal: http://www.waed.uscourts.gov/sites/default/files/court%20documents/ECF_Criminal_Procedures-20140625.pdf	The login and password required to file documents in ECF serve as the attorney's or Court-approved pro se filer's signature; signature block requirements	Non-Attorney Signature: if the original document requires the signature of a non-attorney, the filing party shall scan the original document, then electronically file it in ECF; 2-year retention requirement. Multiple Signatures: standard provisions; 2-year retention requirements. In criminal cases, the clerk's office maintains original charging documents.	Pro se litigants can obtain ECF log-in and password.
Washington Western	Yes. LR 11(a) states that a document signed electronically (by either a digital signature or by using the "s/ Name" convention) has the same force and effect as if the person had affixed a signature to a paper copy of the document. Electronic signatures must be in conformance with this district's Electronic Filing Procedures for Civil and Criminal Cases. LR 5(d) allows papers to be filed and signed by electronic means. http://www.wawd.uscourts.gov/sites/wawd/files/ECFFilingProceduresAmended12.20.12.pdf LCrR 1(a) incorporates LR 5(d)	LR 11(a) allows for digital signature or "s/Name." Manual specifies signature block requirements and states that pro se litigants are governed by the attorney signature rule.	Non-Attorney signatures: the filing party may scan the entire document, including the signature page, or attach the scanned signature page to an electronic version of the filing; retention requirements. Standard provisions for multiple signature documents.	Manual specifies that pro se litigant are governed by the attorney signature rule.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
West Virginia Northern	Yes. LR Gen P 5.03(c). Also Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf	Attorney signature is "s/(attorney name)." Manual specifies that attorney's log-in and password constitute signature; signature block requirements.	Manual 15.3 Non-Attorney Signature/Multiple Signatures: If an original document contains the signature of a non-attorney, or multiple signatures of attorneys or non attorneys, the filer may scan the original document with the original signature(s) to electronically file on CM/ECF. In the alternative, the filer may convert the document into PDF text format and submit using "s/" for the signature(s) of all signatories. The filer shall retain all documents containing original signatures of anyone other than the filer for a period of not less than 60 days after all dates for appellate review have expired. Should the authenticity of the document be questioned, the presiding judge may require the filer to produce the original document.	
West Virginia Southern	No. LR 5.1 LCrR 49.2 refer to and incorporate Administrative Procedures for Electronic Case Filing	Manual 15.1: attorney's log-in and password constitute signature; signature block requirements.	Manual 15.3: If the original document requires the signature of a non-attorney other than a pro se filer, the filing party or the clerk's office can: (1) scan and electronically file; or (2) converted to PDF with "s/"; 2-year retention requirement. Manual 15.4: filing party may file the scanned document, or file the document electronically, indicating the signatories, "s/(Name)."	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Wisconsin Eastern	No. Electronic Case Filing Policies and Procedures Manual file:///Users/juliemwilson10/Downloads/072811%20ECF%20Policies%20and%20Procedures%20-%20FINAL.pdf	Attorney's log-in and password constitute signature; signature block requirements.	Non-attorney signatures generally: if the original document requires the signature of a non-attorney, the filing attorney must: (1) obtain the signature of the non-attorney on the original document; (2) electronically file the document indicating the signatory in the following format: "s/Signatory Name"; (3) maintain the original document in paper form until one year has passed after the time period for appeal expires; and (4) provide the original document for review upon request of the judge. Documents requiring signature of criminal defendant, a third-party custodian, a United States Marshal, an officer from the U.S. Probation Office, or some other federal officer or agent, the Clerk's Office will scan the document, upload it into ECF, and dispose of the document as provided for in the Manual. Standard provisions for multiple signature documents; retention requirements. Also provisions for notary signatures.	Notary signature provisions (obtain original and then file electronically indicating notary's Certificate of Notarial Acts and "s/(Notary's name).")

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Wisconsin Western	No. LR 5.1 refers to Electronic Filing Procedures http://www.wiwd.uscourts.gov/electronic-filing-procedures	Filing User's log-in and password constitute signature; signature block requirements.	Signatures of someone other than Filing User: Filing User obtains original signature and then electronically files the document by either typing "s/ full name" of the signatory or by scanning the signed document, and retains for 2 years. Multiple signature documents: the Filing User electronically files the document by either typing "s/ full name" of the signer in place of the signature line or by filing a scanned document containing all necessary signatures, and retains for 2 years. Documents requiring signature of criminal defendant must be scanned and filed; filing user must maintain for 2 years.	
