

**ADVISORY COMMITTEE
ON
APPELLATE RULES**

**Washington, D.C.
October 26, 2018**

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ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of October 26, 2018
Washington, DC

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TAB 1

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TAB 1A

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ADVISORY COMMITTEE ON APPELLATE RULES

Chair, Advisory Committee on Appellate Rules	Honorable Michael A. Chagares United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513
Reporter, Advisory Committee on Appellate Rules	Professor Edward Hartnett Richard J. Hughes Professor of Law Seton Hall University School of Law One Newark Center Newark, NJ 07102
Members, Advisory Committee on Appellate Rules	Honorable Jay S. Bybee United States Court of Appeals Lloyd D. George United States Courthouse 333 Las Vegas Boulevard South, Suite 7080 Las Vegas, NV 89101-7065 Honorable Noel Francisco Solicitor General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 Honorable Judith L. French Ohio Supreme Court 65 South Front Street Columbus, OH 43215 Honorable Brett M. Kavanaugh United States Court of Appeals William B. Bryant United States Courthouse Annex 333 Constitution Avenue, N.W., Room 3004 Washington, DC 20001 Christopher Landau, Esq. Quinn Emanuel Urquhart & Sullivan, LLP 1300 I Street, N.W., Suite 900 Washington DC 20005 Honorable Stephen Joseph Murphy III United States District Court Theodore Levin United States Courthouse 231 West Lafayette Boulevard, Room 235 Detroit, MI 48226

<p>Members, Advisory Committee on Appellate Rules (<i>cont'd</i>)</p>	<p>Professor Stephen E. Sachs Duke Law School 210 Science Drive Box 90360 Durham, NC 27708-0360</p> <p>Danielle Spinelli, Esq. Wilmer Cutler Pickering Hale and Dorr LLP 1875 Pennsylvania Avenue, N.W. Washington DC 20006</p>
<p>Clerk of Court Representative, Advisory Committee on Appellate Rules</p>	<p>Ms. Patricia S. Dodszuweit Clerk United States Court of Appeals James A. Byrne United States Courthouse 601 Market Street, Room 21400 Philadelphia, PA 19106-1729</p>
<p>Liaison Members, Advisory Committee on Appellate Rules</p>	<p>Honorable Frank Mays Hull (<i>Standing</i>) United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, N.W., Room 300 Atlanta, GA 30303</p> <p>Honorable Pamela Pepper (<i>Bankruptcy</i>) United States District Court United States Courthouse and Federal Building 517 East Wisconsin Avenue, Room 271 Milwaukee, WI 53202</p>
<p>Secretary, Standing Committee and Rules Committee Chief Counsel</p>	<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>

TAB 1B

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	FRAP Item	Proposal	Source	Current Status
7	11-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 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 4/18
7	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 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 4/18
7	13-AP-H	Consider possible amendments to FRAP 41 in light of <i>Bell v. Thompson</i> , 545 U.S. 794 (2005), and <i>Ryan v. Schad</i> , 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 4/18
7	14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party	Standing Committee	Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee

	FRAP Item	Proposal	Source	Current Status
		consent		Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 4/18
7	15-AP-A/H	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 4/18
7	15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 4/18
7	15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 4/18

	FRAP Item	Proposal	Source	Current Status
6	08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18
6	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 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18
6	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 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18
6	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

	FRAP Item	Proposal	Source	Current Status
				Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Post Standing Committee 1/18, Rule 25(d)(1) amendment removed from Supreme Court package for reconsideration in spring 2018 Final approval of subsection (d)(1) for submission to Standing Committee 4/18 Approved by Standing Committee 6/18
6	15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18 Approved by Standing Committee 6/18
3	18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting. Proposed draft for publication approved for submission to Standing Committee 4/18. Draft approved for publication by Standing Committee 06/18
1	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed to consider issue. Discussed at 4/18 meeting and continued review.
1	17-AP-G	Rule 42(b)–discretionary “may” dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed to review. Discussed at 4/18 meeting and continued review.

	FRAP Item	Proposal	Source	Current Status
1	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed.
1	None assigned yet	Consider if time limits in Rules should be better aligned with the statute, in light of <i>Hamer</i> , 138 S. Ct. 13 (2017)	Christopher Landau	Discussed at 4/18 meeting and subcommittee formed.
1	18-AP-C	Use only first name and last initial of parties in Social Security and immigration cases	Committee on Court Administration and Case Management	Initial consideration at 10/26/18 meeting
1	18-AP-D	Do not count votes of judges who have left office before delivery of order or opinion to clerk	Stephen Sachs	Initial consideration at 10/26/18 meeting
0		Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review. Discussed at 4/18 meeting and removed from agenda. Will reconsider in 4/21.

- 0 removed from agenda
- 1 pending before AC prior to public comment
- 2 approved by AC and submitted to SC for publication
- 3 out for public comment
- 4 pending before AC after public comment
- 5 final approval by AC and submitted to SC
- 6 approved by SC
- 7 approved by SCOTUS

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Effective December 1, 2017

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2017); approved by the JCUS and transmitted to the Supreme Court (Sept 2016)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentication that would allow certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial.	

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provision similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing) (Official Forms approved by Judicial Conference as noted above, which is the final step in approval process for forms).	FRAP 4, 25
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limits, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
BK - Official Forms 411A and 411B	The bankruptcy general and special power of attorney forms, currently director's forms 4011A and 4011B, will be reissued as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). Approved by Standing Committee at June 2018 meeting; to be considered by Judicial Conference at September 2018 meeting.	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Effective December 1, 2018

Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018)

REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to "supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant’s initial appearance; revise the rule to refer to “later” rather than “supplemental” filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Effective (no earlier than) December 1, 2019

Current Step in REA Process: submitted to the Judicial Conference for approval (Sept 2018)

REA History: approved by the Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); unless otherwise noted, published for public comment Aug 2017-Feb 2018; approved for publication (June 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Effective (no earlier than) December 1, 2020

Current Step in REA Process: published for public comment (Aug 2018-Feb 2019)

REA History: unless otherwise noted, approved for publication (June 2018)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendments clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
CV 30	Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.	
EV 404	Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice be deleted; the proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

TAB 1D

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**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	H.R. 720 <i>Sponsor:</i> Smith (R-TX) <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p>Bill Text (as passed by the House without amendment, 3/10/17): https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
Lawsuit Abuse	S. 237 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p>Bill Text: https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</p> <p>Summary (authored by CRS): This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing</p>	<ul style="list-style-type: none"> • 11/8/17: Senate Judiciary Committee Hearing held – “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators” • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

**Pending Legislation That Would Directly or Effectively Amend the Federal Rules
115th Congress**

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Reduction Act of 2017, cont.			<p>the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: None.</p>	
Innocent Party Protection Act	<p>H.R. 725</p> <p><i>Sponsor:</i> Buck (R-CO)</p> <p><i>Co-Sponsors:</i> Farenthold (R-TX) Franks (R-AZ) Goodlatte (R-VA) Sessions (R-TX) Smith (R-TX)</p>		<p>Bill Text: https://www.congress.gov/115/bills/hr725/BILLS-115hr725rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends procedures under which federal courts determine whether a case that was removed from a state court to a federal court on the basis of a diversity of citizenship among the parties may be remanded back to state court upon a motion opposed on fraudulent joinder grounds that: (1) one or more defendants are citizens of the same state as one or more plaintiffs, or (2) one or more defendants properly joined and served are citizens of the state in which the action was brought.</p> <p>Joinder of such a defendant is fraudulent if the court finds: actual fraud in the pleading of jurisdictional facts with respect to that defendant, state law would not plausibly impose liability on that defendant, state or federal law bars all claims in the complaint against that defendant, or no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant. In determining whether to grant or deny such a motion for remand, the court: (1) may permit pleadings to be amended; and (2) must consider the pleadings, affidavits, and other evidence submitted by the parties.</p> <p>A federal court finding that all such defendants have been fraudulently joined must: (1) dismiss without prejudice the claims against those defendants, and (2) deny the motion for remand.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt17/CRPT-115hrpt17.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate; referred to Judiciary Committee • 3/9/17: Passed House (224-194) • 2/24/17: Reported by the Judiciary Committee • 1/30/17: Introduced in the House; referred to Judiciary Committee;

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<p>Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017</p>	<p>H.R. 985 <i>Sponsor:</i> Goodlatte (R-VA)</p> <p><i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)</p>	<p>CV 23</p>	<p>Bill Text (as amended and passed by the House, 3/9/17): https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</p> <p>Summary (authored by CRS): (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p> <p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House
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<p>H.R. 985, cont.</p>			<p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</p>	
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<p>Stopping Mass Hacking Act</p>	<p>S. 406 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	<p>CR 41</p>	<p>Bill Text: https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</p> <p>Summary: (Sec. 2) “Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 1110 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)</p>	<p>CR 41</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf</p> <p>(Sec. 2) “(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.</p> <p>(b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant.”</p> <p>Summary (authored by CRS): This bill repeals an amendment to [R]ule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

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<p>Back the Blue Act of 2017</p>	<p>S. 1134 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 2437 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 5/16/17: Introduced in the House; referred to Judiciary Committee

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<p>To amend section 1332 of title 28, United States Code, to provide that the requirement for diversity of citizenship jurisdiction is met if any one party to the case is diverse in citizenship from any one adverse party in the case.</p>	<p>H.R. 3487 <i>Sponsor:</i> King (R-IA)</p> <p><i>Co-Sponsor:</i> Smith (R-TX)</p>	<p>CV</p>	<p>Bill Text:</p> <ul style="list-style-type: none"> • Substitute: https://judiciary.house.gov/wpcontent/uploads/2018/09/HR-3487-ANS.pdf • Original Bill Text: https://www.congress.gov/115/bills/hr3487/BILLS-115hr3487ih.pdf <p>Summary (authored by CRS): This bill amends the federal judicial code to specify that U.S. district courts have jurisdiction on the basis of diversity of citizenship if at least one adverse party does not share the same citizenship as another adverse party. [Bill would require a \$700 filing fee for the defendant’s removal of a civil action from a state court to a federal district court.]</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 9/13/18: markup held; no final action taken • 9/11/18: “Amendment in the Nature of a Substitute” • 9/6/17: referred to Subcommittee on the Constitution and Civil Justice • 7/27/17: Introduced in the House; referred to Judiciary Committee
<p>To amend title 28, United States Code, to limit the authority of district courts to provide injunctive relief, and for other purposes.</p>	<p>H.R. 4927 <i>Sponsor:</i> Brat (R-VA)</p>	<p>CV</p>	<p>Bill Text: https://www.congress.gov/115/bills/hr4927/BILLS-115hr4927ih.pdf</p> <p>Summary (authored by CRS): This bill limits the authority of federal district courts to issue injunctions. Specifically, it prohibits a district court from issuing an injunction unless the injunction applies only: (1) to the parties to the case before that district court, or (2) in the federal district in which the injunction is issued.</p> <p>Report: None.</p> <p><i>See infra</i> H.R. 6730.</p>	<ul style="list-style-type: none"> • 2/5/18: Introduced in the House; referred to Judiciary Committee
<p>Litigation Funding Transparency Act of 2018</p>	<p>S. 2815 <i>Sponsor:</i> Grassley (R-IA)</p> <p><i>Co-Sponsors:</i> Cornyn (R-TX) Tillis (R-NC)</p>	<p>CV</p>	<p>Bill Text: https://www.congress.gov/115/bills/s2815/BILLS-115s2815is.pdf</p> <p>Summary: Section 2: Transparency and Oversight of Third-Party Litigation Funding in Class Actions. Amends chapter 114 of Title 28 (Class Actions) by adding a § 1716. Section 1716 would provide that in any class action, class counsel must disclose to the court and all named parties the identities of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the</p>	<ul style="list-style-type: none"> • 5/10/2018: Introduced in the Senate; referred to Judiciary Committee

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<p>Litigation Funding Transparency Act of 2018, cont.</p>			<p>contingent right. Also includes timing provisions.</p> <p>Section 3: Transparency and Oversight of Third-Party Litigation Funding in Multi-District Litigation. Amends 28 U.S.C. § 1407 (Multidistrict Litigation) to include similar disclosure, production, and timing provisions as those that apply to class actions above.</p> <p>Section 4: Applicability. Provides that the amendments made by the Act would apply to any case pending on or commenced after the date of enactment.</p> <p>Report: None.</p>	
<p>Federal Courts Access Act of 2018</p>	<p>S. 3249 <i>Sponsor:</i> Lee (R-UT)</p>		<p>Bill Text: https://www.congress.gov/115/bills/s3249/BILLS-115s3249is.pdf</p> <p>Summary: (1) raises the ordinary amount in controversy requirement to \$125K but lowers the Class Action Fairness Act (CAFA) amount in controversy from \$5M to \$125K. (But retains the CAFA provision that allowing aggregation of class members’ damages for amount in controversy purposes.); (2) eliminates the complete diversity requirement; (3) eliminates § 1332(d)(3) & (4)’s discretionary and mandatory carveouts for CAFA cases (i.e., the tests under which district courts either could or must decline to exercise CAFA jurisdiction); (4) deletes § 1332(d)(11) (concerning mass actions); (5) permits removal of § 1332(a) diversity cases featuring in-state defendants so long as at least one defendant is out-of-state; (6) removes the 1-year time limit on removing diversity cases that become removable later than the initial pleading; and (7) revises the criteria for class action diversity removal (including by eliminating the § 1453(b) proviso that removal is “without regard to whether any defendant is a citizen of the State in which the action is brought”)</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 7/19/2018: Introduced in the Senate; referred to Judiciary Committee
<p>Anti-Corruption and Public Integrity Act</p>	<p>S. 3357 <i>Sponsor:</i> Warren (D-MA)</p>	<p>CV 12</p>	<p>Bill Text: https://www.congress.gov/115/bills/s3357/BILLS-115s3357is.pdf</p> <p>Summary: Section 403: makes the Code of Conduct for United States Judges applicable to the Supreme Court; requires the JCUS to establish enforcement procedures; such</p>	<ul style="list-style-type: none"> • 8/21/18: Introduced in the Senate; referred to Finance Committee

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<p>Anti-Corruption and Public Integrity Act, cont.</p>		<p>procedures must be submitted to Congress</p> <p>Section 404: amends disclosure requirements with respect to financial reports, recusal decisions, and speeches; requires livestreaming of appellate proceedings (subject to exceptions); provisions publicizing case assignments; making websites user-friendly</p> <p>Section 405: places ALJ positions in the competitive service</p> <p>Section 406: provision regarding reporting on judicial diversity</p> <p>Section 407: amends Civil Rule 12 to add a subdivision j:</p> <p style="padding-left: 40px;">(j) Pleading Standards. A court shall not dismiss a complaint under Rule 12(b)(6), (c) or (e):</p> <p style="padding-left: 80px;">(1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief; or</p> <p style="padding-left: 80px;">(2) on the basis of a determination by the court that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.</p> <p>Section 408: amends the E-Government Act of 2002 regarding the public availability of judicial opinions</p> <p>Report: None.</p>	
<p>Injunctive Authority Clarification Act of 2018</p>	<p>H.R. 6730 <i>Sponsor:</i> Goodlate (R-VA)</p>	<p>Bill Text (Amendment): https://www.congress.gov/115/bills/hr6730/BILLS-115hr6730ih.pdf</p> <p>Summary: Prohibits federal courts from issuing an order “that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority” unless the non-party is represented “by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.”</p> <p>Report: None.</p> <p><i>See supra</i> H.R. 4927.</p>	<ul style="list-style-type: none"> • 9/13/18: markup held; reported favorably out of Committee (14-6) • 9/11/18: “Amendment in the Nature of a Substitute” • 9/10/18: Introduced in the House; referred to Judiciary Committee

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TAB 2A

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-6
2. a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve effective December 1, 2018 converting Director’s Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date. pp. 7-15
3. Approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 20-24
4. Approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 25-26

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

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

- Federal Rules of Appellate Procedure pp. 6-7
- Federal Rules of Bankruptcy Procedure pp. 15-17
- Federal Rules of Civil Procedure pp. 17-19
- Federal Rules of Criminal Procedure.....p. 24
- Federal Rules of Evidence pp. 27-29
- Judiciary Strategic Planning pp. 29-30

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 12, 2018. All members were present.

Representing the advisory committees were: Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, of the Advisory Committee on Appellate Rules; Judge Dennis Dow, incoming Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Rules of Evidence.

Also participating in the meeting were: Judge Jeffrey S. Sutton, former Chair of the Standing Committee; Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter; Professor Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff; Patrick Tighe, Law Clerk to the Standing Committee;

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

and Dr. Tim Reagan, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(d)(1) eliminates unnecessary proofs of service when electronic filing is used. Because electronic filing of a document results in a copy of the document being sent to all parties who use the court's electronic filing system, separate service of the document on those parties, and accompanying proofs of service, are not necessary. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court but was withdrawn by the Standing Committee to allow for minor revisions. The revised amendment approved at the Committee's June 2018 meeting includes changes previously approved, but also covers the possibility that a document might be filed electronically and yet still need to be served on a party (such as a pro se litigant) who does not participate in the court's electronic-filing system.

Under the proposed amendment to Rule 25(d)(1), proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee proposed technical amendments to certain rules that reference proof of service requirements, including Rules 5, 21, 25, 26, 26.1, 32, and 39, to conform those rules to the proposed amendment to Rule 25(d)(1). Rule 25(d)(1) was

originally published for comment; the Advisory Committee did not seek additional public comment on the technical and conforming amendments.

Rule 5 (Appeal by Permission)

The proposed amendments to Rule 5(a)(1) revise the rule to no longer require that a petition for permission to appeal “be filed with the circuit clerk with proof of service.” Instead, it provides that “a party must file a petition with the circuit clerk and serve it on all other parties.”

Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)

Under the proposed amendment to Rule 21, in addition to various stylistic changes, the phrase “with proof of service” in Rule 21(a) and (c) is deleted and replaced with the phrases “serve it” and “serving it.”

Rule 26 (Computing and Extending Time)

The proposed amendment to Rule 26 deletes the term “proof of service” from Rule 26(c). A stylistic change was also made to simplify the rule’s description for when three days are added to the time computation: “When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).”

Rule 39 (Costs)

The proposed amendment to Rule 39(d)(1) deletes the phrase “with proof of service” and replaces it with the phrase “and serve.”

Rule 3 (Appeal as of Right—How Taken) and Rule 13 (Appeals from the Tax Court)

The proposed amendments to Rules 3 and 13 – both of which deal with the notice of appeal – are also designed to reflect the move to electronic service. Rules 3(d)(1) and (d)(3)

currently require the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words “mailing” and “mails” to “sending” and “sends,” and deletes language requiring certain forms of service. Rule 13(a)(2) currently requires that a notice of appeal from the Tax Court be filed at the clerk’s office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail. There were no public comments on the proposed amendments to Rules 3 and 13.

Rule 26.1 (Corporate Disclosure Statement)

The proposed amendments to Rule 26.1 revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal; new subdivision (b) corresponds to the amended disclosure requirement in Criminal Rule 12.4(a)(2) and requires the government to identify, except on a showing of good cause, organizational victims of the alleged criminal activity; new subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals, and also imposes disclosure requirements concerning the ownership of corporate debtors.

There were four comments filed regarding the proposed amendments. One comment suggested that language be added to the committee note to help deter overuse of the government exception in the proposed subdivision (b) dealing with organizational victims in criminal cases. In response, the Advisory Committee revised the committee note to follow more closely the committee note for Criminal Rule 12.4.

Another comment suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. The Advisory Committee on Appellate Rules consulted with the reporter for the

Advisory Committee on Bankruptcy Rules and ultimately determined to not make any changes in response to the comment. In response to a potential gap in the operation of Rule 26.1 identified by the reporter to the Advisory Committee on Bankruptcy Rules, however, the Advisory Committee on Appellate Rules revised Rule 26.1(c) to require that certain parties “must file a statement that: (1) identifies each debtor not named in the caption; and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).”

A third comment objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the committee note was required to understand it. The final comment suggested language changes to eliminate any ambiguity about who must file a disclosure statement. In response to these comments and to clarify the proposed amendment, the Advisory Committee folded subparagraph 26.1(d) dealing with intervenors into a new last sentence of 26.1(a). In addition, the phrase “wants to intervene” was changed to “seeks to intervene” in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but who may not truly “want” to intervene. Other stylistic changes were made as well.

Rule 28 (Briefs) and Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rules 28 and 32 change the term “corporate disclosure statement” to “disclosure statement” to conform with proposed amendments to Rule 26.1, as described above.

There were no public comments on the proposed amendments to Rules 28(a)(1) and 32(f). The Advisory Committee sought approval of Rule 28 as published. The Advisory Committee sought approval of Rule 32 as published, with additional technical edits to conform subsection (f) with the proposed amendment to Rule 25(d)(1) regarding references to proofs of service. Rule 32(f) lists the items that are excluded when computing length limits, and one such

item is “the proof of service.” To account for the frequent occasions in which there would be no such proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all the articles in the list of items.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee’s report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee’s request.

The proposed amendments to Rules 35 and 40 create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but not for responses to those petitions. In addition, the Advisory Committee observed that Rule 35 (which deals with en banc determinations) uses the term “response,” while Rule 40 (which deals with panel rehearing) uses the term “answer.” The proposed amendment changes the term in Rule 40 to “response.”

Information Items

The Advisory Committee’s consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing

on the structure of Rule 21, and a subcommittee was formed to evaluate possible amendments. Another subcommittee will consider whether any amendments are appropriate following the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will also consider whether to align the rule with the statute, correcting for divergence that has occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk “may” dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word “may,” hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because litigants lack certainty, and it may result in a court issuing an advisory opinion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 4001, 6007, 9036, 9037, and Official Forms 411A and 411B, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements)

The proposed amendment to Rule 4001(c), which applies to obtaining credit, makes that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. The Advisory Committee proposed the amendment

after concluding that the rule’s provisions are designed to address the complex postpetition financing issues particular to business debtor chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address the consumer financing issues common in chapter 13 cases, such as obtaining a loan to purchase an automobile for family use.

There were no public comments on the proposed amendment. In giving final approval to the amendment at its spring meeting, the Advisory Committee added a title to the new paragraph (4), “*Inapplicability in a Chapter 13 Case,*” and made stylistic changes to address suggestions from the style consultants.

Rule 6007 (Abandonment or Disposition of Property)

The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b) of the Bankruptcy Code, and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five public comments were submitted on the proposed amendments. Two comments addressed the last sentence of the proposed amendment, which stated that a court order granting a motion to compel abandonment “effects abandonment without further action by the court.” The comments stated that this would be inconsistent with § 554(b), which provides for abandonment of property by the bankruptcy trustee, not the court. In response, the Advisory Committee inserted the words “trustee’s or debtor in possession’s” immediately before the word “abandonment.” Two comments criticized as too burdensome the amendment language that requires both service and notice of the motion on all creditors. The Advisory Committee determined that ensuring all parties receive the notice of a motion to abandon property outweighed the concern of burdensomeness, and therefore made no change.

One comment noted that the 14-day period for parties to respond after *service* of a motion to compel abandonment under proposed Rule 6007(b) could be up to three days longer than the 14-day response period after a trustee voluntarily files *notice* of an intent to abandon property under Rule 6007(a). This is because of the extra time allowed for service of motions by mail. The comment suggested possible changes to Rule 6007(a) or Rule 9006(a) that would make the response periods under both subparts of Rule 6007 the same. The Advisory Committee declined to make any change at this time.

Rule 9036 (Notice by Electronic Transmission); Deferral of Action on Rule 2002(g) and Official Form 410.

Proposed amendments to Rules 2002(g), 9036, and Official Form 410 were published in 2017 as part of the Advisory Committee's ongoing study of noticing issues and were intended to expand the use of electronic noticing and service in the bankruptcy courts. Proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and a corresponding amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. Current Rule 9036 provides for electronic service and notice of certain documents by permission of the receiving party and court order. As amended, the rule would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system, without the need of a court order. The proposed amendments to Rule 9036 also allowed service or noticing on any person by any electronic means consented to in writing by that person.