Wyoming	No. LR 5.2(b) and LCrR 49.2(b) refer to CM/ECF Procedures Manual http://www.wyd.uscourts.gov/pdfforms/cmprocmanual.pdf	Filer's log-in and password constitute signature.	Multiple signature documents: filer must obtain written confirmation that content of document is acceptable and then file using one of the acceptable signature options for each signatory. Non-Attorney/Third-Party signatures: Filer must obtain the wet signature and have available for inspection, and file electronically using one of the acceptable signature options.	CM/ECF Procedures Manual gives options for electronic signatures: /s/ Signature, Signature Stamp, and No Signature

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Alabama Middle	9011-1	9011-1; http://www.almb.uscourts.gov/sites/almb/files/local_rules/120109%20Amended%20Local%20Rules.pdf	Electronic submission constitutes signature. /s/ may be used to indicate signature.	Hard copy may be signed and scanned, or electronic version indicating signature may be filed with original signed document kept by filer for (4) years after closing of the case by the court	
Alabama Northern	Rule 5005-4 directs to Administrative Procedures Manual for CM/ECF	5005-4, http://www.alnb.uscourts.gov/sites/default/files/Local%20Rules%2010-1-13_0.pdf Directs to: http://www.alnb.uscourts.gov/sites/default/files/proCMECFfiling.pdf (Part II, Section C)	Filing by registered user electronically constitutes signature, should indicate signature with /s/ name and signature block	For documents requiring original signatures, may file electronically and filer keeps originals for (3) years after closing of the case Pro Se filers may submit all documents to Clerk of Court, who will scan and then retain the originals for (1) year after closing of case	
Alabama Southern	No	n/a	n/a	n/a	
Alaska	LR 5005-4(c)	LR 5005-4(c); http://www.akb.uscourts.gov/pdfs/2012_lbr.pdf	Filing by registered user electronically constitutes signature	Debtor must submit Declaration Re: Electronic Filing bearing original signature for all statements requiring original signature of debtor	"verified documents" must include scanned original signature page
Arizona	LR 5005-2(f)	http://www.azb.uscourts.gov/Documents/Local_Rules.pdf	Filing by registered user electronically constitutes signature. Must keep original copy of signed document for (1) year after conclusion of all appeals	Filer must maintain copy of any document signed by someone other than the filer for (1) year after close of case	Doesn't specifically address non-filing users
Arkansas Eastern & Western	LR 5005-4 directs to Administrative Procedures of CM/ECF	Administrative procedures: http://www.arb.uscourts.gov/orders-rules-opinions/orders/APGo19(7).pdf	All electronic filings must contain either original scanned signature page or indicate with /s/ name	None	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if available)	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
California Central	General Order 06-03	http://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/GO%2006-03.pdf	Filing with login and password constitutes signature, denote with /s/ name	Electronically filed document requiring debtor's signature shall indicate signature with /s/ name and scanned copy of "Electronic Filing Declaration" signed by debtor. Filer must maintain signed declaration for (5) years following close of case	
California Eastern	LR 9004-1(c)	http://www.caeb.uscourts.gov/documents/Forms/LocalRules/12.Local Rule s.pdf	Filing with login and password constitutes signature, denote with /s/ name	Signatures of Other Persons. Signatures of persons other than the registered user may be indicated by either: (if) Submitting a scanned copy of the originally signed document; (ii) Attaching a scanned copy of the signature page(s) to the electronic document; or (iii) Through the use of "/s/ Name" or a software-generated electronic signature in the signature block where signatures would otherwise appear. Electronically filed documents on which "/s/ Name" or a software-generated electronic signature is used to indicate the signatures of persons other than the registered user shall be subject	For scanned documents or where signature is indicated electronically with /s/, original signed document must be kept by filer for (3) years after close of case
California Northern	LR 5005-2	http://www.canb.uscourts.gov/rules/dist/bankruptcy-local-rules#_Toc267554436	Filing constitutes signature, should type name where signature is indicated on document	Registered user, by filing document with signature of non-filer, is certifying that he or she has the original signed document, and shall retain it for (5) years after close of case	
California Southern	General Order 162-A	http://www.casb.uscourts.gov/pdf/GO162a.pdf	Filing by registered user electronically constitutes signature	Debtor must submit Declaration Re: Electronic Filing bearing original signature for all statements requiring original signature of debtor	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Colorado	LR 9011-4	http://www.cob.uscourts.gov/files/mrfa.pdf Any petition, schedule, statement, declaration, claim, order, opinion, judgment, notice, minutes of proceeding or other document filed and authorized or subscribed under any method (digital, electronic, scanned) will be treated for all purposes (both civil and criminal, including penalties for perjury) in the same manner as though manually signed or subscribed.	None specific	None specific	
Connecticut	Standing Order No. 7	http://www.ctb.uscourts.gov/Doc/sorders/STorder7-1.pdf	Filing constitutes signature	Filer must maintain original document signed by non-filer for (5) years following close of case	
Delaware	LR 9011-4	http://www.deb.uscourts.gov/sites/default/files/local_rules/LocalRules_2014.pdf	Filing electronically along with typed signature constitutes signature	Unclear	Rule language is unnecessarily complicated
District of Columbia	Administrative Order Relating to Electronic Case Filing	http://www.dcb.uscourts.gov/dcb/sites/www.dcb.uscourts.gov/dcb/files/AdmOrderSigned.pdf	Electronic submission constitutes signature. /s/ may be used to indicate signature, or may include scanned copy of signature	Filed document may indicate that a signature was authorized in writing by a non-filing user	Filer must maintain hard copies of signed documents for 5 years from the date of filing the document

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if available)	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Florida Middle	LR 9011-4	http://www.flmb.uscourts.gov/localrules/rules/9011-4.pdf	Filing by registered user electronically constitutes signature, should indicate signature with /s/ name and signature block	For documents requiring more than one signature: may scan signature page, or may provide attestation of agreement by all signatories	Filer must keep original documents in case Court asks to review (no time period specified)
Florida Northern	Standing Order #11 Part II, C	http://www.flnb.uscourts.gov/sites/default/files/standing_orders/so11.pdf	Signature when filed with valid user name/password as well as either /s/ name indicated, or scanned original document with signatures	None	
Florida Southern	LR 9011-4	http://www.flsb.uscourts.gov/	Filing with login and password constitutes signature	Unclear	
Georgia Middle	LR 5005-4(b)	http://www.gamb.uscourts.gov/USCourts/sites/default/files/local_rules/Updated Local Rules.pdf	Filing with login and password constitutes signature, along with /s/ name or scan of original signature	Individuals or parties that must file frequently with the court may register as a filing user with the Clerk of Court	
Georgia Northern	LR 5005-7(b)	http://www.ganb.uscourts.gov/cmecf/research/lrulesusbc.html#TOC1_23	/s/ name on document of filing user constitutes signature	/s/ name of non-filing user on document is filer's assertion that the individual has consented to signing the document	No mention of keeping original signed documents. May scan original signed documents instead of /s/ name convention.
Georgia Southern	General Order for Administrative Procedures	http://www.gasb.uscourts.gov/usbcGeneralOrders.htm#go_2010_1	Login and password constitute signatures.	No specific provisions.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if available)	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Hawaii	Local Rule 5005-4	http://www.hib.uscourts.gov/localrules/LBRs.pdf	Login and password constitute signature.	The declarations or certifications required of a debtor in these documents must be made by submitting a paper copy of a declaration substantially conforming to the local form (Declaration re: Electronic Filing [hib_5005-4f2]) with the original signature of each individual or joint debtor, or the original signature of an authorized individual on behalf of a debtor that is an artificial entity.	Documents with original signatures must be retained for one year after a case is closed. In lieu of producing an originally signed paper document, an ECF User may produce the document's scanned image with the digital file's "date modified" information attached.
Idaho	ECF Procedures	http://www.id.uscourts.gov/announcements/ECFProcedures_Final.pdf	Login and password constitutes signature, should indicate on form with /s/ name		In bankruptcy cases, the Registered Participant must electronically submit a scanned pdf copy of the original signature page of the original and any amended petition, schedules and statement of financial affairs to the Clerk at the time of electronically filing these documents with the Court in CM/ECF.
Illinois Central	Standing Order	http://www.ilcb.uscourts.gov/sites/ilcb/files/3rd%20amd%20GO%20re%20ECF.pdf	Login and password constitute signature, should indicate on form with /s/ name	/s/ name of non-filing user on document is filer's assertion that the individual has consented to signing the document	
Illinois Northern	ECF Procedures	http://www.ilnb.uscourts.gov/sites/default/files/Procedures_for_CMECF.pdf	Login and password constitute signature, should indicate on form with /s/ name	Any document signed by a non-filer must be accompanied by a declaration with an original signature.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if available)	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Illinois Southern	Electronic Filing Rules	http://www.ilsb.uscourts.gov/sites/default/files/ElectronicFilingRulesDec2013.pdf	Login and password constitute signature, should indicate on form with /s/ name or include a scanned copy of the signature.	Parties with legal representation follow the rules for electronic filing. Pro se parties must submit documents with original signatures to the court for scanning.	
Indiana Northern	Standing Order	http://www.innb.uscourts.gov/pdfs/6thAmendedECFOrder.pdf	Login and password constitute signature; unless document includes a scanned signature, should indicate on form with a /s/ for signature.	A debtor's signature may be submitted via scanned document, attached to the filed document or submitted separately.	
Indiana Southern	Administrative Manual	http://www.insb.uscourts.gov/AdminManual/Attorney/AdminPoliciesandProcedures.htm	For documents filed electronically through CM/ECF, use of the e-filer's user ID and password when filing documents electronically, combined with the use of the /s/ as a replacement for a wet signature.	The /s/ format is acceptable for debtors as well, as long as the electronic filer retains the document with the wet signature.	Scanned signatures are also permitted. For consent agreements or other similar documents, the filer may obtain permission to use /s/ from other authorized electronic filers. For everyone else, the filer must retain the wet signature document.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Iowa Northern	Standing Order	http://www.ianb.uscourts.gov/publicweb/sites/default/files/standing-ordes/ExhibitOnetoStandingOrder1-Revised11-08.pdf	Login and password constitute signature and documents should include a /s/ with the name of the filer.	The filing user must retain wet signatures for five years for any non-filing users.	Papers requiring signatures of more than one party must be electronically filed by either (1) submitting a scanned paper containing all necessary signatures; (2) representing the consent of the other parties on the paper; (3) identifying on the paper the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than seven (7) business days after filing; or (4) in any other manner approved by the court.
Iowa Southern	CM/ECF Filing Manual	http://www.iasb.uscourts.gov/cmecf/external/IA_Southern_Bk_Manual.htm	All documents must be filed with a /s/ for the signature or a scanned signature. The original wet signature must be retain by the attorney until the appeal time expires.		
Kansas	Local Rule	http://www.ksb.uscourts.gov/images/local_rules/2014_Local_Rules.pdf	Login and password constitute signature; should indicate /s/ on documents.	Filing user must retain the original signature on any document for 6 years.	
Kentucky Eastern	Administrative Procedures Manual	http://www.kyeb.uscourts.gov/sites/kyeb/files/June%202014%20APM%20with%20TOC%20Web%20Version_0.pdf	All documents must be filed with a /s/ for the signature or a scanned signature.	The original wet signature must be retain by the attorney until the appeal time expires or until one year after the closing of the case.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if available)	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Kentucky Western	Local Rule 5005-4	http://www.kywb.uscourts.gov/fpweb/local_rules_online.htm#5005-4	Login and password serve as the filer's signature. A /s must be included on the signature line.		
Louisiana Eastern	Administrative Manual	http://www.laeb.uscourts.gov/sites/laeb/files/AdminProcManual121213.pdf	Login and password constitute signature; must indicate /s/ on signature line in documents or submit scanned signature.		
Louisiana Middle	Administrative Procedures Manual	http://www.lamb.uscourts.gov/sites/lamb/files/adminprocedures-2013-12.pdf	Login and password constitute signature; must indicate s/ on signature line in documents or submit scanned signature.	A document filed electronically shall either contain a scanned signature or a s/ on the signature line.	