Four sets of comments were submitted addressing the proposed amendments. Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised implementation issues and therefore suggested a delayed

effective date of December 1, 2021 with respect to the proposed amendments to Rule 2002(g) and Official Form 410.

All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center (BNC) would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would have to be manually retrieved and conveyed to the BNC by clerk's office personnel.

Three comments expressed concerns that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed proof of claim email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions in the Bankruptcy Code and rules that allow a creditor to designate an address for notice and service. One comment suggested the following order of priorities: (a) CM/ECF email address for registered users; (b) BNC email address; and (c) proof of claim opt-in email address. This order of priorities was inconsistent, however, with the proposed committee note accompanying the amendments to Rule 2002(g), which stated that “[a] creditor’s election on the proof of claim, or an equity security holder’s election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case.”

The Advisory Committee discussed the comments during its spring meeting. Members accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. The idea of approving the rule and form amendments now but delaying their effective date until 2021 provoked concern

that technological advances during that three-year period might result in better means of employing electronic service and noticing than is currently proposed.

Members were also persuaded that the comments about determining priorities among conflicting creditor email addresses show a need for further coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Therefore, the Advisory Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be deferred for now.

The comments supported immediate implementation of the proposed amendments to Rule 9036. Those amendments (a) allow both clerks and parties to serve and give notice through CM/ECF to registered users; (b) allow other means of electronic service and noticing to be used for parties that give written consent to such service and noticing; and (c) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus, the Advisory Committee recommended final approval of the amendments to Rule 9036, with minor non-substantive wording changes to clarify applicability and in response to suggestions from the Standing Committee's style consultants, and with the addition of the following sentences to the committee note:

The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

Rule 9037 (Privacy Protection for Filings Made with the Court)

The proposed amendment to Rule 9037 adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in

compliance with Rule 9037(a). The Advisory Committee proposed the amendment in response to a suggestion submitted by the Committee on Court Administration and Case Management.

Three comments were submitted. The first suggested that the proposed amendment be expanded to allow parties to submit a redacted document as an alternative to the designation of sealed documents to be included in the record on appeal under Rule 8009(f). The Advisory Committee decided this suggestion was beyond the scope of the situation it was attempting to address with proposed Rule 9037(h), and therefore declined to make any change in response to this comment.

The second comment recommended that the amendment be revised to clarify that no fee need be collected, or replacement document filed, from a party seeking to redact his or her protected information unless it is the party who filed the previous (unredacted) document. In addition, the second comment pointed out two instances of the phrase “unless the court orders otherwise” that created ambiguity.

Judicial Conference policy already addresses the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. JCUS-SEP 14, pp. 9-10. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that “[t]he court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor.” Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Advisory Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Advisory Committee agreed that the rule was ambiguous concerning when a bankruptcy court may “order otherwise,” and revised the proposal to clarify that any part of the rule may be modified by court order.

The final comment suggested that proposed Rule 9037(h) contained an inadvertent gap because the rule did not require the filing of a redacted version of the original document as a condition of the restrictions upon public access. Under the rule as published, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view upon filing and before the court rules on the motion. The suggestion recommended that the motion to redact not be restricted from public view until the court rules on it.

When the Advisory Committee initially considered how best to provide for the redaction of already-filed documents, it strove to avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document. Accordingly, the proposed rule requires immediate restriction of public access to the motion and the unredacted original document. Access to those documents remains restricted if the court grants the motion to redact. Although not expressly stated, the intent and implication of the rule was that if the motion is granted, the redacted document, which was filed with the motion, would be placed on the record as a substitute for the original document that remained protected from public view. As explained in the committee note: “If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted.”

To eliminate any ambiguity, the Advisory Committee added language to the rule stating that “[i]f the court grants [the motion], the redacted document must be filed.” The Advisory

Committee did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

Finally, stylistic changes were made in response to suggestions from the style consultants, and the committee note was revised to reflect the changes made to the rule.

Official Form 411A (General Power of Attorney) and Official Form 411B (Special Power of Attorney)

As part of the Forms Modernization Project, the power of attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director’s Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. The Forms Modernization Project group recommended this change to allow greater flexibility in their use, in light of increased restrictions on making modifications to Official Forms under then pending amendments to Rule 9009 that became effective in 2017.

The Advisory Committee later realized, however, that using Director’s Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). That rule provides that “[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*” (emphasis added). In revisiting this matter, the Advisory Committee concluded that its earlier decision to convert the forms to Director’s Forms was unnecessary. Rule 9009 allows modifications of Official Forms “as provided in these rules.” The relevant rule here – Rule 9010(c) – only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that “conforms substantially” to an Official Form have been interpreted to permit modifications of those forms and are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Advisory Committee’s fall 2017 meeting and is available on the AO website. Treating Rule 9010(c) as permitting

modifications of the power of attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii). Accordingly, to bring the rule and forms into conformity, the Advisory Committee recommended designating the power of attorney forms as Official Forms 411A and 411B, in keeping with the new numbering system for forms, with an effective date of December 1, 2018.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revisions to the Official Bankruptcy Forms and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 as set forth in Appendix B and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2002, 2004, and 8012 with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee recommended publication for public comment of amendments to three of the rule's subdivisions. This package of amendments would (i) require

giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (ESI). The Advisory Committee discussed the suggestion at its fall 2017 and spring 2018 meetings. By a close vote, the Advisory Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to ESI and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 sets forth the disclosure requirements for a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel. It is modeled on Appellate Rule 26.1. The Advisory Committee on Appellate Rules has proposed amendments to Rule 26.1 that were published for comment in August 2017, including one that is specific to bankruptcy appeals. The Advisory Committee on Bankruptcy Rules therefore proposed publication of conforming amendments to Rule 8012 this summer.

Information Item

The Advisory Committee has created a Restyling Subcommittee and charged it with recommending whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011.

To inform its recommendation, the subcommittee is seeking input from those who would be affected by such a restyling. The subcommittee worked with the Standing Committee's style consultants to produce a draft restyled version of Rule 4001 that illustrates changes that would likely occur should the restyling project proceed.

At its spring meeting, the Advisory Committee decided to seek comment on one section of the restyled rule, Rule 4001(a), and it approved a cover memo and a set of survey questions to be distributed to interested parties, such as all bankruptcy judges and clerks and various professional bankruptcy organizations. The cover memo explains that the exemplar is not being proposed for adoption, nor is the Advisory Committee seeking substantive comments on its revisions, but rather that input is sought on the threshold issue of whether restyling should be undertaken. Additional language was added to emphasize that substance and "sacred words" will prevail over style rules. The deadline for making comments was set at June 15, 2018. The subcommittee will analyze the responses over the summer in preparation for making a recommendation to the Advisory Committee at its September meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an

organization, with a request that they be published for comment in August 2018. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

The proposed amendments to Rule 30(b)(6) are the result of over two years of work by the Advisory Committee. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to the rule. By way of background, this is the third time in twelve years that Rule 30(b)(6) has been on the Advisory Committee’s agenda. In the past, the Advisory Committee ultimately concluded that the problems reported by both plaintiffs’ and defendants’ counsel involve behavior that could not be effectively addressed by a court rule.

The initial task of the subcommittee formed in 2016 was to reconsider whether it is feasible (and useful) to address by rule amendment problems identified by bar groups. The subcommittee worked on initial drafts of more than a dozen possible amendments that might address the problems reported by practitioners and, in the summer of 2017, invited comment on a narrowed down list of six potential amendment ideas. More than 100 comments were received. In addition, members of the subcommittee participated in conferences around the country to receive input from the bar. The focus eventually narrowed on imposing a duty to confer in good faith between the parties. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule. The proposed amendment requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.

As drafted, the duty to confer requirement is meant to be iterative and recognizes that a single interaction will often not suffice to satisfy the obligation to confer in good faith. The committee note also explicitly states that “[t]he duty to confer continues if needed to fulfill the requirement of good faith.” The duty to confer is also bilateral – it applies to the responding organization as well as to the noticing party.

Information Items

The Advisory Committee met on April 10, 2018. Among the topics on the agenda were updates from two subcommittees tasked with long-term projects. As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform procedural rules “for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).” With input and insights from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee has developed draft rules. The three draft rules are for discussion purposes only and do not represent any decision by the subcommittee to recommend adoption of these or any other rules.

Another subcommittee has been formed to consider three suggestions that the Advisory Committee develop specific rules for multidistrict litigation proceedings. Among the many proposals are early procedures to address plainly meritless cases and broadened mandatory interlocutory appellate review for important issues. This subcommittee will also consider a suggestion that initial disclosures be expanded to include third party litigation financing agreements, which are used in multidistrict litigation proceedings as well as other contexts. With assistance from the Judicial Panel on Multidistrict Litigation, the subcommittee has begun gathering information and identifying issues on which rules changes might focus. The subcommittee’s work is at a very early stage – the list of issues and topics for study is still being developed.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a recommendation that they be approved and transmitted to the Judicial Conference.

New Rule 16.1 (Pretrial Discovery Conference; Request for Court Action)

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and ESI. While the subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment. A mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. Consensus developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol.¹ Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible given the variation among cases.

¹The “ESI Protocol” is shorthand for the “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the subcommittee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The proposed rule has two sections. Subsection (a) requires that, no later than 14 days after the arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Subsection (b) states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to “determine” when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. In either situation, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party. The proposed rule does not require the court to accept the parties’ agreement or otherwise limit the court’s discretion. Courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving ESI. The committee note draws attention to this point and states that counsel “should be aware of best practices” and cites the ESI Protocol.

Six public comments were submitted, and each comment supported the general approach of requiring the prosecution and defense to confer. The Advisory Committee made some

changes in response to concerns raised by the comments. First, the Advisory Committee agreed to revise proposed Rule 16.1(b)'s reference to "timing, manner, or other aspects of disclosure" to mirror Rule 16(d)(2)(A)'s reference to "time, place, or manner, or other terms and conditions of disclosure." Second, the Advisory Committee emphasized in the committee note that the proposed rule does not modify statutory safeguards. Finally, in response to two comments that addressed the applicability of the proposed rule to pro se parties, the Advisory Committee made two changes: amending the rule to make it clearer that government attorneys are not required to meet with pro se defendants; and adding to the committee note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure that pro se defendants "have full access to discovery." The Advisory Committee also made several non-substantive changes recommended by the Committee's style consultants.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a member of the Standing Committee drew the Advisory Committee's attention to a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule – as well as Rule 5(e) of the Rules Governing Section 2254 Cases – provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." Although the committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, the Advisory Committee determined that the text of the rule itself has contributed to a misreading of the rule by a

significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing “within a time fixed by the judge” as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendments confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence, providing that the moving party or petitioner “may file a reply to the respondent’s answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.” The committee note states that the proposed amendment “retains the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’” The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Three comments were submitted, two of which addressed issues fully considered before publication: the need for an amendment, and whether to replace “may” with a phrase such as “has a right to” or “is entitled to.” The Advisory Committee considered these two issues at length prior to publication and determined not to revisit the Advisory Committee’s resolution.

A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed amendments to the rules, it did approve the addition of the following sentence to the committee notes: “Adding a reference to the time for filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.” In the Advisory Committee’s view, this additional language will serve as a helpful reinforcement of best practices.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts and committee notes are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Item

The Advisory Committee met on April 24, 2018. At that meeting, the Advisory Committee added to its agenda two suggestions from district judges recommending that pretrial disclosure of expert testimony in Rule 16 (Discovery and Inspection) be amended to parallel Civil Rule 26. While there is consensus among members of the Advisory Committee that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed, members also agree that there is no simple solution. There are many different types of experts, and criminal proceedings are of course not parallel in all respects to civil proceedings. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded disclosure of forensic expert testimony; it will take some time for the effects of those guidelines to be fully realized. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Rules of Evidence) and also plans to hold a mini-conference.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Rules of Evidence submitted proposed amendments to Rule 807, with a recommendation that they be approved and transmitted to the Judicial Conference.

The project to amend Rule 807 (Residual Exception) began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation, the Advisory Committee determined that it would not seek to expand the breadth of the exception. But in conducting its review of cases decided under the residual exception, and in discussions with experts at a conference at Pepperdine Law School, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems addressed by the proposed amendment to Rule 807 are as follows:

1. The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.
2. Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Advisory Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception, and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness.
3. The requirements in Rule 807 that the hearsay must be proof of a “material fact” and that admission of the hearsay be in “the interests of justice” and consistent with the “purpose

of the rules” have not served any good purpose. The Advisory Committee determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

4. The notice requirement in current Rule 807 is problematic because it does not contain a good cause exception, it does not require the notice to be provided in writing, and its requirements of disclosure of the “particulars” of the statement and the name and address of the declarant are difficult to implement.

Proposed amendments to Rule 807 were published for comment in August 2017. The Advisory Committee received nine public comments. It carefully considered those comments, most of which were positive, and made some changes. The Advisory Committee also implemented some of the suggestions made by members of the Standing Committee at its June 2017 meeting, including adding references to Rule 104(a) and to the Confrontation Clause to the committee note. Finally, the Advisory Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a “near-miss” of a standard exception. A change to the text and committee note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendments to the Federal Rules of Evidence and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee’s report.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 404(b) (Crimes, Wrongs, or Other Acts) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The Advisory Committee has monitored significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several circuits have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

1. Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.
2. Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.
3. Limiting the "inextricably intertwined" doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Advisory Committee considered several textual changes to address these case law developments. At its April 2018 meeting the Advisory Committee decided against proposing extensive substantive amendments to Rule 404(b), based on its conclusion that such amendments would add complexity without rendering substantial improvement. The Advisory Committee did recognize that some protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the

evidence and the reasoning that supports the purpose.” In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the “general nature” of the bad act should be deleted, given the prosecution’s expanded notice obligations under the Department of Justice proposal. The Advisory Committee also unanimously agreed that the requirement that the defendant must request notice be deleted, as that requirement simply leads to boilerplate requests.

Finally, the Advisory Committee determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “other crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Information Items

At its April 26-27, 2018 meeting, the Advisory Committee discussed the results of the symposium held at Boston College School of Law in October 2017 regarding Rule 702. The symposium consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Advisory Committee with extremely helpful insight, background, and suggestions for change.

The Advisory Committee is considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. Judge Paul Grimm submitted a suggestion that Rule 106 should be amended in two respects: 1) to provide that a completing

statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Advisory Committee continues to consider the possibility of amending Rule 606(b) to reflect the Supreme Court’s 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b) barring testimony of jurors on deliberations violated the defendant’s Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant’s witnesses during deliberations. When it first considered the issue in April 2017, the Advisory Committee at that time declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Advisory Committee revisited the question at its April 2018 meeting and came to the same conclusion but will continue to monitor the case law applying *Pena-Rodriguez*.

The Advisory 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 cross-examine the declarant.

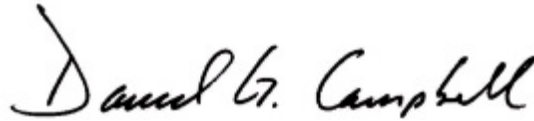
Finally, the Advisory Committee determined not to go forward with possible amendments to Rules 609(a), 611, and 801(d)(1)(A).

JUDICIARY STRATEGIC PLANNING

Chief Judge Carle E. Stewart, the judiciary’s planning coordinator, asked Judicial Conference committees to provide an update on the initiatives they are pursuing to implement the strategies and goals of the *Strategic Plan for the Federal Judiciary*. The judiciary’s long-range planning officer addressed the Committee on how its feedback on the *Strategic Plan* and reporting of its long-term initiatives helps foster communication between the Executive

Committee and Judicial Conference committees. The Committee will provide an update to Chief Judge Stewart on the rules committees' progress in implementing initiatives in support of the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

- Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)
- Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpts)
- Appendix C – Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings for the United States District Courts (proposed amendments and supporting report excerpt)
- Appendix D – Federal Rules of Evidence (proposed amendments and supporting report excerpt)

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 3. Appeal as of Right—How Taken**

2 * * * * *

3 **(d) Serving the Notice of Appeal.**

4 (1) The district clerk must serve notice of the filing of
5 a notice of appeal by ~~mailing~~sending a copy to
6 each party's counsel of record—excluding the
7 appellant's—or, if a party is proceeding pro se, to
8 the party's last known address. When a defendant
9 in a criminal case appeals, the clerk must also
10 serve a copy of the notice of appeal on the
11 defendant, ~~either by personal service or by mail~~
12 ~~addressed to the defendant~~. The clerk must
13 promptly send a copy of the notice of appeal and

¹ New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

14 of the docket entries—and any later docket
15 entries—to the clerk of the court of appeals named
16 in the notice. The district clerk must note, on each
17 copy, the date when the notice of appeal was filed.

18 (2) If an inmate confined in an institution files a
19 notice of appeal in the manner provided by
20 Rule 4(c), the district clerk must also note the date
21 when the clerk docketed the notice.

22 (3) The district clerk’s failure to serve notice does not
23 affect the validity of the appeal. The clerk must
24 note on the docket the names of the parties to
25 whom the clerk ~~mail~~sends copies, with the date
26 of ~~mailing~~sending. Service is sufficient despite
27 the death of a party or the party’s counsel.

28 * * * * *

Committee Note

Amendments to Subdivision (d) change the words “mailing” and “mails” to “sending” and “sends,” and delete language requiring certain forms of service, to allow for electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

1 **Rule 5. Appeal by Permission**

2 **(a) Petition for Permission to Appeal.**

3 (1) To request permission to appeal when an appeal
4 is within the court of appeals' discretion, a party
5 must file a petition ~~for permission to appeal.~~ The
6 ~~petition must be filed~~ with the circuit clerk ~~with~~
7 ~~proof of service~~ and serve it on all other parties to
8 the district-court action.

9 * * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to “proof of service” to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when service is completed using a court’s electronic filing system.

1 **Rule 13. Appeals From the Tax Court**

2 **(a) Appeal as of Right.**

3 * * * * *

4 (2) **Notice of Appeal; How Filed.** The notice of
5 appeal may be filed either at the Tax Court clerk's
6 office in the District of Columbia or by ~~mail~~
7 ~~addressed~~ sending it to the clerk. If sent by mail
8 the notice is considered filed on the postmark
9 date, subject to § 7502 of the Internal Revenue
10 Code, as amended, and the applicable regulations.

11 * * * * *

Committee Note

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

1 **Rule 21. Writs of Mandamus and Prohibition, and**
2 **Other Extraordinary Writs**

3 **(a) Mandamus or Prohibition to a Court: Petition,**
4 **Filing, Service, and Docketing.**

5 (1) A party petitioning for a writ of mandamus or
6 prohibition directed to a court must file ~~at the~~
7 petition with the circuit clerk ~~with proof of service~~
8 and serve it on all parties to the proceeding in the
9 trial court. The party must also provide a copy to
10 the trial-court judge. All parties to the proceeding
11 in the trial court other than the petitioner are
12 respondents for all purposes.

13 * * * * *

14 **(c) Other Extraordinary Writs.** An application for an
15 extraordinary writ other than one provided for in
16 Rule 21(a) must be made by filing a petition with the
17 circuit clerk ~~with proof of service~~ and serving it on the
18 respondents. Proceedings on the application must

19 conform, so far as is practicable, to the procedures
20 prescribed in Rule 21(a) and (b).

21 * * * * *

Committee Note

The term “proof of service” in subdivisions (a)(1) and (c) is deleted to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when service is completed using a court’s electronic filing system.

1 **Rule 25. Filing and Service**

2 * * * * *

3 **(d) Proof of Service.**

4 (1) A paper presented for filing must contain either of
5 the following if it was served other than through
6 the court's electronic-filing system:

7 (A) an acknowledgment of service by the person
8 served; or

9 (B) proof of service consisting of a statement by
10 the person who made service certifying:

11 (i) the date and manner of service;

12 (ii) the names of the persons served; and

13 (iii) their mail or electronic addresses,

14 facsimile numbers, or the addresses of

15 the places of delivery, as appropriate

16 for the manner of service.

17 (2) When a brief or appendix is filed by mailing or
18 dispatch in accordance with Rule 25(a)(2)(A)(ii)*,
19 the proof of service must also state the date and
20 manner by which the document was mailed or
21 dispatched to the clerk.

22 (3) Proof of service may appear on or be affixed to
23 the papers filed.

24 * * * * *

Committee Note

The amendment conforms Rule 25 to other federal rules regarding proof of service. As amended, subdivision (d) eliminates the requirement of proof of service or acknowledgment of service when service is made through a court's electronic-filing system. The notice of electronic filing generated by the court's system serves that purpose.

* This anticipates adoption of the proposed amendment transmitted to Congress on April 26, 2018.

1 **Rule 26. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time aAfter Certain Kinds of Service.**

4 When a party may or must act within a specified time
5 after being served, and the paper is not served
6 electronically on the party or delivered to the party on
7 the date stated in the proof of service, 3 days are added
8 after the period would otherwise expire under
9 Rule 26(a), ~~unless the paper is delivered on the date of~~
10 ~~service stated in the proof of service. For purposes of~~
11 ~~this Rule 26(c), a paper that is served electronically is~~
12 ~~treated as delivered on the date of service stated in the~~
13 ~~proof of service.~~

Committee Note

The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision to conform to the amendments to Rule 25(d).

1 **Rule 26.1. ~~Corporate~~ Disclosure Statement**

2 **(a) ~~Who Must File~~ Nongovernmental Corporations.**

3 Any nongovernmental ~~corporate~~ corporation that is a
4 party to a proceeding in a court of appeals must file a
5 statement that identifies any parent corporation and any
6 publicly held corporation that owns 10% or more of its
7 stock or states that there is no such corporation. The
8 same requirement applies to a nongovernmental
9 corporation that seeks to intervene.

10 **(b) Organizational Victims in Criminal Cases. In a**

11 criminal case, unless the government shows good
12 cause, it must file a statement that identifies any
13 organizational victim of the alleged criminal activity.
14 If the organizational victim is a corporation, the
15 statement must also disclose the information required
16 by Rule 26.1(a) to the extent it can be obtained through
17 due diligence.

18 **(c) Bankruptcy Cases.** In a bankruptcy case, the debtor,
19 the trustee, or, if neither is a party, the appellant must
20 file a statement that:

- 21 (1) identifies each debtor not named in the caption;
22 and
23 (2) for each debtor that is a corporation, discloses the
24 information required by Rule 26.1(a).

25 **(d) Time for Filing; Supplemental Filing.** ~~A party must~~
26 ~~file.~~ The Rule 26.1(a) statement must:

- 27 (1) be filed with the principal brief or upon filing a
28 motion, response, petition, or answer in the court
29 of appeals, whichever occurs first, unless a local
30 rule requires earlier filing;
31 (2) ~~Even if the statement has already been filed, the~~
32 party's principal brief must include the statement
33 be included before the table of contents; in the
34 principal brief; and

35 ~~(3) A party must supplement its statement~~
 36 supplemented whenever the information ~~that must~~
 37 ~~be disclosed~~required under Rule 26.1~~(a)~~ changes.
 38 ~~(e)~~**(e) Number of Copies.** If the Rule 26.1~~(a)~~ statement is
 39 filed before the principal brief, or if a supplemental
 40 statement is filed, ~~the party must file~~ an original and 3
 41 copies must be filed unless the court requires a different
 42 number by local rule or by order in a particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an “interest that could be affected substantially by the outcome of the proceeding.” Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the

14 FEDERAL RULES OF APPELLATE PROCEDURE

effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

1 **Rule 28. Briefs**

2 **(a) Appellant's Brief.** The appellant's brief must contain,
3 under appropriate headings and in the order indicated:

4 (1) a ~~corporate~~ disclosure statement if required by
5 Rule 26.1;

6 * * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

1 **Rule 32. Form of Briefs, Appendices, and Other Papers**

2 * * * * *

3 **(f) Items Excluded from Length.** In computing any
4 length limit, headings, footnotes, and quotations count
5 toward the limit but the following items do not:

- 6 • ~~the~~cover page;
- 7 • ~~a~~~~corporated~~disclosure statement;
- 8 • ~~a~~table of contents;
- 9 • ~~a~~table of citations;
- 10 • ~~a~~statement regarding oral argument;
- 11 • ~~an~~addendum containing statutes, rules, or
12 regulations;
- 13 • certificates of counsel;
- 14 • ~~the~~signature block;
- 15 • ~~the~~proof of service; and
- 16 • any item specifically excluded by these rules or
17 by local rule.

* * * * *

Committee Note

The phrase “corporate disclosure statement” is changed to “disclosure statement” to reflect the revision of Rule 26.1. The other amendment to subdivision (f) does not change the substance of the current rule, but removes the articles before each item because a document will not always include these items.

1 **Rule 39. Costs**

2 * * * * *

3 **(d) Bill of Costs: Objections; Insertion in Mandate.**

4 (1) A party who wants costs taxed must—within 14
5 days after entry of judgment—file with the circuit
6 clerk, ~~with proof of service,~~ and serve an itemized
7 and verified bill of costs.

8 * * * * *

Committee Note

In subdivision (d)(1) the words “with proof of service” are deleted and replaced with “and serve” to conform with amendments to Rule 25(d) regarding when proof of service or acknowledgement of service is required for filed papers.

Excerpt from the May 22, 2018 Report of the Advisory Committee on Appellate Rules

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

DAVID G. CAMPBELL
CHAIR

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CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 22, 2018

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 6, 2018, in Philadelphia, Pennsylvania. * * * * *

First, it approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to (1) electronic service (Rules 3 and 13) and (2) disclosure statements (Rules 26.1, 28, and 32).

Second, it approved a proposed amendment that had previously been submitted to the Supreme Court but withdrawn for revision and for which it now seeks final approval. This proposed amendment, discussed in Part III of this report, relates to proof of service (Rule 25(d)).

Third, it approved proposed amendments, not previously published for comment, that it views as conforming and technical amendments for which it seeks final approval. These proposed amendments, discussed in Part IV of this report, relate to proof of service (Rules 5, 21, 26, 32, and 39).

* * * * *

II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 13, 26.1, 28, and 32. These amendments were published for public comment in August 2017.

The proposed amendments to Rules 3 and 13—both of which deal with the notice of appeal—are designed to reflect the move to electronic service. Rule 3 currently requires the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words “mailing” and “mails” to “sending” and “sends,” and deletes language requiring certain forms of service. Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk’s office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

There were no public comments on the proposed amendments to Rules 3 and 13, and the Committee seeks final approval for them as published.

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~**sending** a copy to each party’s counsel of record—excluding the appellant’s—or, if a party is proceeding pro se, to the party’s last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, ~~either by personal service or by mail addressed to the defendant.~~ The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk’s failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~**sends** copies, with the date of ~~mailing~~**sending**. Service is sufficient despite the death of a party or the party’s counsel.

* * * * *

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk’s office in the District of Columbia or by ~~mail addressed~~ [sending it](#) to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

The proposed amendment to Rule 26.1 would change the disclosure requirements designed to help judges decide if they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term “corporate disclosure statement” to “disclosure statement.”

There were no public comments on the proposed amendments to Rules 28 and 32. The Committee seeks final approval for Rule 28 as published and Rule 32 in a slightly-modified form discussed in Part IV, *infra*.

Rule 28. Briefs

(a) Appellant’s Brief. The appellant’s brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~-disclosure statement if required by Rule 26.1;

* * * * *

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a ~~corporate~~-disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Excerpt from the May 22, 2018 Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2018

Page 4

There were four comments, however, regarding the proposed amendment to Rule 26.1. First, the National Association of Criminal Defense Lawyers (NACDL) suggested that language be added to the Committee Note to help deter overuse of the government exception in the proposed subsection (b) dealing with organizational victims in criminal cases. Second, Charles Ivey suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. Professor Elizabeth Gibson, the reporter to the Bankruptcy Rules Committee, was consulted in response to this comment. Third, journalist John Hawkinson objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the Committee Note was required to understand it. Finally, Aderant CompLaw suggested language changes to eliminate any ambiguity about who must file a disclosure statement.

The Committee revised the proposed amendment to Rule 26.1 and accompanying Committee Note, in response to these comments.

The Committee Note was revised to follow more closely the Committee Note for Criminal Rule 12.4 and account for the NACDL comment.

Professor Gibson suggested that no change was needed in response to the Ivey comment, but did suggest that Rule 26.1(c) be revised to address a potential gap in the proposed amendment, and the Committee agreed. In particular, the published proposal required that certain parties “must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must” provide particular information. That language was changed to require that certain parties “must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).”

In an effort to clarify the proposed amendment in response to the Hawkinson and Aderant CompuLaw comments, the Committee took what in the published version had been a separate subparagraph 26.1(d) dealing with intervenors and folded it into a new last sentence of 26.1(a). In addition, the phrase “wants to intervene” was changed to “seeks to intervene” in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but not truly “want” to intervene. Other stylistic changes were made as well.

The Committee seeks final approval for Rule 26.1 as revised.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~ Nongovernmental Corporations and Intervenor. Any nongovernmental ~~corporate~~ corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Cases. In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).

(d) Time for Filing; Supplemental Filing. A party must file the The Rule 26.1(a) statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing;

(2) Even if the statement has already been filed, the party's principal brief must include the statement be included before the table of contents: in the principal brief; and

(3) A party must supplement its statement be supplemented whenever the information that must be disclosed required under Rule 26.1(a) changes.

(e) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an “interest that could be affected substantially by the outcome of the proceeding.” Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Attachment B1 to this report contains the text of the proposed amendments to Rules 3, 13, 26.1, 28, and 32.

III. Action Item for Final Approval After Withdrawal and Revision

The Committee seeks final approval for a proposed amendment to Rule 25(d). This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court, but after discussion at the January 2018 meeting was withdrawn for revision with the expectation that a revised version would be presented at the June 2018 meeting.

This proposed amendment to Rule 25(d) is designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version was withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The prior version provided, "A paper presented for filing other than through the court's electronic-filing system must contain either of the following: * * *" As revised, the proposed amendment provides, "A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system: * * *"

Rule 25. Filing and Service

* * * * *

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system:

(A) an acknowledgment of service by the person served;
or

(B) proof of service consisting of a statement by the person who made service certifying:

- (i) the date and manner of service;
- (ii) the names of the persons served; and
- (iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with [Rule 25(a)(2)(A)(ii)]¹, the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

* * * * *

Attachment B2 to this report contains the text of the proposed amendment to Rule 25(d).

IV. Action Item for Final Approval Without Public Comment

Rules 5 (appeals by permission), 21 (extraordinary writs), 26 (computing time), Rule 32 (form of papers), and 39 (costs), all currently contain references to “proof of service.” If the proposed amendment to Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Committee seeks final approval of what it views as technical and conforming amendments to these Rules. Some stylistic changes are proposed as well.

These amendments were also discussed at the January 2018 meeting of the Standing Committee, and comments were provided by the style consultants at that meeting, with the expectation that revised versions would be presented at the June 2018 meeting.

Rule 5 would no longer require that a petition for permission to appeal “be filed with the circuit clerk with proof of service.” Instead, it would provide that “a party must file a petition with the circuit clerk and serve it on all other parties ***.”

¹ An amendment to include this corrected citation has been approved by the Supreme Court.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. ~~The petition must be filed with the circuit clerk with proof of service~~ and serve it on all other parties to the district-court action.

* * * * *

Similarly, the phrase “proof of service” in Rule 21(a) and (c) would be deleted and replaced with the phrase “serve it on” and “serving it.”

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

The term “proof of service” would also be deleted from Rule 26(c). Stylistically, the expression of the current rules for when three days are added would be simplified: “When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).”

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time ~~a~~After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a), ~~unless the paper is delivered on the date of service stated in the proof of service.~~ For purposes of this Rule 26(c), a paper that

~~is served electronically is treated as delivered on the date of service stated in the proof of service.~~

* * * * *

Rule 32(f) lists the items that are excluded when computing any length limit. One such item is “the proof of service.” To take account of the frequent occasions in which there would be no such proof of service, the article “the” is proposed to be deleted. And given that change, the Committee agreed that it made sense to delete all of the articles in the list of items. If both this proposed amendment and the other proposed amendment to Rule 32 (discussed in Part II above) are approved, the two sets of changes should be merged.

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ cover page;
- a ~~corporate~~² disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

The phrase “with proof of service” would also be deleted from Rule 39 and replaced with the phrase “and serve ***.”

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, ~~with proof of service,~~ and serve an itemized and verified bill of costs.

* * * * *

Attachment B3 to this report contains the text of the proposed amendments to Rules 5, 21, 26, 32, and 39.

² The word “corporate” is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

Excerpt from the May 22, 2018 Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2018

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 12, 2018 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee” or “Committee”) held its spring meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12, 2018. The following members participated:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.

Professor William K. Kelley
Judge Carolyn B. Kuhl
Elizabeth J. Shapiro, Esq.*
Judge Amy St. Eve
Judge Srikanth Srinivasan
Judge Jack Zouhary

The advisory committees were represented by their chairs and reporters:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Incoming Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate
Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate
Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate
Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Bridget M. Healy	Attorney Advisor, RCS
Scott Myers	Attorney Advisor, RCS
Julie Wilson	Attorney Advisor, RCS
Frances F. Skillman	Paralegal Specialist, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He apologized to any Washington Capitals fans who would miss the Stanley Cup victory parade in D.C. because of the meeting.

He welcomed Judge Dennis Dow of the U.S. Bankruptcy Court for the Western District of Missouri, who will be the Chair of the Advisory Committee on Bankruptcy Rules beginning October 1, 2018. Because the current Chair, Judge Sandra Segal Ikuta, could not attend the meeting, Judge Dow is attending in her place. Judge Campbell also welcomed Professor Ed Hartnett who was recently appointed as Reporter to the Advisory Committee on Appellate Rules. He also noted that Chief Justice Roberts reappointed Judges Bates and Molloy as Chairs of their respective Advisory Committees for another year. Judge St. Eve was recently appointed to the U.S. Court of Appeals for the Seventh Circuit, and although Director Duff appointed Judge St. Eve to the Judicial Conference Committee on the Budget, Judge St. Eve graciously agreed to serve her remaining term on the Standing Committee.

Judge Campbell remarked that Judge Zouhary's tenure on the Standing Committee ends on September 30, 2018. Judge Zouhary will continue to help with the pilot projects going forward. He thanked Judge Zouhary for his service, noting that he is an innovator in district court case management.

In addition, Judge Campbell lamented the passing of Professor Geoffrey C. Hazard, Jr., a longtime member of and consultant to the Standing Committee. Professor Hazard passed shortly after the Committee's meeting in January 2018, and Judge Campbell said that he will be greatly missed.

Lastly, Judge Campbell discussed Professor Dan Coquillette's upcoming retirement from his role as Reporter to the Standing Committee in December 2018 but noted that Professor Coquillette will remain as a consultant thereafter. Chief Justice Roberts appointed Professor Catherine Struve as Associate Reporter, and we will ask the Chief Justice to appoint Professor Struve as Reporter while Dan transitions to a consulting role. Judge Campbell thanked Professor Coquillette for his service and looks forward to the celebration later this evening.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process, which is included in the Agenda Book. Also included are the proposed rules approved by the Judicial Conference in September 2017, adopted by the Supreme Court, and transmitted to Congress in April 2018. If Congress takes no action, the rule package pending before Congress will become effective December 1, 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 4, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met on April 6, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of five action items and presented a few information items.

Action Items

Appellate Rules 3 and 13 – Electronic Service. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 3 and 13, both of which concern notices of appeal. The proposed amendments were published for public comment in August 2017 and received no comments.

The proposed amendments to Rules 3 and 13 reflect the increased reliance on electronic service in serving notice of filing notices of appeal. Rule 3 currently requires the district court clerk to serve notice of filing the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Similarly, Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

One Committee member remarked that use of "sends" and "sending" in Rule 3 seemed vague and inquired why more specific language was not used. Judge Chagares responded that a more general term was used to cover a variety of ways to serve notices of appeal, reflecting the various approaches courts use as they transition to electronic service.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 3 and 13.**

Appellate Rules 26.1, 28, and 32 – Disclosure Statements. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 26.1, 28, and 32. The proposed amendment to Rule 26.1 changes the disclosure requirements in several respects designed to help judges decide whether they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term “corporate disclosure statement” to “disclosure statement.” These proposed amendments were published in August 2017. The proposed amendments to Rules 28 and 32 received no public comments whereas Rule 26.1 received a few.

The National Association of Criminal Defense Lawyers (“NACDL”) suggested that the Committee Note include additional language to help deter overuse of the government exception in 26.1(b) concerning organizational victims in criminal cases. In response, the Advisory Committee revised the Rule 26.1 Committee Note to more closely follow the Committee Note for Criminal Rule 12.4 and account for the NACDL comment. In addition, Charles Ivey suggested that Rule 26.1(c) include additional language referencing involuntary bankruptcy proceedings and requiring that petitioning creditors be identified in disclosure statements. The Advisory Committee consulted Professor Gibson, Reporter to the Bankruptcy Rules Committee, and accepted Professor Gibson’s suggestion that no change was needed. Finally, two commentators argued that the meaning of 26.1(d) regarding intervenors was ambiguous. In response, the Appellate Rules Committee folded language from 26.1(d) regarding intervenors into a new last sentence in 26.1(a) and changed the title of subsection (a) to reflect that intervenors are subject to the disclosure requirement.

One member asked what constitutes a “nongovernment corporation” and whether this term includes entities such as Fannie Mae and Freddie Mac, which are government-sponsored publicly traded companies. This member also questioned why Rule 26.1 was limited to corporations, noting that limited partnerships can raise similar issues as corporations. One Committee member stated that disclosures should be broader rather than narrower and did not see the harm in deleting “nongovernmental.” Another member questioned whether it is onerous to list governmental corporations. A different member reiterated that other types of entities can present similar problems as corporations.

Professor Struve noted that the goal of the proposed amendments to Rule 26.1 is to track the other disclosure provisions in the Civil, Criminal, and Bankruptcy Rules. Professor Cooper relayed the history of these disclosure statement rules, stating that the Civil Rules Committee decided to limit the disclosure statement to “nongovernment corporations” given the significant variation among local disclosure rules. Judge Chagares reiterated Professor Struve’s point that the purpose underlying the proposed change to Appellate Rule 26.1 is consistency with the other federal rules regarding disclosure statements. Professors Beale and King noted a memo by Neal Katyal exploring why the disclosure statement is limited to “nongovernmental corporations” and concluding that this limitation was not causing a practical problem.

A member noted the federal rules should be consistent with each other. However, a bigger problem is whether the newly consistent rules provide judges with adequate information for recusal. Judge Campbell said that there are two distinct issues: first, whether to approve Rule 26.1 to make it consistent with the other federal rules, and second, whether to change or revisit the current policy underlying the disclosure statement rules. He argued that the second question was not ripe for the Committee's consideration.

A member asked if 26.1(b)'s disclosure obligation is broader than 26.1(a). Judge Campbell responded that subsection (b) is parallel with Criminal Rule 12.4 whereas subsection (a) is parallel with Civil Rule 7.1. He reiterated that the scope of the disclosure obligation should perhaps be reconsidered at a later time.

A member suggested deleting "and intervenors" in Rule 26.1(a)'s title, and Judge Chagares concurred. For consistency with other subsection titles, another member recommended making "victim" and "criminal case" plural in Rule 26.1(b)'s title, as well as deleting the article "a" preceding "criminal case." The Committee's style consultants recommended making a few stylistic changes in subsection (c), including adding a semicolon after "and" as well as deleting "in the bankruptcy case" in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 26.1, 28, and 32, subject to the revisions made to Rule 26.1 during the meeting.**

Appellate Rule 25(d) – Proof of Service. The Advisory Committee sought final approval for a proposed amendment to Appellate Rule 25(d), which is designed to eliminate unnecessary proofs of service in light of electronic filing. This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court. But after discussion at the January 2018 meeting, the previously submitted version was withdrawn for revision to address the possibility that a document might be filed electronically but still require service through means other than the court's electronic filing system on a party who does not participate in electronic filing. The Advisory Committee now seeks final approval of the revised language. Judge Campbell thanked Professor Struve for noting the potential issue. Judge Chagares also noted a few minor changes that should be made, including adding a hyphen between "electronic filing" in 25(d)(1) and deleting the words "filing and" in the Committee Note. Judge Chagares noted the Advisory Committee's view that the proposed revision to 25(d) was technical in nature, and did not require republication.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 25(d), subject to the revisions made during the meeting.**

Appellate Rules 5, 21, 26, 32, and 39 – Proof of Service. If the proposed amendment to Appellate Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee sought final approval without public comment of what it views as technical and conforming amendments to Rules 5, 21, 26, 32, and 39. Proposed amendments to

Rules 5, 21(a)(1), and 21(c) delete the phrase “proof of service” and add “and serve it,” consistent with Rule 25(d)(1). Rule 26(c) eliminates the “proof of service” term and simplifies the current rule for when three days are added for certain kinds of service. Current Rule 32(f) lists the items that are excluded when computing length limits, including “the proof of service.” Given the frequent occasions in which there would be no proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all of the articles in the list of items. Rule 39(d) removes the phrase “with proof of service” and replaces it with “and serve.” Judge Chagares explained that the Advisory Committee did not think public comment was necessary for these technical, conforming amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 5, 21, 26, 32, and 39.**

Appellate Rule 35 – En Banc Determinations. The Advisory Committee sought approval for publication of proposed amendments to Appellate Rules 35 and 40, which would establish length limits applicable to responses to petitions for rehearing en banc. Also, Rule 40 uses the term “answer” whereas Rule 35 uses the term “response.” The proposed amendment would change Rule 40 to use the term “response” for consistency.

Some members noted other inconsistencies between the two rules. For instance, one member stated that Rule 35(e) just concerns the length limit whereas Rule 40 imposes additional requirements. Professor Hartnett responded that although the Advisory Committee has formed a subcommittee to examine Rules 35 and 40 more comprehensively, the committee felt it appropriate to move forward with this amendment in the interim. Judge Campbell asked if the Advisory Committee has a time table for when this review will conclude, and Judge Chagares stated they hope to finish this review in the fall. One Committee member noted that clarifying the length limits in the appellate rules is generally helpful and important.

One Committee member commented that the Committee Note to Rule 35 states “a court,” instead of “the court” like the text of rule. The Committee’s style consultants concurred that “a” should be changed to “the.”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rules 35 and 40, subject to the revisions made during the meeting.**

Information Items

Judge Chagares announced the formation of three subcommittees to examine: (1) Rule 3(c)(1)(B) and the merger rule; (2) Rule 42(b) regarding voluntary dismissals, and; (3) whether any amendments are appropriate in light of the Supreme Court’s decision in *Hamer v. Neighborhood Hous. Servs. Of Chi.*, 138 S. Ct. 13 (2017). One member asked if the Rule 42(b) subcommittee will explore whether different rules regarding voluntary dismissals should exist for class actions, and Judge Chagares stated that the subcommittee is exploring why judicial discretion over voluntary dismissals may be necessary, including in the class action context.

In addition, Judge Chagares noted that the Advisory Committee examined the problem of appendices being too long and including too much irrelevant information, as well as how much the requirements vary by circuit. However, technology is changing quickly which may transform how appendices are done. Accordingly, the Advisory Committee decided to remove this matter from the agenda and to revisit it in three years. Judge Chagares stated that the Advisory Committee also removed from its agenda an item relating to Rule 29 and blanket consents to amicus briefs, and an item relating to whether “costs on appeal” in Rule 7 includes attorney’s fees. The Committee discussed the Supreme Court’s recent decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), but that discussion did not give rise to an agenda item.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Incoming Chair Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 3, 2018, in San Diego, California. The Advisory Committee sought approval of eight action items and presented three information items.

Action Items

Bankruptcy Rule 4001(c) – Obtaining Credit. The Advisory Committee sought final approval for a proposed amendment to Bankruptcy Rule 4001(c), which details the process for obtaining approval of post-petition credit in a bankruptcy case. The proposed amendment would make this rule inapplicable to chapter 13 cases. The Advisory Committee received no comments on this proposed change. Some post-publication changes were made, such as adding a title and a few other stylistic changes. No Standing Committee members had any comments or questions about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 4001(c).**

Bankruptcy Rule 6007(b) – Abandonment or Disposition of Property. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 6007(b). The proposed amendments are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with the procedures set forth in Rule 6007(a). The Advisory Committee received some comments on this rule, some of which they accepted but others they declined to adopt. The Committee’s style consultants suggested changes to subpart (b) which would have improved the overall language. Because the purpose of the current amendment is simply to parallel the text of Rule 6007(a), the Advisory Committee declined to accept these suggestions, but will revisit the styling improvements if the restyling project goes forward.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 6007(b).**

Bankruptcy Rule 9036 – Notice and Service Generally; Deferral of Action on Rule 2002(g) and Official Form 410. These amendments are designed to expand the use of electronic noticing and service in bankruptcy courts. The proposed amendments to Rule 2002(g) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The published amendments to Rule 9036 allow not only clerks but also parties to provide notices or to serve documents through the court’s electronic-filing system. The proposed amendments to Official Form 410 add a check box for opting into email service and noticing.

The Advisory Committee received four comments, each raising concerns about the technological feasibility of the proposed changes and how conflicting email addresses supplied by creditors should be prioritized given the different mechanisms for supplying email addresses for service. The AO and technology specialists with whom the Advisory Committee consulted confirmed these concerns. Consequently, the Advisory Committee unanimously recommended deferring action on amendments to Rule 2002(g) and Official Form 410. By holding these amendments in abeyance, the Advisory Committee will have additional time to sort out these technological issues.

Nevertheless, the Advisory Committee recommends approving the amendments to Rule 9036. In Rule 9036, the word “has” in the second sentence of the Committee Note should be changed to “have.” One Committee member asked if the phrase “in either of these events” should be “in either of these cases,” and the Committee’s style consultants noted that they try not to use “case” unless referring to a lawsuit.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9036, subject to the revision made during the meeting.**

Bankruptcy Rule 9037(h) – Motion to Redact a Previously Filed Document. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 9037, which adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The Advisory Committee received comments on the proposed changes, including one seeking to expand the amendments to address how documents placed under seal by the bankruptcy court should be handled on appeal. The Advisory Committee rejected this concern as beyond the scope of the rule amendment.

Another comment suggested an explicit waiver of the filing fee if a party bringing the motion seeks to redact protected privacy information disclosed by a different party (i.e., a debtor motion to redact his or her social security number inappropriately revealed in an attachment to a creditor’s proof of claim). The Advisory Committee agreed with this sentiment but did not think that changing the rule was necessary because Judicial Conference guidelines already permit the court to waive the filing fee in this situation. A third commenter noted that nothing in the rule required filing the redacted document. In response, the Advisory Committee added language making it clear that the redacted document must be filed.

A final comment argued that restrictions on accessing the originally filed document should not go into effect until the redacted document is filed. The current rule as written imposes restrictions on the document once the motion to redact is filed. The Advisory Committee rejected this comment, finding such restrictions necessary and appropriate because other people will be made aware of this sensitive information when the motion to redact is filed.

Judge Campbell asked if the language of “promptly restrict” is sufficient to guide clerks and whether clerks know to restrict access to these documents upon the filing of a motion to redact. Judge Dow responded affirmatively and noted that the clerk member of the Advisory Committee advised that clerks already impose restrictions as a matter of course. Judge Chagares asked about the scope of the rule and whether it applies to an opinion, which is also a “document filed.” Judge Dow stated that it could, and Professor Bartell noted that the rule only applies to the protected privacy information listed in Rule 9037(a).