Louisiana Western	Administrative Manual		Login and password constitute signature. Any document containing an original signature shall indicate the signature on the filed document with an /s/ and shall be retained by the filer.	Documents must contain either original signatures or verification by unsworn declaration under any applicable rule or statute. These documents will be scanned by the Office of the Clerk and the original documents will be retained by the Clerk of Court for at least five (5) years after the case is closed. Attorneys filing documents with original signatures must retain the documents for five years after the case is closed.	Each electronic filer shall execute and file, no later than forty-eight (48) hours following the date the petition was electronically filed, a Declaration Re: Electronic Filing of Petition, Schedules, & Statements form.
Maine	Administrative Manual	http://www.meb.uscourts.gov/Pdf/Administrative%20Procedures_%203_2011.pdf	Login and password constitute signature, and signature should be indicated on documents with /s/.	Documents with original signatures other than the filer shall be retained by the filer for two years following the closing of the case or the expiration of the appeals period.	For stipulations and other similar documents, a non-filing party who disputes the authenticity of his or her signature must file an objection within 10 days of the notice of electronic filing.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Maryland	General Order	http://www.mdb.uscourts.gov/sites/default/files/general-orders/03-02.pdf	Login and password constitute signature, and signature should be indicated on documents with /s/.	Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until three (3) years after the bankruptcy case is closed.	
Massachusetts	Appendix 8 of the Local Rules.	http://www.mab.uscourts.gov/pdffdocuments/localrules/appendix/8.pdf	Login and password constitute signature, and signature should be indicated on documents with /s/. Where an electronically filed document sets forth the consent of more than one party, the additional consents may be supplied by: (1) a scanned document containing all of the necessary signatures; or (2) a representation that the Registered User has authority to consent on behalf of the other parties who are purported signatories to the document; or (3) a notice of endorsement filed by the other signatories no later than three business days after filing of the document; or (4) any other manner approved by the Court.	Unless the Court orders otherwise, all electronically filed documents, (including, without limitation, affidavits or a debtor's petition, schedules, statement of affairs, or amendments thereof) requiring signatures of a non-Registered User under the penalties of perjury shall also be executed in paper form, together with a Declaration Re: Electronic Filing in the form of MLBR Official Local Form 7. The Declaration Re: Electronic Filing shall be filed with the Court as an imaged, and not electronically created, document, together with or in addition to the document electronically filed with the Court. Said Declaration shall be valid for the declarant for all subsequently filed documents requiring a signature in	All original signatures shall be retained by the registered user until 5 years after the closing of the case and are considered property of the court.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Michigan Eastern	Administrative Procedures	http://www.mieb.uscourts.gov/sites/default/files/courtinfo/ECFAdminProc.pdf	Login and password constitutes signature, should indicate on form with /s/ name	Each Paper that must contain an original signature by a person other than the Filer or User, or that is required to be verified under Rule 1008 or as provided in 28 U.S.C. §1746 by a person other than the Filer or User, shall be filed electronically by a Filer or a User. The Paper containing the original signature shall be retained by the Filer or User who files the Paper for five years after the closing of the case or adversary proceeding.	
Michigan Western	Administrative Procedures	http://www.miwb.uscourts.gov/cms/assets/Rules-and-Forms/AdminOrders/AdminProc.pdf	Login and password constitutes signature with /s/ to indicate signature on the document.	When the original petition is filed electronically, the attorney for the debtor(s) shall file in paper form, the originally executed "Declaration Re: Electronic Filing" with the Court within five (5) business days of the electronic filing. The Court will retain the original Declaration	Any document filed by a filing user with an original signature must be retained by the filing user for a period of 5 years after the closing of the case and all time periods for appeals have expired
Minnesota	Local Rule 9011-4	http://www.mnb.uscourts.gov/content/rule-9011-4-signatures	Login and password constitutes signature and the filer should indicate /s/ on the document.	The Filing User shall submit either a scanned image of the Form ERS 1 Signature Declaration signed by the debtor(s) or the electronic document with a scanned image of the signature page signed by the debtor(s). When an original signature of a non-Filing User is required on a verification, affidavit or other similar document, the Filing User shall submit a scanned image of the signature page of the document signed by the non-Filing User. The scanning of documents is governed by Local Rule 9004-1(e).	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Mississippi Northern	Administrative Procedures	http://www.msnb.uscourts.gov/cmecf/pdfs/AdminProcMSNB.pdf	Login and password constitutes signature and the filer should indicate /s/ on the document.		The original signed document shall be maintained by the attorney of record or the party originating the document until the case or adversary proceeding is closed and all maximum allowable times for final orders in appeals in that case or adversary proceeding have expired, and the time within which a discharge of the debtor may be revoked has passed.
Mississippi Southern	Administrative Procedures	http://www.mssb.uscourts.gov/media/96910/Website%20Notice%20MSSB%20Admn%20Procedures%20Rev.%2002-26-2014.pdf	Login and password constitutes signature and the filer should indicate /s/ on the document.		Registered ECF Users must maintain originally executed copies of signed documents for one year after the case is closed in the bankruptcy court.
Missouri Eastern	Procedures Manual	http://www.moeb.uscourts.gov/pdfs/local_rules/2013/Procedures_Manual_2013.pdf	Login and password constitutes signature.	Login and password constitutes the filing users representation regarding others' signatures.	
Missouri Western	Administrative Procedures	http://www.mow.uscourts.gov/bankruptcy/rules/bk_ecf_procedures.pdf	Login and password constitutes signature.	Login and password constitutes the filing users representation regarding others' signatures.	On the day the original petition is filed electronically, the attorney for the debtor(s) shall electronically file the "Declaration Re: Electronic Filing."