A member stated that he is generally supportive of the rule change and asked whether the rule should apply more broadly, including in the Civil and Criminal Rules. Professor Beale noted that the Advisory Committees on Civil and Criminal Rules, respectively, have considered this question and decided against a parallel rule change because outside the bankruptcy context, where the problem is more frequent, judges routinely and quickly handle these matters when they arise.

This same member also asked why the information is limited to the information listed in Rule 9037(a). Professors Gibson and Beale explained that Rule 9037(a) is the bankruptcy version of the privacy rules adopted by the advisory committees to limit certain information in court documents as required by the E-Government Act. Professor Capra noted that the E-Government Act does not prohibit going farther than the information listed and that the Committee could decide to prohibit disclosing additional information. He added that if the issue is taken up, it should apply across the federal rules and not just in bankruptcy.

A member questioned why the rule uses the term “entity.” Judge Dow explained that the term “entity” is a defined term in the Bankruptcy Code, and the broadly defined term even encompasses governmental entities.

This member also asked if the Advisory Committee considered any changes to 9037(g) regarding waiver. Professor Bartell explained that the waiver rule is still intact and that the Advisory Committee decided no change was needed. A member inquired about local court rules that address this waiver problem, and Professor Bartell noted that bankruptcy courts have such rules.

Another Committee member suggested adding language in the Committee Note stating that 9037(g) does not abrogate the “waiver” provision. Professor Gibson was reluctant to make that change absent discussion with the Advisory Committee. Judge Campbell stated that, under the current rule, a problem already exists. Parties are currently filing motions to redact, and in certain situations it is possible such a motion could conflict with the waiver provision. This rule just creates a formal procedure for filing a motion to redact. It does not affect the current case law regarding waiver.

Professor Hartnett asked what happens when the motion is granted and whether the court, not the party, is required to docket the redacted document. Professor Gibson noted that the filing party must attach the redacted document to its motion to redact and that the court has the responsibility to docket the redacted document. The Advisory Committee explored requiring the moving party to file the redacted document as a separate document, but rejected this approach.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9037.**

Official Forms 411A and 411B – Power of Attorney. Proposed Official Forms 411A and 411B are used to execute power of attorney. As part of the Advisory Committee's Forms Modernization Project, prior versions of these forms were changed from Official Forms to Director's Forms 4011A and 4011B. However, Judge Dow explained that this created a problem because Bankruptcy Rule 9010(c) requires execution of a power of attorney on an Official Form, and these forms are no longer Official Forms. To rectify this problem, the Advisory Committee sought approval to re-designate Director's Forms 4011A and 4011B as Official Forms 411A and 411B. Because there would be no substantive changes for which comment would be helpful, the Advisory Committee sought final approval of the forms without publication.

Judge Campbell asked if the Judicial Conference can designate these forms as Official Forms, or if Supreme Court approval is required. Professor Gibson and Mr. Myers said that under the Rules Enabling Act, the Judicial Conference makes the final decision in approving Official Bankruptcy Forms, and that if it acts this September, the changes will become effective on December 1, 2018.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the designation of Director's Forms 4011A and 4011B as Official Forms 411A and 411B effective December 1, 2018.**

Bankruptcy Rule 2002(f), (h), and (k) – Notices. Bankruptcy Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee sought approval to publish amendments to three of the rule's subdivisions for public comment. These amendments would: 1) require giving notice of the entry of an order confirming a chapter 13 plan; 2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and 3) add a cross-reference reflecting the relocation of the provision specifying the deadline for an objection to confirmation of a chapter 13 plan. The Standing Committee had no questions or comments about these proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rule 2002(f), (h), and (k).**

Bankruptcy Rule 2004(c) – Examinations. Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. The

Advisory Committee sought approval to publish an amendment to 2004(c) adding a reference to electronically stored information to the title and first sentence of the subdivision. The Standing Committee had no questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 2004(c).**

Bankruptcy Rule 8012 – Corporate Disclosure Statement. The Advisory Committee sought approval to publish an amendment to Rule 8012 concerning corporate disclosure statements in bankruptcy appeals. The amendment adds a new subdivision (b) to Rule 8012 to require disclosing the names of any debtors in an underlying bankruptcy case that are not revealed by the caption in an appeal and, for any corporate debtors in the underlying bankruptcy case, disclosing the information required of corporations under subdivision (a) of the rule. Other amendments track Appellate Rule 26.1 by adding a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal, and make stylistic changes to what would become subdivision (c) regarding supplemental disclosure statements.

Professor Gibson noted that the reference to subdivision (c) will be dropped from the Committee Note. A Committee member asked if the term “corporation appearing” already captures corporations seeking to intervene. Professor Gibson responded that it might be better to track the language used in FRAP 26.1. The first sentence should read: “Any nongovernmental corporation that is a party to a proceeding in the district court” She also noted that Rule 8012(b) will incorporate the language changes made to FRAP 26.1(c) at the meeting today, including adding a semicolon before “and” as well as deleting “in the bankruptcy case” in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 8012, subject to the revisions made during the meeting.**

Information Items

Judge Dow stated that a Restyling Subcommittee is exploring whether to recommend that the Advisory Committee restyle the Federal Rules of Bankruptcy Procedure. To inform this recommendation, the Committee’s style consultants produced a draft of a restyled Rule 4001. In consultation with the FJC, the Subcommittee is conducting a survey of interested parties, including judges, clerks of courts, and other bankruptcy organizations, which will conclude on June 15, 2018. The survey uses a restyled example of 4001(a). The Subcommittee will analyze the survey responses and make a recommendation to the Advisory Committee at its September 2018 meeting. Although only preliminary results were available at the time of the meeting, Judge Dow said that responses from most bankruptcy judges and clerks were positive.

Professor Capra asked whether the Bankruptcy Rules could be restyled given that they track language in the Bankruptcy Code. Judge Dow noted that the parallels with the Code do not prohibit restyling; rather, they provide a reason for caution in undertaking that restyling effort. He

emphasized that no decision on restyling has been made. Informed by the survey of interested parties, the Advisory Committee will consider the advantages and disadvantages of restyling and determine how, if at all, to move forward.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on April 24, 2018, in Washington, D.C. The Advisory Committee sought approval of two action items and shared two information items.

Action Items

New Criminal Rule 16.1 – Pretrial Discovery Conference. Judge Molloy reviewed the history of the proposal, which originated as a suggestion by members of the defense bar to amend Rule 16 to address disclosure and discovery in complex criminal cases, including those involving voluminous information and electronically stored information. At Judge Campbell’s suggestion, a subcommittee held a mini-conference to gather information on the problem and potential solutions. Mini-conference participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. This conference significantly helped the Advisory Committee develop the proposed new Rule 16.1 by, among other things, building consensus on what sort of rule was needed and whether the rule should apply to all criminal cases. One member echoed that the mini-conference was fantastic and helped the Advisory Committee reach consensus on this rule. Judge Campbell applauded the Advisory Committee for finding consensus.

The new rule has two new sections. The first section, Rule 16.1(a), requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. The second section, Rule 16.1(b), states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.”

Publication of the rule produced six comments. One comment from the DOJ expressed concern that the new rule could be read to grant new discovery authorities that could undermine important legal protections. The Advisory Committee agreed and decided to conform the language of the proposed rule to the phrasing of Criminal Rule 16(d)(2)(A). Two comments addressed whether the rule required the government to confer with pro se litigants and the Advisory Committee, in turn, changed the rule’s language to “the government and the defendant’s attorney” reasoning that it would not be practical for the government to confer about discovery with each pro se defendant. Two commenters recommended relocating the rule, but the Advisory Committee rejected this suggestion. One commenter suggested adding “good faith” to the meet and confer requirement but the Advisory Committee had already explored and rejected this idea. Professor Beale noted that the words “try to agree” capture this idea of conferring in good faith.

Lastly, two comments concerned whether the new rule would displace local rules or orders imposing shorter times for discovery. As published, the Committee Note stated that the rule “does not displace local rules or standing orders that supplement its requirements or limit the authority

of the district court to determine the timetable and procedures for disclosure.” The Advisory Committee determined that the Committee Note affirms the district courts retain authority to impose additional discovery requirements by local rule or court order, and that no further clarification was needed.

Many Committee members expressed concern that the Committee Note did not address adequately the concern about displacing local rules. One member reads the note to authorize local rules that are inconsistent with Rule 16.1. Judge Bates said that this issue has come up in his court and he shares the same concern. Professor Capra stated that whether a local rule that supplements the Federal Rules is inconsistent remains an open question. Professor Marcus discussed the history of Civil Rule 83 dealing with local rules.

Judge Campbell proposed addressing this concern by adding the language “and are consistent with.” Professor Cooper suggested that it would be helpful to add a comment that the local rules must be consistent with the Federal Rules. He also proposed adding a citation to Rule 16 to ensure that Rule 16.1 is not interpreted as altering Rule 16’s discovery obligations. Judge Livingston echoed Professor Cooper’s concern that this last sentence is too freestanding and could benefit from a citation.

Professor Beale responded that this Committee Note language satisfied the interested parties and that she did not think that referencing other rules in the Committee Note is a good idea. Instead, she proposed adopting Judge Campbell’s proposal. A Committee member expressed similar sentiments asking why the Committee Note does not use the phrase “consistent with.” Judge Campbell reminded the Committee that the proposed language reflected an accord that had been carefully worked out among the interested parties.

After much discussion, consensus emerged to revise the last sentence in the third paragraph of the Committee Note as follows: “Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure.”

Other Committee members raised stylistic concerns with Rule 16.1. In an email sent prior to the meeting, a Committee member raised some grammatical and stylistic comments about Rule 16.1, which Judge Molloy and the Reporters agree require revisions. First, the word “shortly” in the first sentence in the Committee Note should be replaced with “early in the process, no later than 14 days after arraignment,” to better track the language of the rule. Second, an errant underline between “it” and “displace” in the third paragraph of the Committee Note will be removed. Third, the phrase “determine or modify” will be added in the fifth paragraph of the Committee Note to more closely parallel the rule’s language. Lastly, this member also noted that the commas in Rule 16.1(b) should not be bolded.

Another Committee member proposed using words like “process” or “procedure” instead of “standard” in the third paragraph of the Committee Note reasoning that such terms better reflect that Rule 16.1 is instituting a new procedure. The Committee’s style consultants stated that the

word “procedure” would be appropriate to use. Judge Molloy and the Reporters agreed with this change.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed new Rule 16.1, subject to the revisions made during the meeting.**

Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings – Right to File a Reply. Judge Richard Wesley, a former member of the Standing Committee, raised this issue with the Advisory Committee, noting a conflict in the cases construing Rule 5(d) of the Rules Governing Section 2255 Proceedings. This rule currently states that “[t]he moving party may submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.” Although the Committee Note and history of the rule make clear an intent to give the inmate a right to file a reply, some courts have held that the inmate has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right. After reviewing the case law, the Advisory Committee concluded that the text of the current rule contributes to a misreading of the rule by a significant number of district courts. A similar problem was found with regard to parallel language in Rule 5(e) of the Rules Governing Section 2254 Cases. The Advisory Committee agreed to correct this problem by placing the provision concerning the time for filing in a separate sentence, thereby making clear in the text of each rule that the moving party (or petitioner in § 2254 cases) has a right to file a reply.

Three comments were received during publication. The Advisory Committee determined that the issues raised by the comments were considered at length prior to publication and no changes were required. No Standing Committee members raised any questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings.**

Information Items

Criminal Rule 16 – Pretrial Discovery Concerning Expert Witnesses. The Advisory Committee received two suggestions from district judges recommending that Rule 16’s provisions concerning pretrial discovery of expert testimony should be amended to provide expanded discovery similar to that under Civil Rule 26. Judge Molloy noted that there are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil cases. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded discovery of forensic expert testimony. While there will not be a simple solution, there is consensus among the Advisory Committee members that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Evidence Rules) and also plans to hold a mini-conference.

Task Force on Protecting Cooperators. Judge St. Eve updated the Committee on the efforts of the Task Force on Protecting Cooperators. In April 2018, Director Duff sent 18 recommendations identified by the Task Force for implementation by the Bureau of Prisons (“BOP”). A day before the Director’s scheduled meeting with the BOP, the BOP Director resigned, and that meeting did not occur. Since then, meetings have taken place with the BOP’s Acting Director, who had attended the Task Force meetings. He and his staff are preparing the BOP’s response, which they anticipate sending to Director Duff and the Task Force later this month. Some of the BOP Recommendations must be approved by the BOP union. Ms. Womeldorf has drafted the Task Force’s second and final report, which will be submitted sometime next month to Director Duff. Some of the Task Force’s recommendations may have to be considered by the Standing Committee and the Committee on Court Administration and Case Management. That said, Judge St. Eve stated that the Task Force’s work is coming to a close.

Judge Campbell noted that, last January, the Standing Committee reviewed the Advisory Committee’s decision not to recommend any rules implementing the CACM Interim Guidance or similar approaches to protecting cooperator information in case files and dockets based on the Task Force’s recommendations. The Advisory Committee on Criminal Rules will revisit this decision after the Task Force’s second and final report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on April 10, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of one action item and presented four information items.

Action Item

Rule 30(b)(6) – Deposition of an Organization. The Advisory Committee sought approval for publication of proposed amendments to Rule 30(b)(6) which would impose a duty to confer. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to Rule 30(b)(6). In the summer of 2017, the subcommittee invited comment on a preliminary list of possible rule changes. Over 100 comments were received. Discussions eventually focused on imposing a duty on the noticing and responding parties to confer in good faith. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule.

As drafted, the duty to confer is iterative, and the proposed language requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each person who will testify. The first topic has not proved controversial; however, the second topic – the identity of the witnesses – has generated more discussion. Some fear the rule might be interpreted to require that organizations obtain the noticing party’s approval of its selection of witnesses. Nevertheless, the Advisory Committee decided to keep the identity of witnesses as a topic of conferring, at least for the public comment process, because the proposal carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf, and the Committee Note affirms that the choice of the designees is ultimately up to the organization.

Judge Bates noted that the Standing Committee received comments about the Advisory Committee's decision to include the identity of witnesses as a topic on which the parties must confer. Although these comments were addressed to the Standing Committee, he assured the Standing Committee that the Advisory Committee considered their substance when deciding to recommend publication. He noted that there is some force to the concerns stated in the comments, but that the Advisory Committee decided to include this topic because it is tied to the question of the matters for examination (the other question about which the parties must confer). Discussing what kind of person will have knowledge about a matter for examination may help avoid later disputes. Judge Bates also emphasized that the amendment only adds a requirement to confer; it does not require that the parties agree nor lessen the organization's ability to choose its witnesses.

Moreover, he cautioned that the comments to the Standing Committee are coming from only one segment of the bar, particularly from the defense bar and those who represent organizations who often must identify such witnesses. Interestingly, one letter from past, present, and upcoming Chairs of the ABA Section of Litigation did raise concerns about the "identity" topic. That said, Judge Bates anticipates receiving many comments on this topic if the proposed amendment is approved for public comment, and he thinks comments from other groups will be informative. He guaranteed that these late submissions will be included as part of the Advisory Committee's broader assessment after public comment concludes.

Judge Campbell noted that the Standing Committee has received eight to ten last-minute comments about the proposed amendments to Rule 30(b)(6). This happens from time to time, but having received a number of them, he stated that the Standing Committee needs to clarify when it is appropriate to address comments directly to the Standing Committee. Clarification will help ensure that the public has fair notice of when to properly submit comments and that all commenters are treated equally. The Reporters discussed these questions at their lunch meeting today, and the Standing Committee will consider this procedural issue at its January 2019 meeting.

Many of these late comments noted by Judge Campbell expressed concern that the noticing party would have the ability to dictate the witnesses the organization must produce for deposition. In response, Judge Campbell stated that this is not the intent of the rule. Moreover, he noted that the rule also lists the matters for examination as a topic of conferring. Under the logic of the comments, it could be said that the organization now can dictate the matters for examination. Again, this is not the intent of the rule.

Lastly, Judge Bates reported that the Advisory Committee rejected adding a reference to Rule 30(b)(6)'s duty to confer in Rule 26(f) because Rule 26(f) conferences occur too early.

After this introduction, the Standing Committee engaged in a robust discussion about the Rule 30(b)(6) amendments. One member asked whether the conference must always occur and whether complex litigation concerns were driving this requirement. Professor Marcus responded that many complained about the inability to get the parties to productively engage on these matters and that the treatment here reflects repeat reports from the bar about issues with Rule 30(b)(6). This same member questioned whether the iterative nature of the confer requirement needs to be included in the rule. Judge Bates answered that it is important to signal in the rule the continuing

obligation to confer because the topics of the conference may not be resolved in an initial meeting. For example, the identity of the organization's witnesses may have to be decided once the matters for examination are confirmed. The member stated this is a helpful change to a real problem and that it avoids the "gotcha" element of Rule 30(b)(6) depositions by requiring more particularity.

Another member asked whether it may be wise to require parties to identify and produce documents they will use at the deposition. By providing all such documents in advance of the deposition, parties can better focus on the issues. Moreover, Rule 30(b)(6) notices often list the matters to be discussed and providing the documents to be used will enable parties to get more specific. Another member agreed, asserting that documents ought to be identified prior to the deposition. Professor Marcus noted that such a practice could help focus the issues, but it also could lead to parties dumping a bunch of documents they may not use.

One member suggested that identifying documents is a best practice and should be highlighted in the Committee Note to Rule 30(b)(6). Professor Coquillette responded that committee notes should not be used to discuss best practices but to illustrate what the rule means. A member noted that nothing in the proposed rule would prohibit providing the document in advance; in fact, it would not change what many lawyers already do. One member recommended deleting "at least some of" from the first paragraph of the Committee Note, which discusses how it may be productive to discuss other matters at the meet and confer such as the documents that will be used at the deposition.

Other members questioned why the rule does not address timing. One member proposed adding a provision requiring the parties to make such disclosures within a certain number of days before the deposition. Another member seconded this concern. Judge Bates stated that this is a rule about conferring, not about timing, and the Advisory Committee learned that timing is often not the real issue facing the bar.

Echoing a point raised in the letter from present, past, and incoming Chairs of the ABA Section of Litigation, one Committee member expressed concern about previous committee notes – the 1993 Committee Note stating that a Rule 30(b)(6) deposition counts as a single deposition (for purposes of the presumptive limit on the number of depositions), and the 2000 Committee Note indicating that, if multiple witnesses are identified, each witness may be deposed for seven hours. The member thought this approach could carry unintended consequences. Professor Marcus discussed the history of the seven-hour rule and stated that the Advisory Committee has twice studied this issue carefully, most recently when Judge Campbell served as Chair. Getting more specific seemed to generate more problems, and although the Advisory Committee considered this, they do not think there is a cure because any solution would lead to other problems. The Advisory Committee consequently concluded that a requirement to confer was a step in the right direction.

Committee members discussed at length the "identity" requirement. One member noted his agreement with the criticism that "identity" is unclear. He does not know if it is helpful to require conferencing about "identity." The member stated that he conducted an informal survey and said that this is not much of an issue, especially for good lawyers. Another member noted that she does not see Rule 30(b)(6) issues often unless they concern the scope of the deposition, which

the “matters for examination” topic addresses. She shared her colleague’s concern that “identity” is unclear.

Judge Bates noted that district court judges do not see many Rule 30(b)(6) issues, but the Advisory Committee heard from the practicing bar that problems do not always get to the judge. The proposal is responsive to the practicing bar’s concerns. Judge Campbell explained that they write rules for the weakest of lawyers and that the “identity” topic responds to the concerns of practitioners who complain that they cannot get organizations to identify the witnesses. Judge Bates reminded everyone that the proposed language is not final, but rather is the proposed language for public comment. The comments received thus far are from one constituency – members of the bar that primarily represent organizations – and comments have yet to be received from the rest of the bar.

Another Committee member remarked that the “identity” topic is important because it will inform the serving party whether the organization has no responsive witness and must identify a third party to depose. This member also suggested adding something encouraging the parties to ask the court for help in resolving their Rule 30(b)(6) disputes and to remind them of this practice’s efficacy. Judge Bates noted that committee notes typically do not remind parties to come to the court to resolve such disputes, and Professor Marcus noted that judicial members on the Advisory Committee objected to inclusion of this concept in an earlier draft.

Despite this conversation, a Committee member stated that he was still uncomfortable with the “identity” language. He proposed stating “and when reasonably available the identity of each person who will testify.” Another Committee member noted that such language would reinforce the iterative nature of the rule because organizations could identify witnesses shortly after conferring on the matters for examination.

Professor Cooper expressed skepticism about this Committee member’s proposal. After conferring with Judge Bates and Professor Marcus, Professor Cooper recommended adding “the organization will designate to” so that the topic for conferral will be “the identity of each person the organization will designate to testify.” The additional language – “the organization will designate to” – will reinforce that organizations maintain the right to choose who will testify and thus better respond to the concerns raised. If they make this change, they also recommended deleting the earlier use of “then.”

Another Committee member noted that the Committee Note’s use of the phrase “as necessary” was confusing and could be interpreted as requiring multiple conferences. He recommended instead: “The duty to confer continues if needed to fulfill the requirement of good faith.” Judge Bates liked this proposal, in part because it used fewer words and clarified the iterative nature of the rule.

After this discussion, Judge Campbell summarized the proposed modifications: (1) deleting “then” before the word “designate”; (2) deleting “who will” and adding “the organization will designate to”; (3) deleting “at least some of” from the first paragraph of the Committee Note; and (4) changing the wording of the penultimate sentence of the third paragraph of the Committee Note to read “The duty to confer continues if needed to fulfill the requirement of good faith.”

Judge Bates noted that they may need to explain the deletion of “then” in the Committee Note, and Judge Campbell said that he and Professors Cooper and Marcus can explore this after the meeting. If such language is needed, a proposal can be circulated to the Standing Committee for consideration and approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 30(b)(6), subject to the revisions made during the meeting.**

Information Items

Rules for Multidistrict Litigation. The subcommittee formed to consider creating rules for multidistrict litigation is still in the information gathering phase. Proposed legislation in Congress known as the Class Action Fairness Bill would affect procedures in MDL proceedings. Judge Bates noted that consideration of this subject will be a long process, and that the subcommittee is attending various conferences on MDLs. The subcommittee has identified eleven topics for consideration, including the scope of any rules and whether they would apply just to mass torts MDLs or all types of MDLs, the use of fact sheets and *Lone Pine* orders, rules regarding third-party litigation financing, appellate review, etc. He encouraged Committee members to provide the subcommittee their perspective on any of these topics. Judge Bates noted that the subcommittee has not decided if rules are necessary or whether a manual and increased education would be better alternatives.

Social Security Disability Review Cases. A subcommittee is considering a suggestion from the Administrative Conference of the United States to create rules governing Social Security disability appeals in federal courts. The subcommittee has not concluded its work, and whatever rules it may recommend, if any, still need to be considered by the Advisory Committee. The most significant issues concerning these types of proceedings are administrative delay within the Social Security Administration and the variation among districts both in local court practices and in rates of remand to the administrative process. Whatever court rules may be proposed will not address the administrative delay.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 26-27, 2018, in Washington, D.C. The Advisory Committee presented two action items and seven information items.

Action Items

Evidence Rule 807 – Residual Exception. The Advisory Committee sought final approval for proposed amendments to Evidence Rule 807. Professor Capra reviewed the history of suggestions to amend the rule, noting that the Advisory Committee found that the rule was not working as well as it could. The proposal deletes the language requiring guarantees of trustworthiness “equivalent” to those in the Rule 803 and Rule 804 hearsay exceptions and instead

directs courts to determine whether a statement is supported by “sufficient” guarantees of trustworthiness in light of the totality of the circumstances of the statement’s making and any corroborating evidence. Subsections (a)(2) and (a)(4) are removed because they are at best redundant in light of other provisions in the Evidence Rules. The amendments also revise Rule 807(b)’s notice requirement, including by permitting the court, for good cause, to excuse a failure to provide notice prior to the trial or hearing.

One member asked if this proposal will increase the admissibility of hearsay evidence. Professor Capra noted that any increase will be marginal, perhaps in districts that adhere to a strict interpretation of the rule regarding “near miss” hearsay.

Ms. Shapiro noted the fantastic work Professor Capra did to help improve this rule and stated that the DOJ is incredibly grateful for his work.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 807.**

Evidence Rule 404(b) – “Bad Acts” Evidence. The Advisory Committee sought approval to publish proposed amendments to Evidence Rule 404(b). Professor Capra explained various Rule 404(b) amendments considered and rejected by the Advisory Committee. The Advisory Committee, however, accepted a proposed amendment from the DOJ requiring the prosecutor to provide notice of the non-propensity purpose of the evidence and the reasoning that supports that purpose. The Advisory Committee liked this suggestion because articulating the reasoning supporting the purpose for which the evidence is offered will give more notice to the defendant about the type of evidence the prosecutor will offer. The Advisory Committee also determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “*other* crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Professor Bartell asked whether the Advisory Committee considered designating a specific time period for the prosecutor to provide notice. Professor Capra said the Advisory Committee considered this idea but thought it was too rigid.

One member inquired about implementing a notice requirement for civil cases. Professor Capra responded that notice was not necessary in civil cases because this information comes out during discovery. Judge Campbell also noted that lawyers in civil cases are not bashful about filing Rule 404 motions in limine.

Another member asked whether it would be better that subsection 404(b)(3) track the language of 404(b)(1) instead of stating “non-propensity purpose.” Professor Capra said the Advisory Committee will consider this idea during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 404(b).**

Information Items

Judge Livingston provided a brief update of the Advisory Committee's other work. First, the Advisory Committee decided not to proceed with rule changes to Evidence Rules 606(b) and 801(d)(1)(A).

Second, the Advisory Committee considered at its April 2018 meeting the results of the Symposium held at Boston College School of Law in October 2017 regarding forensic expert testimony, Rule 702, and *Daubert*. The Symposium proceedings are published in the Fordham Law Review. No formal amendments to Rule 702 have been considered yet but the Advisory Committee is exploring two possible changes: 1) an amendment focusing on forensic and other experts overstating their results and 2) an amendment that would address the fact that a fair number of courts have treated the reliability requirements of sufficient basis and reliable application in Rule 702 as questions of weight and not admissibility.

Lastly, Judge Grimm proposed amending Rule 106 regarding the rule of completeness to provide that: 1) a completing statement is admissible over a hearsay objection, and 2) the rule covers oral as well as written or recorded statements. The courts are not uniform in their treatment of Rule 106 issues, and the Advisory Committee decided to consider this proposal in more depth at its next meeting.

THREE DECADES OF THE RULES ENABLING ACT

To honor Professor Coquillette's thirty-four years of service to the Standing Committee and his upcoming retirement as Reporter to the Standing Committee, Judge Sutton – a former Chair of the Standing Committee – led a question and answer session with Professor Coquillette. The discussion was wide-ranging and provided current Committee members with helpful history on challenges faced by the rules committees over time. Professor Coquillette noted that the Rules Enabling Act ("REA") has been so successful in part because the Department of Justice played an integral role in the REA process. He thanked the DOJ for recognizing the value of the REA and for helping preserve its integrity. Although the Standing Committee must be sensitive to the political dynamics Congress faces, Professor Coquillette cautioned that the REA process should not become partisan football. He stated that the Committee must "check its guns at the door" and do the fair and just thing. It is so important that the Committee be seen as fair, Professor Coquillette explained, because the manner in which the Committee is perceived when reaching its decisions is vital to preserving the REA and faith in the rules process.

JUDICIARY STRATEGIC PLANNING

Brian Lynch, the Long-Range Planning Officer for the federal judiciary, discussed the strategic planning process and how the Standing Committee can provide feedback on the *Strategic Plan for the Federal Judiciary*. He emphasized that the Committee's reporting on long-term initiatives will help foster dialogue between the Executive Committee and other judicial committees.

Following Mr. Lynch’s presentation, Judge Campbell directed the Committee to a letter dated July 5, 2017, in which the Standing Committee provided an update on the rules committees’ progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*. Judge Campbell proposed updating this letter to reflect its ongoing initiatives that support the judiciary’s strategic plan. In 2019, the Committee will be asked to update the Executive Committee on its progress regarding these identified initiatives.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved authorizing Judge Campbell to update and forward to Chief Judge Carl Stewart correspondence reflecting the Committee’s long-term initiatives supporting the *Strategic Plan for the Federal Judiciary*.**

LEGISLATIVE REPORT

Julie Wilson of the Rules Committee Staff (“RCS”) briefly delivered the legislative report. She noted that two new pieces of legislation have been proposed since January 2018 – namely, H.R. 4927 regarding nationwide injunctions, and the Litigation Funding Transparency Act of 2018 (S. 2815) regarding the disclosure of third-party litigation funding in class actions and MDLs. Neither bill has advanced through Congress. Ms. Wilson indicated that the RCS will continue to monitor these bills as well as others identified in the Agenda Book and will keep the Committee updated.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Standing Committee will next meet on January 3, 2019 in Phoenix, Arizona. He reminded the Committee that at this next meeting it will confer about its policy regarding comments on proposed rules addressed directly to the Standing Committee outside the typical public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 3

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Minutes of the Spring 2018 Meeting of the
Advisory Committee on the Appellate Rules
April 6, 2018
Philadelphia, Pennsylvania

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 6, 2018, at approximately 9:00 a.m., at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli. Solicitor General Noel Francisco was represented by H. Thomas Byron III.

Also present were Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Bridget M. Healy, Attorney Advisor, RCSO; Marie Leary, Research Associate, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure; Patrick Tighe, Rules Law Clerk, RCSO; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules, participated in part of the meeting by telephone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He introduced Edward Hartnett, the new Reporter, and Patricia S. Dodszuweit, the former chief deputy clerk and now the Clerk of United States Court of Appeals for the Third Circuit and Clerk of Court Representative. He thanked Bridget Healy, Shelly Cox, and Rebecca Womeldorf for organizing the meeting. He then briefly reminded everyone of the rule making process under the Rules Enabling Act, and noted that the only amendment

to the Federal Rules of Appellate Procedure that took effect on December 1, 2017, was an amendment to FRAP 4(a)(4)(B) that restored subsection (iii).

II. Approval of the Minutes

The draft minutes of the November 8, 2017, Advisory Committee meeting were corrected to reflect that Kevin Newsome was appointed to the United States Court of Appeals for the Eleventh Circuit, and approved as amended.

III. Discussion Items

A. Proposed Amendments to Rules 3, 13, 26.1, 28, and 32, Published for Public Comment in August 2017, Particularly Proposal to Amend Rule 26.1 to Provide More Information Relevant to Recusal (08-AP-A; 08-AP-R; 11-AP-C)

Judge Chagares noted that there were no public comments on the proposed amendments to Rules 3, 13, 28, and 32, and no member of the Committee had any objection to them. He then opened discussion of the proposed amendment of Rule 26.1, dealing with disclosures designed to help judges decide if they must recuse themselves. This proposed amendment had been published for public comment, and was being considered in light of those comments.

Before turning to the particular proposals, an attorney member asked whether information about third-party funding of litigation showed up anywhere to inform recusal decisions. Judge Campbell noted that this issue was under active consideration by the Civil Rules Committee. Mr. Coquillette noted that the issue was also under consideration by state legislatures and bar associations. Those who oppose requiring disclosure observe that judges would not invest in third-party litigation funders, but a judge member pointed out that their relatives might.

Judge Chagares then turned to 26.1, noting that the version before the Committee had been revised in light of the comments and the input of Ms. Struve and the style consultants. In particular, the published version had a separate subparagraph 26.1(d) dealing with intervenors; for clarity that was folded into a new last sentence of 26.1(a).

Judge Chagares identified a glitch in the version of 26.1(a) in the agenda book (page 125). It refers to any “nongovernmental corporation to a proceeding.” The glitch could be fixed by adding the word “party,” so that it would read “nongovernmental corporate party to a proceeding.” Judge Campbell noted that it could also be fixed by adding the phrase “that is a party,” so that it would read “nongovernmental

corporation that is a party to a proceeding.” The Committee was content with either phrasing, leaving the matter to coordination with the Committee on Bankruptcy Rules.

An attorney member questioned whether the word “proceeding” should be changed to “case,” for consistency with Rule 26.1(c). Judge Pepper stated that the Bankruptcy Committee wanted to be sure that the 26.1(c) provision dealing with bankruptcy refer to “case” rather than “proceeding,” but that “proceeding” was appropriate for 26.1(a), because there may be proceedings in the courts of appeals that are not cases. Judge Campbell advocated not changing things that don’t need changing, and the Committee decided to leave the word “proceeding.”

An academic member observed that a proposed intervenor may seek intervention because of a need to protect its interests, but not truly “want” to intervene, and therefore suggested changing the word “wants” to “seeks” in the final sentence of 26.1(a). The Committee agreed, so that the final sentence would read, “The same requirement applied to a nongovernmental corporation that seeks to intervene.”

Turning to 26.1(b), dealing with organizational victims in criminal cases, Judge Chagares noted that the only proposed change from the published version was stylistic. Rule 26.1(c), dealing with bankruptcy cases, had a stylistic change from the published version that replaced redundant language with a cross-reference to 26.1(a). In keeping with the wishes of the Bankruptcy Committee, “proceeding” in this subsection was changed to “case,” to avoid confusion with the term “adversary proceeding” in bankruptcy cases.

The reporter pointed out that the phrasing of the version of 26.1(d) before the Committee was problematic in that 26.1(d)(3) provided that the “statement must . . . supplement the statement,” and suggested it be changed to the “statement must . . . be supplemented.” An attorney member noted that a 26.1(d)(2) had a similar problem, in that it provided that the “statement must . . . include the statement,” and suggested that it be changed to the “statement must . . . be included.”

Turning to the Committee Note, a judge member asked if the word “mainly” was needed, and another judge member suggested striking it. An attorney member pointed to the need to restore the word “of” to the phrase “disclosure of the names of all the debtors.” Another attorney member suggested that the phrase “the names of the debtors” should be restored, because the pronoun “they” might be read to refer to “bankruptcy cases,” rather than the intended referent “the names of the debtors.” Invoking the rule of the last antecedent, a judge member agreed.

As so amended, the Committee agreed to forward the proposed amendment to Rule 26.1 to the Standing Committee.

B. Proposal to Amend Rule 25(d) to Eliminate Unnecessary Proofs of Service in Light of Electronic Filing (and Technical Conforming Amendments to Rules 5, 21, 26, 32, and 39) (11-AP-D)

Judge Chagares explained that this proposal was designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version of this amendment to Rule 25(d) was approved by the Standing Committee and sent to the Supreme Court, but withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The version before the Committee (page 137 of the agenda book) is designed to be consistent with other Rules. It requires that a paper presented for filing must have an acknowledgement or proof of service "if it was served other than through the court's electronic filing system." In response to a question from Judge Campbell, it was confirmed that this version is consistent with the Bankruptcy Rule.

The Committee had no concern with conforming amendments to Rules 5, 21, 39 eliminating references to "proof of service." Judge Campbell raised a concern about the conforming amendment to Rule 26, asking whether the three-day rule should apply to all papers served electronically or only those served through the court's electronic filing system, given that a party might not serve until several days after filing. After several members of the Committee observed that the clock under Rule 26(c) starts upon service, not filing, the Committee agreed that there was no need to change the version of Rule 26(c) as proposed on page 155 of the agenda book. At the suggestion of an academic member of the Committee, the last clause of the Committee Note—which refers to a court's electronic filing system—was deleted.

The Committee approved the elimination of the articles from the list of items in Rule 32(f), and also eliminated the first sentence of the Committee Note referring to proof of service.

Judge Chagares confirmed that the prior reporter had done a global search for "proof of service," so that these are the only needed conforming amendments.

The Committee agreed that these were technical amendments, so that, in its view, there was no need for further public comment.

C. Rule 3(c)(1)(B) and the Merger Rule (16-AP-D)

Professor Sachs reported on behalf of the subcommittee formed to study the designation of the judgment or order appealed from in a notice of appeal. Under the merger doctrine, an appeal from a final judgment brings up interlocutory orders

supporting that judgment. But there is a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. That is, a negative inference is drawn that other, unmentioned, orders are not being appealed.

The subcommittee's work led it to other adjacent issues, including the proper handling of a notice of appeal when the district court did not enter a separate judgment. The subcommittee sought to get a sense of the Committee as to the extent of the problem, and whether the focus should be on the narrow issue that prompted the agenda item or on these broader issues.

Professor Struve pointed out that there is a great deal of confusion in this area, including the proper handling of appeals from post-judgment orders where the party is really seeking review of the underlying prior order, and appeals from an initial order but not an order denying reconsideration (or vice versa). It is nonetheless quite challenging to draft a rule that fixes these problems without creating new ones.

An attorney member stated that the line of cases in the Eighth Circuit is problematic and somewhat terrifying, because clients often question whether a simple notice of appeal from a final judgment is enough, and seek to have particular orders mentioned to make sure they are covered. Looking under this rock, however, revealed lots of other problems. Judge Chagares noted that in all his years on the bench, he had seen a problem regarding the order designated only once.

A judge member asked whether this was a jurisdictional matter that could only be handled by Congress. Several members of the Committee responded that issues involving the content of the notice of appeal, as opposed to the time for appeal, were not jurisdictional. Professor Sachs suggested that one approach might be to broadly authorize amendments to notices of appeal, but that allowing amendments out of time might raise jurisdictional and supersession issues.

An attorney member stated that the current Rule, which tells the reader to "designate the judgment, order, or part thereof being appealed," is very ambiguous. It is written to cover both appeals from final judgments and appeals from interlocutory orders, and gives no indication that an appeal from a final judgment brings up prior interlocutory orders. It invites the inexperienced lawyer to list everything. But a rule cannot explain the entire merger doctrine. A different attorney member suggested that a Rule could state that an appeal from a final judgment brings up the final judgment and all interlocutory orders, but Professor Struve noted that the merger doctrine doesn't cover all prior orders. Professor Sachs raised the question of whether the merger doctrine also applies when an appeal is properly taken from an interlocutory order.

A judge member suggested that, from the appellee's perspective, it would be good to know what is actually being appealed. Attorney members noted that the question of what issues will be raised on appeal is addressed in subsequent filings.

The reporter suggested that perhaps the Rule should call on the appellant to designate simply the *appealable* judgment or order, leaving to the merger doctrine the question of what issues are *reviewable* on appeal from that appealable judgment or order.

As for the question of whether to address the broader issues or only the narrow issues, and even whether a rogue line of cases in one circuit justifies a Rule change, Judge Chagares reminded the Committee that upending an established Rule, at times, can cause more confusion than clarity. Justice French agreed to join the subcommittee.

D. Improving Appendices

Judges Chagares observed that a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology may solve the problem.

Ms. Dodszeit stated that the Clerks recommend waiting. The technology is changing quickly, and electronic appendices, with briefs that cite to the electronic record of the district court, will make for a great shift in how appendices are done.

A judge member noted that the biggest problem is duplication. An attorney member reminisced about appendices that ran 20,000 pages, but that current practice of a proof brief, with an appendix that includes what is actually cited, avoids that problem.

Judge Campbell stated that trial exhibits are not placed on the electronic docket, but are frequently put in electronic form for use of the jury. Perhaps they should be put on the electronic docket.

The Committee decided to remove this matter from the agenda, but revisit it in three years.

E. Dismissals under Rule 42(b) (17-AP-G)

Mr. Landau reported for the subcommittee examining Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The

parallel Supreme Court Rule (Rule 46.1), by contrast, uses the word “will” rather than “may.” The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion.

A judge member asked whether there was ever a legitimate reason to not dismiss. The reporter asked whether laws that require judicial approval of settlements, such as the Tunney Act, apply to settlements on appeal. Others raised the possibility of class actions. Judge Campbell stated that class actions are dealt with in forthcoming Civil Rules.

An attorney member stated that some judges are concerned with what appear to be conflicts of interest between attorneys with institutional interests who want to flush a case after oral argument and the client who is being sold out. Mr. Coquillette stated that such a lawyer would be violating lots of rules of professional conduct, and that there are other remedies for such behavior. Judge Kozinski once wrote a dissent contending that an attorney with an institutional interest was giving up on a case with no gain to the client in return, prompting an attorney member to ask how the judge could know that there was no gain in return.

The subcommittee will continue its examination.

F. Rule 29 Blanket Consent to Amicus Briefs (17-AP-F)

Professor Sachs presented a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. A blanket consent procedure would reduce the burden on amici and parties in seeking and providing individualized consent, and perhaps on the court deciding motions if consent is not obtained in time. Mr. Byron noted that there are some cases in which the Department of Justice has to respond to many emails seeking consent, and this amendment would help a little, but that the emails are not much of a burden so that it isn't really needed.

Ms. Dodszuweit reported that there were about 100 cases in that past five years in the Court of Appeals for the Third Circuit with even one amicus brief. She also reported that, under current practice, if the Clerk were to receive a blanket consent letter, it would be noted on the docket and the Clerk would act in accordance with it.

In light of the very different amicus practice in the Supreme Court compared to the courts of appeals, the Committee decided to take this matter off the agenda, with thanks to Professor Sachs for raising the issue.

G. Costs on Appeal

This matter had previously been referred to the Civil Rules Committee for feedback. Judge Chagares reported that the Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works.

Accordingly, the Committee decided to remove the matter from its agenda.

H. Supreme Court Decision in *Hall v. Hall*

The reporter presented a discussion of the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. The reporter noted that this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved.

The Committee decided that this matter is appropriately handled by the Civil Rules Committee, while some members suggested keeping an eye on the trap-for-the-unwary concern and looking to see if the provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

I. Length of Answers/Responses to Petitions Under Rules 35 and 40 (18-AP-A and 18-AP-B)

Mr. Byron presented a proposal to add length limitations to the answers/responses to petitions for rehearing and rehearing en banc under Rules 35 and 40. He noted that experienced practitioners understand that the length limitations for the petitions themselves apply, but that it would be good to have this stated in the Rules themselves.

Judge Chagares noted that the draft before the Committee offered two alternative phrasings. As for Rule 35, the Committee opted for “The length limitations in Rule 35(b)(2) apply to a response.” As for Rule 40, the Committee opted for “The requirements of Rule 40(b) apply to a response to a petition for panel rehearing.”

A judge member noted that his court always puts a length limitation in the order permitting the filing. Mr. Byron responded that not all courts of appeals do so.

Mr. Byron added that it might be appropriate to undertake a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21.

The reporter presented a second issue. Rule 35 uses the term “response,” while Rule 40 uses the term “answer.” He suggested that Rule 40 be changed to “response,” pointing to Black’s Law Dictionary definitions of the two terms. Ms. Dodszeit suggested that Rule 35 be changed to “answer,” pointing to the use of “answer” in other Rules to designate a document filed only with the Court’s permission in response to a petition. The reporter noted that the Supreme Court Rules use the term “response” for a document filed only with the Court’s permission in response to a petition, and that Fed. R. App. P. 32(c)(2) refers to “a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition.”

The Committee opted for the word “response” in both the Rule and the Committee Note, and deleted some unnecessary words in the proposed Note. Despite some concerns about the proposed Note stating that the Advisory Committee changed the language for stylistic reasons, the Committee decided to leave in that language—which was modelled on language from the Restyling Project—pending review by the style consultants. (18-AP-A).

The Committee also decided to pursue a more general study of Rules 35 and 40, and Danielle Spinelli was added to the subcommittee. (18-AP-B).

IV. New Matters

Judge Chagares invited discussion of possible new matters for the Committee’s consideration, and, in particular, matters that would increase efficiency and promote the just, speedy, and inexpensive resolution of cases. Mr. Landau noted that the Supreme Court had distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017). He suggested that the Committee might want to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee was formed, consisting of Mr. Landau, Judge Kavanaugh, and Judge Chagares.

V. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and the meeting. He announced that the next meeting would be held on October 26, 2018, in Washington, DC.

The Committee adjourned at approximately 12:30 p.m.

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TAB 4A

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MEMORANDUM

TO: Appellate Rules Advisory Committee
FROM: FRAP 3 Subcommittee
DATE: October 3, 2018
RE: **Rule 3, Notice of Appeal (16-AP-D)**

At its April 2018 meeting, the Committee discussed a proposal by Neal K. Katyal and Sean Marotta to amend Rule 3(c)'s requirements for the content of a notice of appeal (16-AP-D). (See Attachment A.) Katyal and Marotta argued that this rule had received divergent and unpredictable interpretations in certain courts of appeals. Initial inquiries by members of the Committee suggested that Katyal and Marotta had identified a real concern. (See Attachment B.)

The issue has been referred to a subcommittee, which is now composed of H. Thomas Byron III, Justice Judith French, Christopher Landau, and Stephen Sachs. (Judge Michael Chagares and Edward Hartnett also participated *ex officio*.) After studying the issue further, the subcommittee recommends that Rule 3(c) be amended in three respects. (See Attachment C.) We also suggest that certain related issues remain on the agenda.

1. Executive Summary

Rule 3(c)(1)(B) currently requires a notice of appeal to “designate the judgment, order, or part thereof being appealed.” While this language might seem clear, in practice it has led to confusion. The judgment or order *on appeal*—the one serving as the basis of the court’s appellate jurisdiction, from which time limits are calculated under 28 U.S.C. § 2017, and so on—is often distinct from the various orders or decisions that may *be reviewed* in the course of the appeal. Under the merger doctrine, for example, a plaintiff may ordinarily obtain review of one claim’s early dismissal in the course of an appeal from a final judgment that disposes of all remaining claims. (Indeed, the plaintiff ordinarily

must do so, as the early dismissal of a single claim is nonfinal under 28 U.S.C. § 1291 and Civil Rule 54(b).) Colloquially, litigants often describe the nonappealable orders or decisions that will be reviewed in an appeal as also being “on appeal”; and in an excess of caution, appellants sometimes include them in the Rule 3 notice.

The courts appear to disagree on the effect of these designations. Katyal and Marotta contend that some cases apply an *expressio unius* approach. If a notice names the judgment or order on appeal as well as a particular order or decision to be reviewed, the court construes the notice as limiting the appeal *only* to review of the latter order or decision, and thus as excluding the many other orders or decisions that would otherwise be reviewable. This approach, they argue, not only traps unwary litigants, but encourages appellants either to put too much or too little detail into the notice of appeal.

The subcommittee’s research, with the assistance of rules clerk Patrick Tighe, seems to confirm Katyal and Marotta’s assessment. Some courts of appeals appear to adopt the *expressio unius* approach, reading the unnecessary designation of nonappealable orders as partially undoing the effect of other, proper designations. Yet many courts do not, and those that do may adopt this approach only inconsistently, with some panels reading notices more liberally and others more strictly.

The problem is especially acute in appeals from orders disposing of the last remaining claims in a civil case. Because district courts do not always set out their judgments in separate documents, as required by Civil Rule 58, some appellate courts will construe an appeal of the order adjudicating the last set of claims to extend to the final judgment as a whole, while others will take it to extend only to the last set of claims addressed. This inconsistency gives rise to both intra- and intercircuit splits and produces unclear signals for litigants.

We believe that these issues merit clarification through rule-making. Our proposal is to amend Rule 3(c) in three substantive respects. First, the notice of appeal should not require a designation of anything other than the judgment or *appealable* order

being appealed—that is, the judgment or order which serves as the basis for the court’s appellate jurisdiction. Other orders or decisions may turn out to be reviewable in the course of the appeal, but they need not be mentioned in the notice. Second, the *expressio unius* inference should be avoided. If a party designates an additional judgment or order in the notice, that additional designation should not be taken to limit the scope of the appeal. Third, in a civil appeal arising from an order disposing of the last set of claims, the court should construe the notice as designating the entire final judgment, whether or not that judgment has been set out in a separate document. Prior nonfinal orders that are reviewable on appeal from final judgment should not have to be specifically designated in the notice of appeal.