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Montana	Local Rule 9011-1	http://www.mtb.uscourts.gov/Reports/2009/BKRulesFinal.pdf	Login and password constitutes signature and the filer should indicate /s/ on the document or print name.	The original declaration under penalty of perjury relating to the petition, statements, schedules, and any amendment to any of these types of documents, shall be transmitted by personal delivery, mail, or electronic means to the Clerk and, if necessary, shall be scanned into the CM/ECF system. The signature appearing on the electronic document shall be the original.	The original signed documents must be retained in paper form by the filer for five years after the case is closed.
Nebraska	Local Rule 9011-1	https://www.neb.uscourts.gov/Robohelp_Manuals/Local_Rules/index.htm	The pleading or other document electronically filed may indicate a signature, e.g., "s/Jane Doe." The CM/ECF filer login and password may constitute the signature of said party on any electronically filed pleading (i.e., affidavits, petition, schedules). The attorney of record or the party originating the document shall maintain the original signed	See column D.	
Nevada	Administrative Procedures	http://www.nvb.uscourts.gov/downloads/cm-ecf/procedure-electronic-filing.pdf	The User Log-In and Password that are required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court.		

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
New Hampshire	Administrative Order 5005-4	http://www.nhb.uscourts.gov/OrdersRulesForms/LocalRulesOrdersPDFs/2012%20LBRs%20IBRs%20AOs%20and%20LBFs%20-%20Clean.pdf	Login and password constitute signature, along with /s/ on signature line.	If a document that is electronically filed contains an original signature under oath, other than that of the Filing User, a paper copy of a Declaration Regarding Electronic Filing must be submitted to the court within seven (7) days in the form of LBF 5005-4, signed under oath, and must have attached to it a copy of the Notice of Electronic Filing for that document, which includes the electronic document stamp. The clerk retains declarations for three (3) years after the case is closed.	
New Jersey	Appendix to Local Rules; Administrative Procedures	http://www.njb.uscourts.gov/sites/default/files/local_rules/August_1_2012_LR_Package.pdf#page=57	Login and password constitute signature, along with /s/ on signature line.	Documents that are electronically filed and require original signatures, other than that of the filer must be maintained in paper form by the filer for not less than seven years from the date of closure of the case or proceeding in which the document is filed. The document requiring third party signatures must be electronically filed either by (1) submitting a scanned document containing the third party signature; or (2) by submitting a document displaying the name of the person with an “/s/”.	
New Mexico	Electronic Filing Procedures	http://nmb.uscourts.gov/efp	Login and password constitute signature; an /s/ on the signature block may be used but is not a requirement.	Documents which require the verified signature of a person other than the electronically filing attorney may be electronically filed utilizing scanning technology	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
New York Eastern	Electronic Filing Procedures; Local Rule 9011-1	http://www.nyeb.uscourts.gov/sites/nyeb/files/general-orders/ord_559.pdf	Either an /s/ on the signature line or a scanned copy of the signature.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, stipulations and other documents which must contain original signatures, documents requiring verification under FRBP 1008, and unsworn declarations under 28 U.S.C. § 1746, shall be filed electronically and bear “electronic signatures” that conform to E.D.N.Y. LBR 9011-1(b). The hard copy of the originally executed document, and/or original exhibits, shall be maintained by the filer for two years after the entry of a final order terminating the case or proceeding to which the document relates.	
New York Northern	Electronic Filing Procedures	http://www.nynb.uscourts.gov/sites/default/files/CMECF/AdminProc010112.pdf	Registered attorneys must indicate signature on electronically filed documents with an /s/.	Petitions, lists, schedules and statements, amendments, pleadings, affidavits, and other documents which must contain original signatures or which require verification under Fed. R. Bankr.P. 1008 or an unsworn declaration as provided in 28 U.S.C. § 1746, may be filed electronically by attorneys registered with the electronic filing system.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if available)	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
New York Southern	Rule 9011-1; Administrative Procedures		Registered attorneys must indicate signature on electronically filed documents with an /s/.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, stipulations and other documents which must contain original signatures, documents requiring verification under Federal Rule of Bankruptcy Procedure 1008, and unsworn declarations under 28 U.S.C. § 1746, shall be filed electronically and all signatures in any PDF document shall conform to the following format: “/s/ Jane Doe” or “s/ Jane Doe.” The filer must maintain a hard copy of the originally executed document for the later of two years or the entry of a final order terminating the case or proceeding to which the document relates.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
New York Western	Administrative Procedures	http://www.nywb.uscourts.gov/sites/nywb/files/ECF_Administrative_Procedures_Oct_2010_update.pdf	An /s/ is required on the signature block or a scanned signature.	Filing a document electronically is the filer's representation that the original signature was obtained prior to electronic filing.	For a period of not less than five (5) years after the closing of the bankruptcy case, the ECF Registered Participant that made the filing of each pleading, paper or other document must retain the original paper version of such pleading, paper or other document bearing original ink signatures pursuant to the verification requirements under Bankruptcy Rule 1008 or 28 U.S.C. § 1746, whether the signature is that of the ECF Registered Participant or made by someone other than the ECF Registered Participant.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
North Carolina Eastern	Local Rule 5005-4	http://www.nceb.uscourts.gov/sites/nceb/files/local-rules.pdf	The login and password constitute the filing user's signature.	The filing user is certifying the authenticity of any signatures when filing a document.	A Filing User must obtain original signatures prior to filing on all electronically filed documents that require original signatures from any person other than the Filing User which documents must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed.