2. Current Caselaw

As Prof. Catherine Struve has noted, “the rules in this area are intricate and sometimes contradictory,” and the “caselaw appears to vary even within a given circuit.” C. Wright et al., *Federal Practice and Procedure* § 3949.4.

Cases in several circuits have held that when a notice of appeal designates a final judgment as well as a specific interlocutory order, the scope of the appeal does not extend to other interlocutory orders that would otherwise have merged into the final judgment. See, e.g., *Santos-Santos v. Torres-Centeno*, 842 F.3d 163 (1st Cir. 2016); *Rosillo v. Holten*, 817 F.3d 595 (8th Cir. 2016); *Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F.3d 1067 (11th Cir. 2003); *Minn. Min. & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294 (Fed. Cir. 2002); cf. *Elizondo v. Green*, 671 F.3d 506 (5th Cir. 2012) (discussing the issue, but finding it forfeited by the appellant).

However, other cases—sometimes from the very same courts—do not apply this *expressio unius* inference. See, e.g., *United States ex rel. Booker v. Pfizer, Inc.*, 847 F.3d 52 (1st Cir. 2017); *Prudential Secs., Inc. v. Yingling*, 226 F.3d 668 (6th Cir. 2000); *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co.*, 707 F.3d 853 (7th Cir. 2013); *Harvey v. Waldron*, 210 F. 3d

1008 (9th Cir. 2000); *Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295 (11th Cir. 2014); *Cybersettle, Inc. v. Nat'l Arbitration Forum, Inc.*, 243 F. App'x 603 (Fed. Cir. 2007).

The courts are also divided on a second topic, involving appeals from final orders. Under Civil Rule 54(b), an order in a civil case that adjudicates only some of the claims and that leaves others still pending is nonfinal and revisable. Absent the district court's directing entry of a partial final judgment, such an order typically does not support appellate jurisdiction. However, as discussed further below, a subsequent order that adjudicates all the remaining claims of all parties will serve as a final judgment, even if no judgment is ever styled as such or set out in a separate document under Civil Rule 58. When a notice of appeal designates an order of the latter kind—an order disposing of the last set of claims—there is disagreement on whether the notice is effective to appeal the final judgment as a whole, or whether it is limited to the particular claims that are in the last set of claims that were adjudicated.

Some courts hold that the notice should be construed narrowly, as limited to the last set of claims. See, e.g., *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579 (1st Cir. 2007); *Phillips v. City of New York*, 775 F.3d 538, 543 n.6 (2d Cir. 2015); *Bag of Holdings, LLC, v. City of Philadelphia*, 682 F. App'x 94 (3d Cir. 2017); *Jackson v. Lightsey*, 775 F.3d 170 (4th Cir. 2014); *Hickey v. Ficano*, 1995 WL 351325, at *1 (5th Cir. Jun. 9, 1995); *Bickerstaff v. Lucarelli*, 830 F.3d 388 (6th Cir. 2016); *Stephens v. Jessup*, 793 F.3d 941 (8th Cir. 2015); *Moton v. Cowart*, 631 F.3d 1337 (11th Cir. 2011); *Araya v. JPMorgan Chase Bank, N.A.*, 775 F.3d 409 (D.C. Cir. 2014); *Artrip v. Ball Corp.*, 735 Fed.Appx. 708 (Fed. Cir. 2018).

Yet other courts—or, indeed, other panels of the same courts—have construed these notices broadly, as appealing the final judgments as a whole. See, e.g., *Elliott v. City of Hartford*, 823 F.3d 170 (2d Cir. 2016) (*per curiam*); *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177 (3d Cir. 2010); *Caudill v. Hollan*, 431 F.3d 900 (6th Cir. 2005); *Badger Pharmacal, Inc., v. Colgate-Palmolive Co.*, 1 F.3d 621, (7th Cir. 1993); *Hall v. City of Los*

Angeles, 697 F.3d 1059 (9th Cir. 2012); *Montgomery v. City of Ardmore*, 365 F.3d 926 (10th Cir. 2004); *KH Outdoors, LLC v. City of Trussville*, 465 F.3d 1256 (11th Cir. 2006); *Martinez v. Bureau of Prisons*, 444 F.3d 620 (D.C. Cir. 2006) (*per curiam*).

3. Proposed Amendments

This confusion in the caselaw warrants correction. Requirements for the notice of appeal ought to be clear, so that appellants may know in advance what language they should or should not include. If the appellant makes the wrong guess, the error is often fatal. While the rules governing the content of the notice of appeal are not themselves jurisdictional, a timely notice that is effective as to the matter under review is a condition of the court's jurisdiction. See *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012).

These difficulties have been noticed by the legal press, with some commentators urging attorneys to be “over-inclusive in drafting the notice of appeal,” even if “an appeal from a final judgment should normally include review of prior orders that are part of that judgment.” *Appellate Jurisdiction—Notice of Appeal—Lack of Jurisdiction Over Orders Not Expressly Appealed From*, Fed. Litigator, Jan. 2017, at 14; see also Herr & Baicker-McKee, *Notice of Appeal—Scope of Review—Failure to Identify Orders Appealed From*, Fed. Litigator, Sept. 2015, at 15. Appellate practice should not require that kind of uncertainty and expense.

It seems unlikely that the issue will be addressed through further percolation. Many of the circuit courts have extensive bodies of caselaw on the topic, and two petitions for certiorari involving these issues have been denied in recent years. See *Rosillo v. Holten*, 137 S. Ct. 295 (2016); *Schramm v. LaHood*, 559 U.S. 1067 (2010). The state of the law is sufficiently messy—and the individual cases often sufficiently factbound—that Supreme Court or en banc review cannot be assured.

We therefore propose amending Rule 3(c) to clarify the requirements for the notice of appeal. The amendments are set out

in full in Attachment C, together with a proposed Committee Note. They would involve three substantive changes:

3.1. *Clarifying the designation requirement*

The existing Rule 3(c)(1)(B) requires the appellant to “designate the judgment, order, or part thereof being appealed.” This requirement is potentially ambiguous as between the items actually on appeal and the items that will be reviewed. We propose amending the rule as follows:

Rule 3. Appeal as of Right—How Taken

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

* * *

(B) designate the judgment, *appealable* order, or part thereof being appealed; and

* * *

Limiting the notice of appeal to judgments and *appealable* orders—that is, orders from which there is statutory jurisdiction to take an appeal—would achieve two goals. First, it would clarify the requirement for litigants. The many interlocutory orders that are not the basis of the court’s appellate jurisdiction, yet which they hope will be reviewed in the course of the appeal, may be safely left out of the notice. Second, adding “appealable” would remind courts in advance to construe the notice appropriately, with the understanding that such orders need not be named. This change would encourage clarity and economy in drafting and interpreting notices of appeal, without altering the scope of the appellate jurisdiction they support.

3.2. *Eliminating the expressio unius inference*

Even with the amendment above, some appellants may still draft notices of appeal with more detail than necessary. For ex-

ample, a party might seek to appeal from “the Court’s final judgment entered on June 1 and from the order of May 7 granting summary judgment on Count III.” While the latter designation is surplusage, a cautious appellant might include it anyway, to guarantee that the designated order will be reviewed. In such a case, the court should not construe the notice of appeal as providing for *narrower* review than if the surplusage had been left out, and if notice had referred simply to “the Court’s final judgment entered on June 1.” A narrower construction would unfairly penalize the appellant for its excess of caution.

We propose adding a new subdivision of Rule 3(c):

(4) The designation of any additional judgment, order, or part thereof must not be construed to limit the scope of the notice of appeal.

The language of the proposed amendment follows Rule 3(c)(1)(B)’s existing list of appealable items: “judgment, order, or part thereof.” Whatever the notice of appeal designates, it ordinarily supports review of other items that properly merge into the items designated. Any further designations should expand the scope of that review, not contract it. An appellant that wishes to appeal more narrowly can limit its appeal expressly to a single “part” of a judgment or appealable order; but an additional belts-and-suspenders designation should not be conflated with an express limit.

Because this amendment applies only to *additional* designations, it requires that the judgment or order on appeal be properly designated in the first place. We therefore do not believe that this amendment would result in any prejudice or unfair surprise to appellees. In any case, if a court fears excessive vagueness in the notice of appeal, it has many tools with which to narrow the matters in dispute, other than construing the notice itself more strictly. For example, many courts of appeals already require the appellant to file a statement of issues long before the opening brief. But these tools do not have jurisdictional consequences, nor should they.

3.3. *Ensuring full review of final orders*

In civil cases, there is often no firm distinction between a “judgment” and an “order.” Civil Rule 54(a) defines “judgment” to “include[] * * * any order from which an appeal lies.” As a result, many documents are “judgments” under the Civil Rules without being styled as such.

Instead, the Civil Rules define judgments functionally. Unless the district court directs entry of a partial judgment,

any order or other decision * * * that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.

Civil Rule 54(b). Once the claims have all been adjudicated, however, there is “nothing for the court to do but execute the judgment.” *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Engineers & Participating Employers*, 571 U.S. 177, 183 (2014). So an order adjudicating the last set of claims is a “final decision” under § 1291, and thus a “judgment” under Civil Rule 54(a). See also 28 U.S.C. § 1295(a)(1) (“final decision” in patent cases); cf. 28 U.S.C. § 158(d)(1) (“final decisions” in bankruptcy).

Typically the judgment must be set out in a separate document and so noted on the docket. See Civil Rule 58(a)–(b). But sometimes this does not happen, as Rule 4(a)(7) recognizes. Rather than requiring litigants to prod the district court into producing the necessary documents, Rule 4(a)(7) holds that a “judgment” is deemed to be entered after 150 days have passed from its appearance on the docket, even if it is not styled as a judgment or is not set out in a separate document. Moreover, a party may file a notice of appeal before the 150 days are through: Rule 4(a)(2) permits appeals after the judgment or order is announced and before it is deemed to be entered.

Despite this solicitude from the Rules, the absence of a separate document can still create significant difficulties for an appellant when drafting a notice of appeal. Suppose that the district court dismissed Count I in May and awarded summary judgment to the defendants on the remaining counts in December. The plaintiff may appeal the December order as soon as it has issued, as appeals after the announcement but before the entry of a judgment are valid under Rule 4(a)(2). But without a separate document, the only tangible judgment or appealable order in the case will be the December order, the one adjudicating the last set of claims. If the plaintiff promptly files a notice of appeal designating that order, an appellate court might construe the notice as applying *only* to that order, as opposed to the invisible and intangible “judgment” that Rule 4(a)(7) will deem to have been entered 150 days later. This creates a trap for the unwary. The appellant has no separate document to designate, and no obvious reason to designate any prior orders (such as the May dismissal order) which cannot themselves serve as a basis for appellate jurisdiction.

We propose adding a new subdivision of Rule 3(c):

(5) In a civil case, the designation of an order that adjudicates all remaining claims and all remaining rights and liabilities of all parties must be construed as a designation of the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58.

The amended language, which is borrowed from Civil Rules 54 and 58, requires an appellate court to treat final orders in civil cases the same way that § 1291 treats them: as final judgments appropriate for appeal. If a prior order, not explicitly named in the notice, would merge into and be reviewable on appeal of the final judgment, then that prior order is reviewable on appeal of the final order as well: there is no need to specifically designate prior orders.

In some cases, perhaps, a litigant may really seek review *only* of the order adjudicating the last set of claims, and not of the final judgment as a whole. However, there is less to be feared

from overreading the notice of appeal than from underreading it. If the notice is construed as designating the entire final judgment, both courts and parties can narrow the scope of the appeal through required issue statements or subsequent briefing, as noted above. But these do not have jurisdictional consequences, and the safer course is to avoid trapping an unwitting appellant in a jurisdictional default.

(Although the amended language only addresses civil cases, we note that it is made applicable to bankruptcy cases by operation of Rule 6(a)–(b)(1). Bankruptcy Rules 7054(a) and 7058 already incorporate the standards of Civil Rules 54(a)–(c) and 58. As far as we are aware, no similar problems arise under the Criminal Rules.)

4. Further Questions

Our research into these topics revealed other questions which the present proposal does not address—both for reasons of time, and because the subcommittee has not yet formed any consensus view. We are interested in the Committee’s opinion on whether it might be worthwhile to investigate these questions further. For example:

- Should changes be made to Form 1, to improve the accuracy of *pro se* notices of appeal?
- Should the “part thereof” language in Rule 3(c)(1)(B) be retained, amended, or eliminated?
- Should Rule 3 require additional information in the notice of appeal, as is required in a petition for certiorari—say, the date of entry of the judgment or order appealed from, or the statute authorizing appellate jurisdiction?
- Should Rule 3(c) be amended to address common errors in the notice of appeal—such as appellants’ confusion of judgments and postjudgment orders, or of initial orders and subsequent orders denying reconsideration?

We welcome any reactions or suggestions from the Committee concerning these or other issues.

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MEMORANDUM

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TO	Hon. Neil Gorsuch, Chair Prof. Gregory E. Maggs, Reporter	ORGANIZATION	Advisory Committee on Appellate Rules
FROM	Neal Kumar Katyal Sean Marotta	TELEPHONE	(202) 637-5528
DATE	October 15, 2016		
	By Electronic Mail		
SUBJECT	Appellate Rule 3(c)(1)(B) and the Merger Rule		

We want to bring to your attention a possible issue for the Rules Committee to take up. In particular, we may wish to consider changing the Rules to eliminate a trap for the unwary under the Eighth Circuit’s interpretation of Appellate Rule 3(c)(1)(B), which requires a notice of appeal to “designate the judgment, order, or part thereof being appealed.”

In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. In our view, such forfeiture is not justified by the policies underlying Appellate Rule 3(c)(1)(B).

Below, we lay out the general rule and the Eighth Circuit’s exception, the problems with the Eighth Circuit’s exception, and one proposed fix, should you think it worthwhile for the Committee to investigate the matter.

1. Appellate Rule 3(c)(1)(B) requires that a notice of appeal “designate the judgment, order, or part thereof being appealed.” Under the “merger rule,” a “notice of appeal designating the final judgment necessarily confers jurisdiction over earlier interlocutory orders that merge into the final judgment.” *AdvantEdge Business Grp. v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236-37 (10th Cir. 2009); *see also, e.g., John’s Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) (“[I]t has been uniformly held that a notice of appeal that designates the final judgment encompasses not only that judgment, but also earlier interlocutory orders that merge into the judgment.”); *Federal Practice & Procedure* § 3949.4 (4th ed.) (“A notice of appeal that names the final judgment suffices to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory orders . . .”). Absent unusual circumstances, then, a notice of appeal satisfies Appellate Rule 3(c)(1)(B) if it designates the final judgment and any order listed in Appellate Rule 4(a)(4)(A). *See* Appellate Rule 4(a)(4)(B)(ii) (requiring the appellant to file a new or amended notice of appeal if an Appellate Rule 4(a)(4)(A) motion is decided after the initial notice of appeal is filed).

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The Eighth Circuit, however, has a rule that kicks in when a notice of appeal designates not just the final judgment, but also one or more interlocutory orders leading up to the final judgment. In those circumstances, “a notice which manifests an appeal from a specific district court order or decision precludes an appellant from challenging an order or decision that he or she failed to identify in the notice.” *Stephens v. Jessup*, 793 F.3d 941, 943 (8th Cir. 2015). So, for instance, if the notice of appeal designates the final judgment and an order dismissing Count I of the complaint, the appellant would forfeit any challenge to a separate order dismissing Count II of the complaint.

2. With respect to the Eighth Circuit, its *exclusio unius* approach to Appellate Rule 3(c)(1)(B) creates an unjustifiable trap for the unwary.

First, the Eighth Circuit’s exception appears to create a circuit split. The Federal Circuit, for instance, has held that the merger rule still applied where an appellant designated the district court’s final judgment as well as “specifically that portion of the Order & Judgment relating to the entry of an Order for Permanent Injunction.” *Cybersettle, Inc. v. National Arbitration Forum, Inc.*, 243 Fed. Appx. 603, 606 (Fed. Cir. 2007). The First Circuit, while not entirely clear, appears to have done the same. *See Markel Am. Ins. Co. v. Diaz-Santiago*, 674 F.3d 21, 26 (1st Cir. 2012) (appearing to reject the argument that designation of one order without another disclaims intention to appeal omitted order).

Second, the Eighth Circuit’s exception to the merger rule creates a perverse incentive to appeal with less, rather than more, specificity. A notice of appeal that names only the final judgment allows the appellant to present in his opening brief essentially any error in the record below. But a notice of appeal that names the final judgment and, say, a major summary-judgment order but not a subsidiary discovery order, narrows the errors assignable by the appellant

Third, the Eighth Circuit’s exception to the merger rule is inconsistent with the purpose behind Appellate Rule 3(c)(1)(B). The purpose of Appellate Rule 3(c)(1)(B) “is to provide sufficient notice to the appellees and the courts of the issues on appeal.” *R.P. ex rel. R.P. v. Alamo Heights Independent School Dist.*, 703 F.3d 801, 808 (5th Cir. 2012). In truth, it is not clear the ordinary notice of appeal carries out this function well; a notice that appeals the bare final judgment does not give much insight on the particular issues the appellant will raise. And appellees have ample way to know what issues are on appeal: Reading the opening brief. We are not aware of many circumstances where appellees have been prejudiced by having to wait until the opening brief to know the particular issues to be argued. But in any event, Appellate Rule 3(c) is to be construed “liberally.” *Smith v. Barry*, 502 U.S. 244, 248 (1992). The Eighth Circuit’s forfeiture rule appears to be contrary to that liberal rule of construction.

3. We propose that the Committee consider adding to Appellate Rule 3(c)(4) or adding a new Appellate Rule 3(c)(5) to overturn the Eighth Circuit’s exception. There is precedent for such an addition. Following *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which held that an appellant did not comply with Appellate Rule 3(c) by designating the first party appealing and adding “et al.,” the Court relaxed Rule 3(c)(1)(A) to limit satellite litigation. *See* 1993 Committee Notes to Appellate Rule 3. A similar fix may be order here.

So, for example, the Committee could add a new Appellate Rule 3(c)(4) and renumber existing Rule 3(c)(4) and 3(c)(5) accordingly. A new Rule 3(c)(4) would thus read:

“(4) An notice of appeal that designates the district court’s judgment and any order disposing of a motion listed in Rule 4(a)(4)(A) brings up for review any interlocutory order supporting the judgment or order listed in Rule 4(a)(4)(A). A party does not forfeit any argument on appeal by failing to designate an order other than—or designating orders in addition to—the district court’s judgment and any order disposing of a motion listed in Rule 4(a)(4)(A).”

The first sentence of the proposed new subsection merely restates and codifies the existing merger rule. The second sentence retains the core of existing Appellate Rule 3(c)(1)(B) and 4(a)(4)(B)(ii) by making clear that a notice of appeal should designate the district court’s final judgment and the district court’s order disposing of any motion listed in Rule 4(a)(4)(A). But the second sentence also overturns the Eighth Circuit’s exception to the merger rule—and clears up any uncertainty in the other circuits—by making clear that an appellant’s inartful attempt at greater specificity should not be held against him.

The new proposed Appellate Rule 3(c)(4) does not solve all issues surrounding Rule 3(c)(1)(B). There will be questions of whether a particular interlocutory order supports the judgment for merger-rule purposes and what to do when a notice of appeal fails to designate the final judgment or a Rule 4(a)(4)(A) order. Many of those circumstances are addressed by existing Rule 3(c)(4)’s admonition to not dismiss an appeal for informality of the notice. But the proposed addition makes clear that there should not be a “magic words” approach to the merger rule; a notice of appeal that designates the final judgment and any post-judgment motion should receive the benefits of the rule, regardless of the verbiage it uses in addition to that designation.

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MEMORANDUM

TO: Appellate Rules Advisory Committee
FROM: H. Thomas Byron, III
Judge Michael A. Chagares
Christopher Landau
Stephen E. Sachs
DATE: March 9, 2018
RE: **Rule 3, Notice of Appeal (16-AP-D)**

Neal K. Katyal and Sean Marotta suggested that this committee consider amending Rule 3(c)'s requirements for the content of a notice of appeal (16-AP-D). Rule 3(c)(1)(B) requires a notice of appeal to "designate the judgment, order, or part thereof being appealed."

Katyal and Marotta pointed out that the Eighth Circuit in some cases had held that a notice of appeal designating the final judgment and one or more interlocutory orders should be read to limit the scope of the appeal—excluding review of any other orders, notwithstanding the merger rule.

In our discussion and review of cases, our subcommittee identified a related concern: When the district court disposes of all claims, but does not separately enter final judgment, some courts have held that a notice of appeal designating only the last dispositive order closing the case should be read to exclude review of other orders entered earlier.

For that reason, we are currently exploring a range of possible proposals to address the situation where a notice of appeal identifies some but not all orders, in addition to or instead of referring to a final judgment. At Judge Chagares's suggestion, we are seeking additional information from the Administrative Office and the Federal Judicial Center on current practice in the circuits concerning those issues.

We have identified the following questions as appropriate for our initial focus:

1. Does the position described by Katyal and Marotta accurately reflect the position of the Eighth Circuit? If so, do any other courts of appeals follow a similar rule?
2. When a notice of appeal designates an order in a civil case disposing of the last set of remaining claims, whether or not any final judgment is then set out in a separate document (as the Civil Rules might require), which courts of appeals have permitted review of the final judgment as a whole, and which have restricted appellate review to that order only? (Possible examples might include *Elliott v. City of Hartford*, 823 F.3d 170, 173–74 (CA2 2016), or *Moton v. Cowart*, 631 F.3d 1337, 1340 n.2 (CA11 2011).)

In addition, our discussions have identified some related issues that might also be worthy of the committee’s attention in the course of considering any proposed amendment to Rule 3(c). Once our inquiry into the two questions above has been completed, we may consider some issues related to review of post-judgment orders, as well as how strictly courts should construe the designation in a notice of appeal. To that end, we are interested in the following questions:

3. As to post-judgment orders:
 - a. When a notice of appeal is timely filed for appealing the judgment but designates only certain postjudgment orders, which courts of appeals have permitted review of the underlying judgment as well, and which have forbidden such review? (Possible examples might include *Manning v. Jones*, 875 F.3d 408, 411 (CA8 2017), or *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 415 (CA1 2000).)
 - b. When a notice of appeal designates only the final judgment but is timely filed for appealing a

postjudgment order, which courts of appeals have permitted review of the postjudgment order as well, and which have forbidden such review? (Possible examples might include *Caudill v. Hollan*, 431 F.3d 900, 906 (CA6 2005), or *Bogart v. Chapell*, 396 F.3d 548, 555 (CA4 2005).)

4. More generally:

- a. When a litigant drafting a notice of appeal makes the wrong choice among various kinds of related orders—designating, for example, the underlying order and not the order denying leave to amend or denying reconsideration—which courts of appeals have overlooked the error, and which have declined to do so? (Possible examples might include *Williams v. Akers*, 837 F.3d 1075 (CA10 2016), *Huls v. Llabona*, 437 F. App'x 830, 833 (CA11 2011), or *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 772 (CA9 1991).)
- b. Which courts of appeals have overlooked an appellant's error in drafting the notice of appeal on the ground that the error does not prejudice the appellee, and which have declined to do so? (Possible examples might include the cases cited in the cert petition in *Rosillo v. Holten*, 137 S. Ct. 295 (2016).)
- c. How often are questions like these litigated? Do courts often confront issues involving Rule 3(c) or the contents of a notice of appeal? Or do these issues arise only rarely?

We welcome any reactions or suggestions concerning these issues from other members of the committee.

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TAB C

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Federal Rule of Appellate Procedure 3

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;

(B) designate the judgment, **appealable** order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer’s spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The designation of any additional judgment, order, or part thereof must not be construed to limit the scope of the notice of appeal.

(5) In a civil case, the designation of an order that adjudicates all remaining claims and all remaining rights and liabilities of all parties must be construed as a designation of the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58.