North Carolina Middle	Local Rule 5005-4	http://www.ncmb.uscourts.gov/sites/default/files/local_rules/LR%20July%202014%20update%20final%20with%20TOC.pdf	Login and password constitute signature. Any document containing an original signature shall indicate the signature on the filed document with an /s/ or be a scanned version of the original signature.	The filing user is certifying the authenticity of any signatures when filing a document.	A Filing User must obtain original signatures prior to filing on all electronically filed documents that require original signatures from any person other than the Filing User which documents must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
North Carolina Western	Local Rule 5005-4	http://www.ncwb.uscourts.gov/pdf/LR_web_revised.pdf	Login and password constitute signature.	Filing by an authorized user shall constitute that user's certification that the documents were signed in original signatures prior to electronic filing.	The registered user must retain any documents with original signatures for four years post case closing.
North Dakota	Administrative Procedures	http://www.ndb.uscourts.gov/CM-ECF%20Administrative%20Procedures/CM-ECF_Administrative_Procedures.htm	The user login and password or the signature block on documents filed using court approved software (as provided for by general order dated November 27, 2013) serves as the electronic filer's signature. An /s/ should be used on the signature line.	Documents containing the signature of a nonelectronic filer are to be filed electronically with the signature represented by the name of the nonelectronic filer preceded by a "/s/," "/s" or "s/" or other similar format and where a signature would otherwise appear, or file a scanned image of the signature.	Documents electronically filed that require original signatures, other than that of the electronic filer, must be maintained in paper form by the electronic filer until six years after the case is closed. This retention period does not affect or replace any other retention periods required by other applicable laws or rules.
Ohio Northern	Administrative Procedures	https://www.ohnb.uscourts.gov/ecf/repository/administrative_procedures_manual.pdf	The signature block must contain s/ on the signature line.	Any document requiring the debtor's signature shall first be signed by the debtor, followed by the electronic submission of a copy of the document with the debtor's signature indicated as s/name. Whenever the initial document requiring the debtor's signature is electronically filed in a case, it must be followed by the filing with the clerk of the signature declaration form. The debtor's handwritten signature is required on a reaffirmation agreement or a proposed reaffirmation agreement, even if the signature declaration form has been signed by the debtor. The agreement shall be scanned and filed electronically.	All documents bearing the handwritten signature of the user, or the handwritten signature of any signer on whose behalf the user files such documents, shall be maintained by the user for a period of one year following the closing of the case.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Ohio Southern	Administrative Procedures	https://www.ohsb.uscourts.gov/New%20Local%20Rules/AdminProcs_Clean.pdf	The transmission by a Filer or User to ECF of any document constitutes any required signature of that Filer or User on such document. The signature block should contain an /s/.	A document transmitted to ECF requiring or containing signatures of entities who are not the transmitting Filers or Users shall either (a) show an image of such signature as it appears in the original signed document, or (b) bear the name of the signatory preceded by “/s/ Name” typed in the space where the signature would otherwise appear in a signed document.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents that must contain original signatures or that require verification under Rule 1008 or an unsworn declaration as provided in 28 U.S.C. § 1746 shall be retained by the Filer or User who files such a pleading, document, or other paper for a minimum of two years from the closing of the case or proceeding.
Oklahoma Eastern	Administrative Procedures; Local Rule 9011-1	http://www.okeb.uscourts.gov/sites/default/files/AdmGuide10-01-09.pdf	Login and password constitute signature; signature line must contain an /s/,	CM/ECF Users filing documents that require the signature of a non-filing attorney (e.g., joint motion, stipulation, etc.) shall indicate the signature of the non-filing attorney with an “s/” and the name typed in the space where a signature would otherwise appear, or shall file a scanned image of the document containing the nonfiling attorney’s signature.	The attorney of record or the party originating the document shall maintain documents with original signatures filed in a bankruptcy case for at least one year after the case is closed. In adversary proceedings, the attorney of record or party originating the document shall maintain documents with original signatures filed in the proceeding until after the proceeding is concluded and one year after case is closed.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Oklahoma Northern	Local Rules 9011-1 and 9011-4	http://www.oknb.uscourts.gov/sites/default/files/Local%20Rules.pdf	The electronic filing of a petition, pleading, motion, or other paper by an attorney constitutes the signature of that attorney. An /s/ should be used on the signature line in the document.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, motions, and other documents which must contain original signatures or which require verification under Bankruptcy Rule 1008 or an unsworn declaration, as provided in 28 U.S.C. § 1746, shall be filed electronically.	The attorney of record or the party originating the document shall maintain documents with original signatures filed in a bankruptcy case for at least one year after the case is closed.
Oklahoma Western	Appendix A to the Local Rules	http://www.okwb.uscourts.gov/sites/okwb/files/local_rules_ECF.pdf	The filing of a document bearing the filer's personal or electronic signature using the filer's login shall be deemed the electronic signature of the Registered Participant. An s/ must appear on the signature line.	The electronic filing of a document electronically signed by a client of the Registered Participant, including but not limited to the petition, statement of financial affairs and schedules of assets and liabilities, shall be deemed a certification by the Registered Participant that he or she has the document bearing the person's original signature in his or her physical possession.	Certain documents, such as affidavits and sworn statements, must bear the personal signature of the person under oath and the notary public. The notarial seal must be visible on any sworn statement.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Oregon	Local Rules 5005 and 9011.	http://www.orb.uscourts.gov/sites/orb/files/documents/general/Local_Rules_clean.pdf	Login and password constitute signature; an /s/ on the signature block must be used.	A document filed electronically must contain, in each location a signature is required, the electronic signature of the filer and of any other signer of the document as follows: “/s/ (Name).” By affixing the “/s/ (Name)” of another signer to an electronically filed petition or other document described in FRBP 1008, the filing ECF Participant certifies under FRBP 9011 that, when filing the document, the filer possesses a counterpart of the document bearing an original signature for each signer.	An electronically filed document described in FRBP 1008 or a properly completed, signed, and filed LBF #5005 with respect to the document and a scanned electronic replica of the signed document must be maintained by the filing ECF Participant or the firm representing the party on whose behalf the document was filed in its original paper form until the later of the closing of the case or the fifth anniversary of the filing of the document.