(4~~6~~) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(~~5~~ 7) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

Committee Note

Rule 3(c)(1) currently requires that the notice of appeal “designate the judgment, order, or part thereof being appealed.” Some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal, despite the fundamental principle that designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or desirable to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of the “judgment, *appealable* order, or part thereof.” In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an authorized appeal is

brought from an interlocutory order, the notice of appeal must designate that appealable order. This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some other order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius rationale*, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary. To remove this trap, a rule of construction is added to Rule 3(c)(1): “The designation of any additional judgment, order, or part thereof must not be construed to limit the scope of the notice of appeal.”

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), and then, after a considerable period for discovery, summary judgment under Federal Rule of Civil Procedure 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of Federal Rule of Civil Procedure

58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by Federal Rule of Civil Procedure 58. To remove this trap, another rule of construction is added to Rule 3(c)(1): “In a civil case, the designation of an order that adjudicates all remaining claims and all remaining rights and liabilities of all parties must be construed as a designation of the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58.”

These rules of construction are added as Rules 3(c)(4) and 3(c)(5), with the existing Rules 3(c)(4) and 3(c)(5) renumbered.

TAB 4B

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, for subcommittee (Judge Chagares, Judge Bybee, Chris Landau)

Date: October 2, 2018

Re: Rule 42(b) and agreed dismissals (17-AP-G)

The subcommittee has been discussing FRAP 42(b), which provides:

Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the court.

The central issue is whether it is appropriate for a court to decline to dismiss an appeal if all parties agree that the appeal should be dismissed. No one is suggesting that an appellant should be able to dismiss an appeal at will, over the objection of other parties.

The first sentence of Rule 42(b). Prior to the restyling of the Federal Rules of Appellate Procedure in 1998, the first sentence provided, “If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk *shall* enter the case dismissed . . .” (emphasis added). One of the tenets of the restyling project was to eliminate the use of the word “shall.” The result in this instance was to replace the word “shall” with the word “may.”

By contrast, Supreme Court Rule 46.1 provides:

At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, *will* enter an order of dismissal. (emphasis added).¹

¹ In a pre- Tunney Act antitrust case, the Court recognized an exception to the prior version of this Rule, holding that “Ordinarily parties may by consensus agree to dismissal of any appeal pending before this Court. However, there is an exception where the dismissal implicates a mandate we have entered in a cause.” *Utah Pub. Serv. Comm’n v. El Paso Nat. Gas Co.*, 395 U.S. 464, 466 (1969) (footnotes omitted). Justice Harlan vigorously objected:

The action taken by the Court today will be dismaying to all who are accustomed to regard this institution as a court of law.

All semblance of judicial procedure has been discarded in the headstrong effort to reach a result that four members of this Court believe desirable. In violation of the Court’s rules, the majority asserts the power to dispose of this case according to its own notions, despite the fact that all the parties participating in the lower court proceedings are satisfied that the District Court’s decree is in the public interest.

The language of the rule could not be clearer—the parties to a lawsuit are given the absolute right to dismiss their appeal without judicial scrutiny. Since 1858, the rules of this Court have expressly recognized the existence of this right, see R[e]vised Rules of the Sup.Ct. of the United States, Rule No. 29 (1858), and I have found no decision in which this right has ever been questioned or limited. Nevertheless, the Court today, without any discussion whatever, ignores the heretofore unquestioned interpretation of the rule and declares that ‘there is an exception where the dismissal implicates a mandate we have entered in a cause.’

In handing down this ipse dixit, the Court not only overlooks the teachings of more than a century of judicial practice, but also undermines the basic policies which support Rule 60. The rule is not a mere technicality but is predicated upon the classical view that it is the function of this Court to decide controversies between parties only when they cannot be settled by the litigants in any other way. See *Marbury v. Madison*, 1 Cranch 137 (1803). On this view of the judicial process, it is difficult to perceive why the Court should feel constrained to enforce its mandate when the parties have subsequently agreed, in a completely voluntary and bona fide way, that a different solution will better accommodate their interests. We have labor enough in deciding those pressing disputes which the parties are unable to resolve; there is no need to ‘do justice’ when no litigant is complaining that a wrong has been committed. Nor will it do to say, as the Court seems to suggest, that antitrust decrees, being affected with a public interest, as they surely are, are always subject to sua sponte enforcement by the Court. ‘Enforcement’ of the laws of the United States is the province of the Executive Branch. It is no more a proper function of this Court to thwart the Department of Justice when it decides to terminate an antitrust litigation than it is to order this department of the Executive Branch to commence an antitrust case which some members of this Court may feel should be brought.

The Committee might consider amending FRAP 42(b) to require the Clerk to dismiss an appeal in these circumstances.

The second sentence of Rule 42(b). The second sentence insists that “no mandate or other process may issue without a court order.” This prohibition existed prior to the restyling, but was part of the first sentence, and used the disfavored word “shall.” It provided, “. . . but no mandate or other process shall issue without an order of the court.” Supreme Court Rule 46.3 has the same prohibition, “No mandate or other process will issue on a dismissal under this Rule without an order of the Court.”

The point of this prohibition is that there is a distinction between a mere dismissal of the appeal—which leaves the district court’s decision undisturbed as if no appeal had ever been taken—and some judicial action by the court of appeals. A clear example of such a judicial action would be vacating the district court’s judgment.

Judge Sloviter once explained:

In this case, because the parties’ motion asks not only that the appeal be dismissed with prejudice, but also that this court vacate the district court judgment and remand the case for dismissal with prejudice, we must consider whether to grant the motion.

As should be self-evident even without reference to the terms of Rule 42(b), action by the court can be neither purchased nor parleyed by the parties. It follows that a judicial act by an appellate court, such as vacating an order or opinion of this court or the trial court, is a substantive disposition which can be taken only if the appellate court determines that such action is warranted on the merits. A provision for such action in a settlement agreement cannot bind the court.

Id. at 475–76 (Harlan, J., dissenting) (footnotes and citation omitted).

Clarendon Ltd. v. Nu-W. Indus., Inc., 936 F.2d 127, 128–29 (3d Cir. 1991).

The same idea was the foundation for the Supreme Court’s decision in *Bonner Mall*, which held that “mootness by reason of settlement does not justify vacatur of a judgment under review” because “[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26, 29 (1994).

The Committee might consider requiring courts to enter agreed judgments, but this is likely to produce opposition from judges, for the reasons expressed above.

The third sentence of Rule 42(b). The distinction between mere dismissal of the appeal and a judicial act by the court of appeals helps explain the third sentence of Rule 42(b), “An appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the court.”

It is easy to see why a motion would be necessary if the parties do not agree, but why would a motion be necessary if the parties agree? Why not simply enter an order in accordance with the parties’ settlement? The reason, as explained above, is that the “terms” to which the parties agree may involve a judicial act—such as vacating the district court judgment—and a court has no obligation to perform a judicial act simply because the parties so desire.

Where this left settling parties. Under the pre-restyling Rules, this left settling parties with a choice. If all they sought was a mere dismissal of the appeal, they were entitled to reach an agreement and have the appeal dismissed. But if they sought more than this—if they sought judicial action—they were required to file a motion.

Again, Judge Sloviter explained:

Rule 42(b) provides two distinct paths to voluntary dismissal in the Court of Appeals. Under the first path, . . . no action by this court is necessary or contemplated under this route. The parties may make whatever arrangement they agree on and need not notify or involve the court of appeals panel.

On the other hand, when the parties seek “a mandate or other process” from this court, we must perforce issue an order.

Clarendon Ltd. v. Nu-W. Indus., Inc., 936 F.2d 127, 128–29 (3d Cir. 1991).

If the first sentence of Rule 42(b) were amended to require a Clerk’s dismissal rather than merely permit a Clerk’s dismissal, settling parties would again face the same choice: If they settle on terms that call for the court to do nothing but merely dismiss the appeal, they would be entitled to reach an agreement and have the appeal dismissed. But if they settle on terms that call for the court to take some judicial action, they must file a motion and convince the court that it is appropriate to take the judicial action sought.

If amending the first sentence of Rule 42(b)—with an appropriate comment—does not make this sufficient clear, the Committee might consider overhauling Rule 42(b) to mirror the current Supreme Court Rule 46.

Rule 42

* * *

(b) Dismissal in the Court of Appeals

(1) If the parties to an appeal or other proceeding sign and file with the circuit clerk an agreement to dismiss the appeal or proceeding, specifying that all fees relating to the appeal or proceeding have been

paid and the terms for payment of any costs, the clerk [must / will] enter an order of dismissal without further reference to the court.

(2)

(A) An appellant may file a motion to dismiss the appeal or proceeding. No more than 14 days after service thereof, an adverse party may file an objection, and the party moving for dismissal may file a reply within 10 days.

(B) If no objection is filed, the clerk [must / will] enter an order of dismissal without further reference to the court.

(C) If an objection is filed, the clerk [must / will] enter an order of dismissal if so directed by the court.

(3) Notwithstanding the clerk's power to dismiss an appeal under subsections (1), (2)(A), and (2)(B) above, no mandate or other process of the court may issue without a court order.

If the committee pursues this route, it might consider whether to use the auxiliary verb “must” or “will” in connection with the clerk's entry of orders of dismissal. The style guidelines instruct that “must” is used to indicate “is required to” while “will” is used “for the future tense, not as an imperative.” Under those guidelines, the question becomes whether it is sufficient to use the future tense rather than impose a requirement on the clerk.

Other considerations. At both the last meeting of the full Committee and in discussions among the subcommittee, situations have been identified in which court approval of settlements is required. Examples include class actions, actions involving minors, and actions under the Tunney Act. If the Committee were inclined to require

that courts generally enter judgments in accordance with settlements, it might be necessary to carve out exceptions for proceedings such as these.

But if the Committee were to accept the distinction drawn above between mere dismissal of an appeal and additional judicial action, such a provision might not be necessary: In any case in which judicial approval of a settlement was required, the district court would already have approved the settlement. And if all that is sought is a dismissal of the appeal, with no other judicial action taken, it might be thought that no further review of the settlement is necessary. Put somewhat differently, if the settlement leaves the district court decision in place, dismissal of the appeal is equivalent to no appeal being filed in the first place.

The Committee may wish to consider, however, whether any provision would need to be made for a settlement on appeal that does not call for any judicial action and leaves the district court judgment in place, but that, as a matter of contract, calls for something in addition to (or some forbearance from enforcing) that district court judgment. Perhaps there would be no such settlements in cases that require judicial approval of settlements, but the Committee may want to consider that question further.

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TAB 4C

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, for subcommittee (Judge Chagares, Thomas Byron, Danielle Spinelli)

Date: October 2, 2018

Re: Rules 35 & 40 comprehensive review (18-AP-A)

At the spring meeting, the Committee proposed length limitation for responses to petitions for rehearing, and proposed that Rule 40 use the term “response” rather than “answer.” These proposals have been published for public comment. As of now, there are still no public comments.

In addition, this subcommittee was formed to undertake a more comprehensive review of Rules 35 and 40.

The subcommittee considered several basic approaches including:

- 1) aligning the structure and language of Rules 35 and 40 with each other;
- 2) revising the structure of Rules 35 and 40, drawing on the structure of Rule 21;
- 3) revising Rule 35 so that it addresses only petitions for initial hearing en banc, while revising Rule 40 so that it address both petitions for panel rehearing and rehearing en banc; and
- 4) doing nothing.

In the subcommittee’s view, the most serious problem with the current Rule 35 and Rule 40 is that it is necessary to consult both Rules in order to file a single document. This can be confusing, especially for less experienced lawyers.

For that reason, the subcommittee thinks that the third option is worth discussion by the full committee: revising Rule 35 so that it addresses only petitions for initial hearing en banc, while revising Rule 40 so that it address both petitions for panel rehearing and rehearing en banc.

If such a change were implemented, a party petitioning for rehearing—whether by the panel or the court en banc—would be able to focus on Rule 40, rather than a blend of Rule 35 and Rule 40. In addition, the distinct criteria for panel rehearing and rehearing en banc could be set forth in a single Rule. A revised Rule 40 might address whether, if both are sought, separate documents are required or permitted. Cf. Rule 35(b)(3) (referring to local rules requiring separate documents). It might also address whether a petition for rehearing en banc should also be construed as a petition for panel rehearing, or vice versa.

The subcommittee is by no means sure that this change is worth making. Not only is there the ever-present risk of harm from the disruption itself that might outweigh any benefit, but there is value in keeping in a single Rule the criteria for both initial en banc proceedings and rehearing en banc. Moreover, creating a Rule that deals only with initial en banc proceedings might encourage what is (and should be) strongly discouraged.

In approaching this project, the subcommittee would draw on local rules for ideas, structure, and language.

The subcommittee hopes to get the full committee's feedback as to whether a project along these lines is worth pursuing and, if not, whether a different approach (such as addressing discrete questions, e.g., whether separate documents are required or permitted, and whether a petition for rehearing en banc should also be construed as a petition for panel rehearing) is worth pursuing instead.

TAB 4D

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, for subcommittee (Judge Chagares, Judge Murphy, Chris Landau)

Date: October 2, 2018

Re: Rule 4(a)(5)(C) and *Hamer* (no # assigned yet)

The subcommittee has been discussing whether it would be appropriate to amend FRAP 4(a)(5)(C) in light of the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017).

Rule 4(a) provides:

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

In *Hamer*, the district court granted plaintiff Hamer an extension for more than the 30 days permitted by Rule 4(a)(5)(C). Hamer filed a notice of appeal within the time set by the district court, but beyond the 30 days permitted by Rule 4(a)(5)(C). The court of appeals dismissed Hamer’s appeal, treating the 30 day limit on extensions as jurisdictional.

The Supreme Court vacated the dismissal, distinguishing between statutory time limits for appeal, such as those contained in 28 U.S.C. §2107(c), and mandatory claim-processing rules, such as those contained in a Federal Rule of Appellate Procedure. It explained that the phrase “ ‘mandatory and jurisdictional’ is erroneous and confounding terminology where, as here, the relevant time prescription is absent from the U.S. Code. Because Rule 4(a)(5)(C), not § 2107, limits the length of the extension granted here, the time prescription is not jurisdictional.” *Hamer*, 138 S. Ct. at 21. A mandatory claim-processing rule, unlike a jurisdictional rule, is subject to waiver or forfeiture. The Court has not yet decided whether a mandatory claim-processing rule is also subject to equitable exceptions. *Id.* at 18 & n.3.

Accordingly, the Court left several questions open on remand, including (1) whether the defendants’ failure to raise any objection in the District Court to the overlong time extension, by itself, effected a forfeiture; (2) whether the defendants could gain review of the District Court’s time extension only by filing a cross appeal; and (3) whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)’s time constraint. *Id.* at 22.

As the subcommittee sees it, there are three major directions that the full Committee might take in light of *Hamer*:

- 1) delete Rule 4(a)(5)(C), leaving no time limit on the extension a district court could set;

2) amend Rule 4(a)(5)(C) to provide some room for flexibility in the 30 day limit for an extension and/or establish standards and procedures for determining forfeiture and waiver;

3) do nothing, leaving the 30 day limit in Rule 4(a)(5)(C) as a mandatory claim processing rule.

Delete Rule 4(a)(5)(C). One might think that there is no choice but to delete Rule 4(a)(5)(C) because the relevant statute sets no limit on the length of an extension granted by a district court, so long as the motion requesting an extension is “filed not later than 30 days after the expiration of the time otherwise set for bringing appeal,” and the district court finds “excusable neglect or good cause.” 28 U.S.C. § 2107. But the Federal Rules are full of non-statutory time limits. See FRCP 4(m) (setting a time limit for service); FRCP 12(a) (setting a time limit to answer or move); FRCP 14 (setting a time limit to file a third-party complaint as of right); FRCP 15(a) (setting a time limit for amending a pleading as of right); FRCP 59(b) (setting a time limit for a motion for a new trial); FRAP 27(a)(3) (setting a time limit to respond to a motion); FRAP 29(a)(6) (setting a time limit for amicus briefs); FRAP 31 (setting time limits for filing briefs); FRAP 40(a) (setting a time limit for a petition for panel rehearing).

Perhaps one might distinguish these Rules as non-jurisdictional, but the very point of *Hamer* is that Rule 4(a)(5)(C) itself is non-jurisdictional.¹ And if there were any doubts about the legitimacy of the current Rule 4(a)(5)(C) it would be extraordinary that Justice Ginsburg’s opinion for an unanimous Court breathed not a word of such doubt. Instead, the Court treated Rule 4(a)(5)(C) as a mandatory claim-processing rule, subject to waiver and forfeiture, and perhaps subject to equitable

¹ And there is even an argument that the supersession clause of the Rules Enabling Act would allow a Rule to supersede a statutory time limit. See 28 U.S.C. § 2072 (“All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”).

exceptions, and remanded for consideration of various ways those doctrines might apply to avoid the enforcement of Rule 4(a)(5)(C).

For these reasons, the subcommittee does not see any obligation to delete Rule 4(a)(5)(C). And there are very good policy reasons to not do so: permitting a limitless extension of time to file a notice of appeal would be quite inconsistent with the demands of finality.

Amend Rule 4(a)(5)(C) to provide more flexibility and/or procedures and standards for waiver and forfeiture. Now that *Hamer* has made clear that the current Rule 4(a)(5)(C) is not jurisdictional, and that the statute would permit a longer extension than 30 days, the Committee might consider providing the district court with some greater flexibility. A “good cause” standard for a longer extension seems too generous: after all, good cause is a basis for an extension at all. Another possible standard might be “extraordinary circumstances” as the pending amendment to FRAP 41(d)(4) provides.

Similarly, now that *Hamer* has made clear that the current Rule 4(a)(5)(C) is subject to waiver and forfeiture, the Committee might consider procedures or standards to determine waiver and forfeiture. For example, the Committee might consider requiring that any motion for an extension be served on all other parties (the current Rule permits *ex parte* motions in some circumstances) and request an extension of a particular length, so that failure to object to an extension of a particular length would forfeit that argument.

There are downsides to proceeding in this direction.

First, Rule 4(a)(5)(C) is not the only time limit set by the Federal Rules of Appellate Procedure that would appear to be a non-jurisdictional mandatory claim-processing rule under *Hamer*. E.g., Rule 4(a)(3) (14-day time limit for multiple appeals); Rule 4(a)(4)(A)(vi) (28-day limit for motions under FRCP 60 to have tolling

effect); Rule 4(b)(4) (30-day limit on extension of time to appeal in criminal cases). If it is appropriate to establish a “good cause” or “extraordinary circumstances” exception for standard for Rule 4(a)(5)(C), is there any reason not to also do so for these Rules?

Second, issues of forfeiture and waiver are ubiquitous. If establishing procedures and standard regarding forfeiture and waiver are appropriate for Rule 4(a)(5)(C), is there any reason not to also do so more generally?

Third, it is an open question whether a mandatory claim-processing rule like Rule 4(a)(5)(C) is subject to equitable exceptions in general, and the doctrine of “unique circumstances” in particular. The “unique circumstances” doctrine “covers cases in which the trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information.” *Carlisle v. United States*, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring). Writing an exception into the text would immediately raise the question of the relationship between the textual exception (on the one hand) and equitable exceptions and “unique circumstances” (on the other).

Do nothing, leaving the 30 day limit in Rule 4(a)(5)(C) as a mandatory claim-processing rule. The downsides noted above are, naturally enough, reasons to do nothing. There are, however, at least two downsides of doing nothing.

First, lawyers and judges might think (*Hamer* notwithstanding) that Rule 4(a)(5)(C) is jurisdictional. Second, there may be extreme situations in which an extension longer than 30 days might be appropriate.

One final note: The Supreme Court has granted certiorari in a case pending this term that poses the question whether compliance with a mandatory claim-processing rule is also subject more broadly to equitable exceptions. *Nutraceutical Corp. v. Lambert*, No. 17-1094. The question presented states:

Federal Rule of Civil Procedure 23(f) establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. On numerous occasions, this Court left undecided whether mandatory claim-processing rules, like Rule 23 (f), are subject to equitable exceptions, because the issue was not raised below. See, e.g., *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3, 22 (2017). That obstacle is not present here.

The question presented is: did the Ninth Circuit err by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline?

As the Ninth Circuit acknowledged below, its decision conflicts with other United States Circuit Courts of Appeals that have considered this issue (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1094.html>

The pendency of *Nutraceutical* might be a reason to do nothing for the time being. If the Court decides that equitable exceptions generally apply to mandatory claim-processing rules, the Committee might think that no further action is required. If the Court decides that there are no equitable exceptions to mandatory claim-processing rules, the Committee might think that some text-based exceptions are appropriate.

TAB 5

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TAB 5A

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**COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

Wm. Terrell Hodges, Chair

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May 1, 2018

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Chief Judges, United States District Courts
Clerks, United States Courts of Appeals
Clerks, United States District Courts

From: Honorable Wm. Terrell Hodges *Wm. Terrell Hodges*
Chair, Committee on Court Administration and Case Management

RE: **PRIVACY CONCERN REGARDING SOCIAL SECURITY AND IMMIGRATION OPINIONS
(INFORMATION)**

On behalf of the Committee on Court Administration and Case Management (CACM), I write to alert you to a privacy concern regarding sensitive personal information made available to the public through opinions in Social Security and immigration cases. For those courts that choose to adopt it, we offer a change to chambers practice, which the Committee believes will go a long way toward addressing this concern.

Nature of the Committee's Concern

About fifteen years ago, with the advent of electronic case files and increased public accessibility to court records, this Committee developed, and the Judicial Conference approved, a privacy policy aimed at protecting personal and sensitive information. The policy provides for remote public access to case files, but requires parties to redact certain personal identifiers.¹ JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16. The policy was subsequently codified

¹ The personal identifiers to be redacted are Social Security numbers, taxpayer identification numbers, names of minor children, financial account numbers, dates of birth, and, in criminal cases, home addresses.

in the Federal Rules of Procedure,² and has been largely successful in limiting the availability of personal identifiers.

Under the privacy policy and subsequent federal rules, documents related to Social Security and immigration cases have a unique status. They are not available via remote public access, and instead can only be accessed at the courthouse.³ These access limits are motivated by the substantial personal and medical information contained in these cases and the difficulty of redacting the sensitive information they contain.⁴ The restrictions do not, however, extend to dockets or court-issued opinions. Fed. R. Civ. P. 5.2(c)(2)(B).⁵ As a result, the opinions, which (by their very nature) often contain a large amount of personal and medical information, remain widely available to the public through a number of government and commercial sources, including the Federal Digital System (FDsys) document repository administered by the Government Publishing Office (GPO); PACER; court websites⁶; and legal research databases such as Westlaw and LexisNexis. Indeed, unlike most documents accessible through PACER, opinions are often available through public search engines such as Google.

This results in a self-defeating scenario in which Fed. R. Civ. P. 5.2(c)(2)(B) restricts remote public access to Social Security and immigration cases because the information they contain is too sensitive to be broadly available, but then places no limits on public access to the opinions that contain much of the same information and are the likeliest documents to be circulated and scrutinized. Though the Committee believes there is a substantial, valid interest in having these opinions publicly available, widespread dissemination defeats the purpose of not making other documents from these cases available via remote access, which is to limit the release of personal and sensitive information.

Addressing this Concern

For these reasons, the Committee has investigated potential options for better balancing the need to provide public access to Social Security and immigration opinions with the need to protect the highly personal information they contain. In this process, the Committee has consulted with stakeholders including the Office of Privacy and Civil Liberties (OPCL) in the U.S. Department of Justice (DOJ), the Executive Office of Immigration Review (EOIR), the Social Security Administration (SSA), the District Clerks' Advisory Group (DCAG), and the Appellate Clerks' Advisory Group (ACAG).

² See Fed. R. App. P. 25(a)(5); Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037.

³ Specifically, the exception found in Fed. R. Civ. P. 5.2(c) applies to any action “for benefits under the Social Security Act” or “relating to an order of removal, to relief from removal, or to immigration benefits or detention.”

⁴ An Advisory Committee Note to Civil Rule 5.2 explains that these cases “are entitled to special treatment due to the prevalence of sensitive information and the volume of filings.”

⁵ The rule states that, in Social Security Act and immigration cases, any person may have remote electronic access to “the docket maintained by the court; and an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.”

⁶ Courts must provide website access to all written opinions in a text searchable format, regardless of whether they are to be published. E-Government Act of 2002, Pub. L. No. 107–347, 116 Stat 2899, Sec. 205(a)(5).

Ultimately, the Committee decided that the most efficient means of improving protections over private Social Security and immigration case information is to encourage courts to **consider adopting a local practice of using only the first name and last initial of any non-government parties in the opinions in these cases.**⁷ This will ensure that the public maintains access to the opinions (in compliance with Civil Rule 5.2(c)(2)(B) and the E-Government Act of 2002), while still obscuring parties' identities within the opinions.⁸ The Committee is aware that docket sheets and other case documents available on PACER would still allow a determined member of the public to access sensitive Social Security and immigration information and identify the associated party. However, taking these proactive measures would eliminate the easy access to this information – including identifiers – that is now provided by public search engines. In addition, the CACM Committee has asked the Standing Committee on Rules of Practice and Procedure to consider whether any changes to Fed. R. Civ. P. 5.2(c) or related rules are needed to protect personal and sensitive information more effectively, while furthering national uniformity.

Thank you for the thoughtful consideration we know you and your colleagues will give to this issue.

If you have any questions or concerns, please feel free to contact Sean Marlaire, Policy Staff, Court Services Office, at 202-502-3522 or by email at Sean.Marlaire@ao.uscourts.gov.

cc: Circuit Executives

⁷ The Committee considered whether courts should use only the initials of non-government parties but declined to adopt that approach at the Social Security Administration's urging. The Committee considered and ultimately found persuasive the fact that using only initials would result in confusion and a potentially unmanageable volume of identically titled cases.

⁸ The courts may also wish to consider whether, when posting these opinions to their websites, they should obscure the non-government parties' names wherever they might be listed alongside the posted opinion.

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TAB 5B

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, reporter

Date: October 2, 2018

Re: Privacy concerns regarding social security & immigration opinions (18-AP-C)

A memo from Judge Wm. Terrell Hodges, the chair of the Committee on Court Administration and Case Management, has been placed on the agenda of the Advisory Committee on the Federal Rules of Appellate Procedure.

The main point of that memo is to encourage courts to adopt a local practice of using only the first name and last initial of non-governmental parties in the opinions issued in social security and immigration cases. This request seems addressed, at most, to local rules or IOPs, if not just to opinion writing norms. See, e.g., CA3 IOP 5.4 (providing for when counsel and the lower court judge are listed on the opinion). I don't know of anything in the FRAP that attempts to tell judges how to draft their opinions, and the letter does not ask for such Rules.

The memo also has a sentence asking the Standing Committee to consider whether any changes to FRCP 5.2(c) or related rules are needed. The relevant FRAP is FRAP 25(a)(5), which simply piggybacks on FRCP 5.2, as well as FRCrP 491, and FRBP 9037. So if any changes are made to any of those rules, they would flow through to the FRAP. I think it would be a mistake to try to have a different approach to privacy in the courts of appeals, so this piggyback approach seems to make the most sense. (Supreme Court Rule 34.6 does largely the same thing, piggybacking on FRAP 25(a)(5), FRCP 5.2, FRCrP 491, and FRBP 9037.)

The particular Rule cited in the memo—FRCP 5.2(c)—deals with remote PACER access. It would be particularly odd, I think, to have a different PACER access rule for the courts of appeals.

None of the Appellate Forms speaks to the narrow question of remote PACER access. Form 4—the IFP affidavit form—is relevant to the broader concerns of FRCP 5.2. But that form already matches FRCP 5.2 in asking for only the last 4 digits of a SSN, and only the initials of dependent minors. These changes were made, effective December 1, 2010, to limit “the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).” Report of the Standing Committee at 3 (September 2009).

For these reason, it appears that the memo from Judge Hodges does not call for any action from this Committee at this time.

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BY ELECTRONIC MAIL

August 13, 2018

The Hon. Michael A. Chagares, Chair
Prof. Edward Hartnett, Reporter
Advisory Committee on Appellate Rules

RE: Participation of Former Judges

Dear Judge Chagares and Prof. Hartnett:

When judges leave the bench—by death, resignation, or otherwise—their votes sometimes live on. In *Altera Corp. v. Commissioner*, Nos. 16-70496, 16-70497 (9th Cir. July 24, 2018), for example, the deciding vote was cast by Judge Stephen Reinhardt, who had passed away nearly four months earlier. This decision and others like it have generated substantial public controversy, culminating in *Altera's* withdrawal by a reconstituted panel on August 7. Yet similar opinions have not been withdrawn, and the issue seems to be a recurring one. I suggest that the Committee consider further rulemaking on this topic. In particular, I propose that participation in issuing an order or judgment be limited to those judges who are authorized to participate when the order or opinion is delivered to the clerk for entry on the docket.

Under 28 U.S.C. § 46, appellate cases are normally heard and determined by three-judge panels or by the court en banc, with a quorum defined as “[a] majority of the number of judges authorized to constitute a court or panel thereof.” § 46(d). In many situations, then, a single judge’s departure will have no effect on the result. The remaining two judges on the panel, or the many other judges of the en banc court, will suffice for a quorum and may decide the case themselves. See, e.g., *Riederer v. United Healthcare Servs., Inc.*, No. 16-3041, 2018 WL 3569959, at 1 n.* (7th Cir. July 24, 2018); *Wabakken v. Cal. Dep’t of Corr. & Rehab.*, 725 F. App’x 564, 566 n.* (9th Cir. 2018); *Hayes v. N.Y.*

Att’y Grievance Comm., 672 F. 3d 158, 161 n.** (2d Cir. 2012); *United States v. Leshen*, 453 F. App’x 408, 409 n.1 (4th Cir. 2011); see also *United States v. Desimone*, 140 F. 3d 457 (2d Cir. 1998).

A problem arises, however, when a former judge has cast the deciding vote. While I have not conducted a full survey, courts appear to handle this problem in a number of different ways. For example:

- Sometimes a court adds a new judge to a diminished panel, whether preemptively, as in *Lanning v. Southeastern Pennsylvania Transportation Authority*, 308 F. 3d 286, 286 n.* (3d Cir. 2002), or after a petition for rehearing, as in *Greenberg v. FDA*, 803 F. 2d 1213, 1215 (D.C. Cir. 1986).
- Sometimes the local rules require adding an additional judge only if the remaining panel judges disagree, as under 2d Cir. IOP E(b), 8th Cir. R. 47E, or Fed. Cir. R. 47.11, or only in certain categories of cases, as under 9th Cir. General Order 3.2.h.
- Sometimes the equally divided court affirms the judgment under review, as in *Mayor & City Council of Baltimore v. Mathews*, 571 F. 2d 1273, 1276 (4th Cir. 1978) (en banc) (per curiam).
- And sometimes, as had occurred in *Altera*, a former judge’s vote is counted even after he or she has left office, as in *Rizo v. Yovino*, 887 F. 3d 453, 456 n.* (9th Cir. 2018) (en banc) (eleven days), *Hernandez v. Chappell*, 878 F. 3d 843, 845 n.** (9th Cir. 2017) (thirty-four days), *Hillsdale College v. HEW*, 696 F. 2d 418, 419 n.* (6th Cir. 1982) (twenty days), *vacated on other grounds*, 466 U.S. 901 (1984), and *Ass’n of National Advertisers v. FTC*, 627 F. 2d 1151, 1154 n.* (D.C. Cir. 1979) (thirty-seven days), *cert. denied*, 447 U.S. 921 (1980).

Counting a former judge’s vote may appear to promote judicial economy or to show respect to a former colleague. But however well-motivated it may be, counting the vote of someone who is no longer an

Article III judge is an improper practice for a court of law. Judges cannot exercise their legal authority after they leave office. Under current law, this authority is needed whenever the judges act, including when they file an opinion or order on behalf of the court. Treating a former judge's vote as decisive, even for efficiency's sake, would exceed this authority and might unduly limit the court's consideration of the issues. And leaving the matter up to discretion and circumstance might undermine public confidence in the judicial process, especially in a contentious case. The issue ought to be addressed by a uniform rule, and the only proper rule is one that limits participation to those judges still authorized to act.

A judge's authority is conferred by law, and the law defines when this authority ends. A judge's tenure in office might end for any number of reasons, including death, resignation, conviction after impeachment, or the expiration of the commission granted by an Article II recess appointment. Or a judge who remains in office might be rendered unable to participate in a particular case, whether by temporary disability or by a newly created conflict. (Say, if a relative acquires an interest that 28 U.S.C. § 455 treats as disqualifying.)

These departures, disqualifications, or recusals do not invalidate past orders of the court. But neither do they allow individuals who are no longer "judges authorized to constitute a court or panel," § 46(d), or who legally "cannot sit because recused or disqualified," § 46(b), to issue *new* orders or to participate further in the case. The not-yet-final vote of a judge who has passed away has no more legal authority than that of a judge who has been impeached and convicted, who has resigned from office, or whose temporary commission has expired. Such a person is no longer an Article III judge; and "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel." *Nguyen v. United States*, 539 U.S. 69, 80–81 (2003).

This is how the law treats judicial status in other contexts. For example, the Judicial Council of the Second Circuit recently concluded that it could not investigate misconduct allegations against Judge Alex Kozinski, because his immediate retirement under 28 U.S.C. § 371(a) meant that he was no longer “a circuit judge” under 28 U.S.C. § 351(d)(1). According to the Judicial Council, he had “resigned the office of circuit judge, and [he] can no longer perform any judicial duties.” *In re Complaint of Judicial Misconduct*, No. 17-90118, slip op. at 2–3 (2d Cir. Judicial Council Feb. 5, 2018). A private citizen who can no longer be the subject of a judicial misconduct investigation can hardly bear responsibility for the future disposition of a still-pending case. Determining the outcome of a pending case is a judicial duty—indeed, one of the more important ones. And if a judge who has left office voluntarily “can no longer perform any judicial duties,” the same is true of a judge who has passed away.

Altera’s initial approach therefore seems inconsistent with the current law governing the composition of the appellate courts. As the Supreme Court has held in a closely related context, a judge’s authority to participate in a case must be assessed as of the time the case is decided. In *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960), the Court concluded that the prior version of § 46 did not allow a retired judge to cast the deciding vote in an en banc proceeding—even though the case had been fully submitted to the en banc court weeks before his retirement took effect. The Court noted that § 46 then referred to cases “heard and *determined*” en banc only by judges in active service, and it concluded that “[t]he literal meaning of the words seems plain enough[:] * * * A case or controversy is ‘determined’ when it is decided.” *Id.* at 688. Today’s version of § 46 likewise refers to cases being “heard and determined” by panels of judges—not panels of former judges or of private citizens. See § 46(c); accord § 46(b) (“hearing and determination”). If a case is determined when it is decided, then a person who is no longer a member of the court when its decision is made may not take part in the court’s determination.

The legal argument for counting a former judge’s deciding vote has to be that the vote had already “vested” at some earlier time, when the judge did have legal authority to act. But a judge does not exercise his or her legal authority by agreeing to a disposition at a postargument conference—or even by approving a draft opinion, giving its author some kind of permanent proxy to file the opinion with the clerk. While certain orders may be entered by a single judge or even the clerk of court, see Rule 27(b)–(c), any other judicial acts must be those of the full court or panel, which can act only by a majority of a quorum. See generally *Arnold v. E. Air Lines, Inc.*, 712 F. 2d 899, 905–06 (4th Cir. 1983) (citing H. Robert, Robert’s Rules of Order § 43, at 339 (S. Robert ed., 1970)).

Once the deciding judge departs or is disqualified, that majority of a quorum is absent. If *two* judges on a panel die or resign, the panel plainly lacks a quorum under § 46(d) to file any new order or opinion: a quorum is needed for the court to “legally transact judicial business,” *Tobin v. Ramey*, 206 F. 2d 505, 507 (5th Cir. 1953), and filing an order or opinion is judicial business. And if a single judge’s departure leaves the court equally divided, then there is no majority on whose behalf the remaining judges might act. As the Supreme Court has long held, “no affirmative action can be had in a cause where the judges are equally divided in opinion,” other than to leave “in full force” any judgment under review. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868). That is why the Court, after the death of Justice Scalia, affirmed a number of decisions by equal division and without precedential effect—see, e.g., *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016)—rather than treating Justice Scalia’s vote as having been permanently cast on the date of some prior conference vote or “join” memo.

Even if it were permitted by law, *Altera’s* approach would still be bad policy. The decision of a circuit court determines the law of the circuit: every word and phrase may have a significant impact, not only on the parties, but on other cases and on the public at large. If other judges continue to work on a case after their former colleague has cast the deciding vote, the eventual opinion can no longer carry the authority

of the full court or panel. Any subsequent changes to the “majority” opinion or order will reflect the choices of less than a majority of a quorum—indeed, perhaps only the choices of a single judge.

The same is true if a former judge’s vote is counted while dissents and concurrences are still in the works. In *Hernandez*, Judge Harry Pregeron’s deciding vote was counted thirty-four days after his death, on the theory that he had “fully participated in this case and formally concurred in this opinion”—presumably referring to the majority opinion—“after deliberations were complete.” 878 F. 3d at 845 n.**. During that thirty-four day period, however, any changes that might have been made to a dissent or a concurrence would have had no opportunity to persuade the judge whose vote was decisive. If local rules permit, a majority of a court or panel can always choose to file its opinion immediately, with separate concurring or dissenting opinions to be published later. But the majority judges’ choice *not* to do so is a choice to keep their options open and their votes nonfinal, which gives their colleagues a chance to convince them otherwise before any final determination is made. To count the vote of a former judge is to preserve that judge’s once-expressed views in amber, a practice fundamentally inconsistent with the full and deliberate consideration that appellate courts owe to the parties and the public.

The most plausible scenario for counting a former judge’s vote is when “[t]he majority opinion and all [separate opinions] were final, and voting was completed,” prior to the judge’s departure. *Rizo*, 887 F. 3d at 456 n.*. Releasing already-written opinions might seem sensible *ex post*—not only to avoid rehearing a case that had been considered at length, but also to avoid any apparent disrespect to the memory of a beloved colleague. Still, the remaining five judges who had joined Judge Reinhardt’s opinion in *Rizo* could not lawfully treat their own judgment as that of the en banc court, when five other members of that court disagreed with them. And a rule that such judgments may be issued in the future, so long as no changes are made to the drafts after the decisive judge leaves office, would also impose an improper burden *ex ante*: it would prevent other members of the court from making what

they might see as necessary changes to their own opinions, on pain of forcing a reconstituted panel, reargument, or affirmance by an equally divided court. (Indeed, such a rule could even be triggered strategically by a judge who hopes for such a result.)

Determining circuit precedent by counting the votes of former judges has the potential to undermine public confidence in the judiciary and in the quality of its decisions. It has already been the subject of much public commentary, most of it starkly negative.¹ And public confidence requires that the practice be stopped *by rule*, rather than by leaving the winning vote in an important case up to circumstance or local variation. Judges' departures from office can come all too suddenly, and the public should be able to depend upon a regular, open, and evenhanded procedure for addressing them. Especially in a contentious case, there should be no suspicion that the outcome has rested on ad hoc decisionmaking or unpredictable discretion. As Congress has created a largely uniform system of appellate courts, there are no local circumstances relevant to this issue that might require the use of different rules in different circuits.

If a general rule is to be made, it should make clear that a judge's vote "vests" only when the order or opinion at issue is actually delivered to

¹ See, e.g., Jonathan H. Adler, *The Dead Can Vote (At Least on the Ninth Circuit) (Updated)*, Volokh Conspiracy (July 25, 2018, 3:49 p.m.), <https://goo.gl/c49RHc>; Howard J. Bashman, *Dead Judges Voting: When Does Life Tenure End?*, Law.com (Feb. 21, 2006), <https://goo.gl/Nqh2s5>; Howard J. Bashman, *Reader Mail on the Subject of Dead Judges Voting*, How Appealing (May 24, 2006, 11:15 p.m.), <https://goo.gl/NMB6us>; Patrick Gregory, *Multiple Circuits Let Dead Judges Vote in Cases*, Bloomberg Law: Big Law Business (Apr. 16, 2018), <https://goo.gl/Vp5D2G>; Tony Mauro, *Posthumous Judging: Appeals Courts Allow It, but Not the Supreme Court*, The Recorder (Apr. 9, 2018, 5:38 p.m.), <https://goo.gl/j7EkjC>; Chris Walker, *Nearly Four Months After His Death, Judge Reinhardt Casts the Deciding Vote in an Important Tax Exceptionalism Case: Altera v. Commissioner of Internal Revenue*, Yale J. Reg. Notice & Comment (July 24, 2018), <https://goo.gl/Z1AaCh>; Ed Whelan, *Reinhardt Votes from the Grave*, National Review: Bench Memos (July 27, 2018, 11:07 a.m.), <https://goo.gl/iKxVcn>; see also Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. Chi. L. Rev. 481, 490 n.37 (1983) (noting cases without detailed discussion).

the circuit clerk for entry on the docket. As Rule 36(a)(1) describes, the clerk normally prepares and enters a judgment upon receiving an opinion from the judges assigned to the case. This duty is purely ministerial: with qualifications not relevant here, the rule states that “[t]he clerk *must* prepare, sign, and enter the judgment.” *Id.* (emphasis added). Once the court has delivered materials to the clerk for entry on the docket, the case has been “determined” within the meaning of § 46(c): the judges’ work is done, no further action on their part is necessary, and the clerk’s subsequent conduct no longer depends on the presence or qualifications of a particular judge. Cf. *Monteiro v. City of Elizabeth*, 436 F. 3d 397, 399 n.* (3d Cir. 2006) (releasing an opinion that had been “submitted * * * to the Clerk’s office for processing” while the panel was fully still constituted). If, however, the materials have not yet been handed off to the clerk, then the law still requires some further action by the judges assigned to the case—and an action supported by fewer than a majority of qualified judges cannot be treated as that of the court.

I suggest that the Committee consider the need for rulemaking on this issue at its next meeting. The date on which a judge’s vote “vests” is a topic that falls within the Supreme Court’s authority “to prescribe general rules of practice and procedure * * * for cases in the * * * courts of appeals.” 28 U.S.C. § 2072(a). That said, the topic has not yet been addressed through rulemaking, and there is no natural home for such a provision in any of the Appellate Rules. The most appropriate location for an amendment may well be Rule 36, which currently addresses the procedure for entering judgments, and which could be expanded to include this issue as well.

While drafting any precise language may be premature, I propose amending that rule substantially as follows, with additions indicated in red:

Rule 36. Entry of Judgment; Notice; Participation

(a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court’s opinion—but if settlement of the judgment’s form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

(c) Participation. Unless these rules provide otherwise, only those judges authorized to be counted toward a quorum when an order or opinion is delivered to the clerk may participate in issuing the order or judgment.

This amendment would limit participation to the judges “authorized to be counted toward a quorum.” That, in turn, is limited by § 46(d) to those judges who are authorized by statute “to constitute a court or panel thereof,” and it is further limited by disqualification provisions (such as 28 U.S.C. §§ 47 and 455) and by the recusal decisions of individual judges. Judges who have chosen to recuse themselves, who may not lawfully participate in a particular matter, or who are no longer in office are not counted toward the quorum, see, *e.g.*, *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1053–54 (5th Cir. 2010), and their votes should not be counted either.

(The proviso “unless these rules provide otherwise” is inserted to account for Rule 27(b), which allows a court “to authorize its clerk to act on specified types of procedural motions.” In such a case, a person other than a qualified judge would lawfully participate in issuing the order of the court.)

The Hon. Michael A. Chagares & Prof. Edward Hartnett
RE: Participation of Former Judges
August 13, 2018
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I hope this is helpful to you. Please do not hesitate to contact me if there is more information that I can provide, and thank you for your time and attention.

Respectfully,

A handwritten signature in blue ink that reads "Stephen E. Sachs".

STEPHEN E. SACHS

SES/ses

cc: Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure

TAB 5D

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, reporter

Date: October 2, 2018

Re: Participation of former judges (18-AP-D)

I have only three brief comments to add to Professor Sachs' detailed letter suggesting an amendment to FRAP 36. The proposed amendment would establish that only those judges authorized to be counted toward a quorum when an order or opinion is delivered to the clerk may participate in issuing the order or judgment. In effect, the proposed amendment would establish delivery of an order or opinion to the clerk—and not some earlier time—as the operative time when a case is determined.

First, while rulemaking in this area may be useful and valuable, there may not be much (if any) choice of permissible rules. That is, if a case is “determined” within the meaning of 28 U.S.C. §46 at the time of the delivery of an order or opinion to the clerk, it might well be that no Rule could establish a different time. The Committee may wish to take care to avoid suggesting the contrary.

Second, while current Supreme Court practice appears to be consistent with the proposed Rule, it is sometimes said that the Supreme Court of the United States counted Justice Grier's vote in *Hepburn v. Griswold*, 75 U.S. 603 (1870), even though he had retired effective January 31, 1870, and the opinion was announced on February 7, 1870. See, e.g., David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chi. L. Rev. 995 (2000) (stating that “Chief Justice Chase was intensely committed to using Grier's vote to support a majority decision” despite “Grier's demonstration of mental incapacity during the conference discussion”); *Knox v. Lee*, 79 U.S. 457, 572 (1871) (Chase, C.J., dissenting) (describing *Hepburn* as decided by a vote of five to three). In *Hepburn*, the opinion of the court recited, “It is proper to state the Mr. Justice Grier, who was a

member of the court when the case was decided in conference, and when this opinion was directed to be read . . . concurred in the opinion” that the legal tender clause, as construed by the other judges, was unconstitutional. *Id.* at 626. This can plausibly be read as simply a notation of Justice Grier’s views, even though his vote did not count. Cf., e.g., *Mayor of New York v. Miln*, 36 U.S. 102 (1837) (Story, J., dissenting) (noting that “the late Mr. Chief Justice Marshall” had heard the arguments in the case at an earlier term and that “his deliberate opinion” coincided with Justice Story’s). If Grier is not counted, there were seven participating justices, and the decision was four to three. Thus Grier’s vote was not necessary to make the Chief Justice’s opinion an opinion of the Court. Moreover, the paragraph about Justice Grier’s views comes at the very end of the opinion, after the paragraph concluding that the judgment under review must be affirmed. Thus there is reason to doubt, despite the protestations of Chief Justice Chase when *Hepburn* was overruled, that Justice Grier’s vote did count in *Hepburn*. See CHARLES FAIRMAN, 6 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 677 (1971) (describing *Hepburn* as decided by Chief Justice Chase, joined by Justices Nelson, Clifford, and Field, over the dissent of Justices Miller, Swayne, and Davis); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 157 (1993) (stating that when *Hepburn* was decided, the “Supreme Court consisted of only seven members”); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 42 (1941) (stating that “[b]efore the decision was announced, Grier resigned, and the score was announced 4 to 3”); cf. *Finishing Inc. v. Di-Chem*, 419 U.S. 601, 617 (1975) (Blackmun, J., dissenting) (describing *Hepburn* as “assertedly” decided by a five to three vote). Even if *Hepburn* is read as supporting the counting of a vote when the judge retires before the decision is announced, it simultaneously illustrates the danger of such a practice. *Hepburn* was overruled a year later, and the entire episode is regarded as “ignominious and embarrassing.” Garrow at 1005; see also *Di-Chem*, 419 U.S. at 618 (describing *Hepburn* as producing “prompt reversal of opinion, embarrassment, and recrimination”).

Third, there is a petition for certiorari pending in *Fresno County Superintendent of Schools v. Rizo*, No. 18-272, that presents the question: “May deceased judges continue to participate in the determination of cases after their deaths?” The petition argues that 28 U.S.C. §46 and Article III answer that question in the negative. <http://www.scotusblog.com/case-files/cases/yovino-v-rizo/>. I emphasize that the Court has not granted certiorari—indeed, the brief in opposition is not even due until November 5, 2018.