Pennsylvania Eastern	Procedures for Electronic Filing	http://www.paeb.uscourts.gov/sites/paeb/files/general-orders/StandingOrder1.pdf	Login and password constitute signature; an s/ must appear on the signature line.	Documents requiring original signatures must be filed electronically with an s/. The filing is the filing user's representation that he/she has the original signed document.	Documents with original signatures must be retained for three years after the case is closed.
Pennsylvania Middle	Administrative Procedures; General Order	http://www.pamb.uscourts.gov/sites/default/files/general-orders/Miscellaneous%20Order%205-04-mp-50007.pdf	Login and password constitute signature; an s/ must appear on the signature line.	All documents filed that contain signatures other than the filing user shall contain /s/ on the signature line or a scanned copy.	There are various retention requirements depending on the type of case.
Pennsylvania Western	Local Rule 5005-6	http://www.pawb.uscourts.gov/sites/default/files/lrules2013/LocalRule5005-6.pdf	Login and password constitute signature; an /s/ must appear on the signature line.	No specific provisions.	Documents with original signatures must be retained for six years after the case is closed.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Puerto Rico	Local Rule 5005-4	http://www.prb.uscourts.gov/sites/default/files/local_rules/LBR-5005-4.pdf	Login and password constitute signature. The document should contain /s/ on the signature line.	Petitions, lists, plans, schedules, statements, amendments, pleadings, affidavits, stipulations, and other documents which must contain original signatures, documents requiring verification under Fed. R. Bankr. P. 1008, and unsworn declarations under 28 U.S.C. § 1746, shall be filed electronically and bear “electronic signatures” including	The Electronic Filer shall retain the original documents containing the original signatures for two (2) years after the case is closed.
Rhode Island	Local Rule 5005-4	http://www.rib.uscourts.gov/newhome/rules/info/flashhelp/Local_Rules.html	Any document signed and filed electronically, or filed conventionally and converted to an electronic document by the clerk, including a proof of claim filed electronically on this court's website, shall constitute the filer's approved signature and have the same force and effect as if the individual signed a paper copy of the document. Documents required to be verified or contain an unsworn declaration that are filed electronically shall be treated, for all purposes (both civil and criminal, including penalties for perjury), the same as though signed or subscribed.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, proofs of claim, stipulations and other documents which must contain original signatures shall be filed electronically and bear “electronic signatures”, including the /s/.	Documents that are electronically filed and require original signatures other than that of the registered user must be maintained in paper form at least two years after the case is closed.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
South Carolina	Local Rule 9011-4	http://www.scb.uscourts.gov/pdf/Local_Rule_s/lr2013_amended_04292014.pdf	Login and password constitute signature; an /s/ must appear on the signature line or a scanned version of the signature.	The electronic filing of a bankruptcy petition; lists; schedules and statements, all amendments thereto; original plans; amended plans; claims; monthly or periodic financial reports; affidavit; and/or unsworn declaration constitutes an attorney's representation that the original signature of the debtor(s) or other signing party has been affixed to the original document. With regard to documents signed by debtor(s), the electronic filing by the attorney constitutes the attorney's representation that the debtor(s) authorized the filing of the documents.	The filing party must retain the original signature in paper form of any document that requires an original signature and must retain any documentation memorializing the consent of a party to the filing of a document with the party's signature where permitted by these rules and where original signatures are not required until the case or adversary proceeding is closed and all maximum allowable times for appeals in that case or adversary proceeding have expired, and, if applicable, the time within which a discharge of the debtor may be revoked has passed. In the event a case is dismissed, all original signed petitions or other documents signed by debtor or other verifying party shall be maintained by the attorney of record
South Dakota	None				
Tennessee Eastern	Local Rule 9011-4	http://www.tneb.uscourts.gov/sites/default/files/localrules.pdf	Login and password constitutes signature.		

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Tennessee Middle	Administrative Procedures for Electronic Filing	http://www.tnmb.uscourts.gov/documents/ecf_procedures[1].pdf	The transmission by a Filer or User to ECF of any document constitutes any required signature of that Filer or User on that document. An /s/ should be used on the signature line.	Documents filed with non-filers signatures shall contain /s/ on the signature line. Other than this requirement, there is nothing specific in the Local Rules or Procedures regarding signatures of non-filing users.	
Tennessee Western	ECF Guidelines	http://www.tnwb.uscourts.gov/PDFs/ECF/ECF_guidelines.pdf	All signature lines must contain /s/ on the signature line.	The signatures of a debtor or joint debtors upon all verifications or unsworn declarations accompanying petitions, statements, schedules, and amendments thereto shall be made upon the documents filed electronically of record on the docket of the Court or, if the declaration, verification, etc., is on diskette or CD in PDF format by means of a signature designation: “/s/(name of signatory).”	Attorneys must maintain the original signature documents for five years after the case is closed.
Texas Eastern	Local Rule 5005	http://www.txeb.uscourts.gov/LBRs%2012_09/5005.pdf	The filing of any document using a login and password constitutes the electronic signature of the filer.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate “Declaration for Electronic Filing,” substantially conforming either to Exhibit “B-1,” “B-2,” or “B-3,” which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Texas Northern	General Order	http://www.txnb.uscourts.gov/sites/txnb/files/general-orders/2004-06%281%29.pdf	The filing of any document using a login and password constitutes the electronic signature of the filer.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate "Declaration for Electronic Filing," substantially conforming either to Exhibit "B-1," "B-2," or "B-3," which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.
http://www.txscourts.gov/bankruptcy/	Administrative Procedures	http://www.txscourts.gov/attorneys/cmecf/bankruptcy/adminproc.pdf	Login and password constitute the filing user's signature.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate "Declaration for Electronic Filing," substantially conforming either to Exhibit "B-1," "B-2," or "B-3," which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Texas Western	Administrative Procedures	administrative_procedures_electronic_filing-2.pdf	Login and password constitute the filing user's signature.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate "Declaration for Electronic Filing," substantially conforming either to Exhibit "B-1," "B-2," or "B-3," which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.
Utah	Electronic Case Filing Protocols.		Login and password constitute signature and documents should include a /s/ with the name of the filer.	Unclear from local rules and protocol document.	Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until 5 years after all time periods for appeals expire.
Vermont	Local Rule 9011-4	http://www.vtb.uscourts.gov/sites/vtb/files/Local_Rules_2012.pdf	Login and password constitute signature, and the filer must use /s/ on the signature line.	All documents submitted for filing by a nonattorney must be signed in ink (the "original signature") by the non-attorney. An electronic image of the non-attorney's original signature is acceptable and may be deemed the original signature for purposes of Fed. R. Bankr. P. 9011, all other Federal Rules of Bankruptcy Procedure, these Rules, and for any other purpose for which a signature is required in connection with matters before the Court.	The debtor's attorney must retain paper originals of all documents that are filed electronically and require original signatures (other than that of the party registered to use the CM/ECF System) for five years from the date of the filing of the document.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Virginia Eastern	Local rule 5005 and Electronic Filing Procedures	https://www.vaeb.uscourts.gov/wordpress/?wpfb_dl=546	Login and password constitute signature.	Non-attorneys shall indicate signature with /s/. Pro se debtors must submit original signatures where necessary.	Documents that are electronically filed and require original signatures shall be maintained by the User until 3 years after the closing of the case. If in the ordinary course of the User's business, the User maintains imaged copies of that person's records, the user may retain an imaged copy in lieu of the document with the original signature to the same extent that the User otherwise retains imaged records in the ordinary course of the User's business.
Virginia Western	Local Rule 5005	http://www.vawb.uscourts.gov/sites/default/files/Local%20Rules%202014%20Final.pdf	Login and password constitute signature.	There is no specific language in the local rules regarding non-filing users, but the language can be interpreted that when a filing user files a document signed by another person, the user is representing that any electronic signature is authorized.	The User shall retain the duly signed paper original of any document required under the preceding paragraph for a period of no less than three (3) years following such case's dismissal or closing, unless otherwise ordered by the Court.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Washington Eastern	Local Rule 5005-3	http://www.waeb.uscourts.gov/sites/default/files/waeb/local_rules/Local_Rules_Complete_Set.pdf	Login and password constitute signature.	A scanned copy of an original signature or /s/ constitute signature. Documents that require a signature under penalty of perjury that are submitted electronically must be accompanied by a statement that the signature was witnessed and by whom.	Original versions of all signed documents must be retained for at least five years.
Washington Western	Local Rule 5005 and Administrative Procedures	http://www.wawb.uscourts.gov/read_file.php?file=3812&id=919	Login and password constitute signature. The document should contain /s/ on the signature line.	Documents with signatures may be filed electronically with an /s/ on the signature line.	Original versions of all signed documents must be retained for at least five years.
West Virginia Northern	Local Rule 5005.4-09	http://www.wvnb.uscourts.gov/sites/wvnb/files/local_rules/N.D.W.V.%20LBR%205005-4.09.pdf	Login and password constitute signature. The document should contain /s/ on the signature line.	The existence of a scanned pdf signature or a properly executed Declaration Re: Electronic Filing and debtor(s)'s testimony at the Section 341 meeting of creditors are prima facie evidence of the existence, authenticity and validity of the signatures on the original petition, schedules, and statement of affairs.	Any documents with original signatures must be retained for seven years after filing.
West Virginia Southern	General Order re: Administrative Procedures for Electronic Filing	http://www.wvsb.uscourts.gov/sites/wvsb/files/general-orders/genord08-07.pdf	Login and password constitute a signature. The document should contain /s/ on the signature line.	Can indicate signature with an /s/ or a scanned version of the signature. Pro se debtors must file any documents with original signatures.	An electronic filer must retain the original of a signed document for a period of no less than seven (7) years after the closing of the case.
Wisconsin Eastern	Local Rule 5005.1 and Administrative Procedures	http://www.wieb.uscourts.gov/index.php/orders-rules/rules/local-rules16	Login and password constitute a signature.	Login and password constitutes a signature. Local Rule 5005.1 requires completion of a declaration regarding electronic filing.	The filer user must maintain any original signatures for five years after the closing of the case.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Wisconsin Western	Electronic Filing User Manual	http://www.wiwb.uscourts.gov/webhelp/ecf_atty_manual.htm	Login and password constitute signature on electronically filed documents. The signature line on the document should indicate /s/.	The filing user must obtain a Declaration Regarding Electronic Filing and indicate /s/ on the documents.	The attorney must obtain a signature on a declaration regarding electronic filing for non-filers and should retain it for a minimum of two years.
Wyoming	Local Rule 5005-2	http://www.wyb.uscourts.gov/sites/default/files/pdf-files/local-rules-20120701.pdf	Login and password constitute a signature; filer must indicate in some way a signature on the filed document.	The filer's login and password constitute a signature, and the document filed must indicate that the original document contains a signature.	

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