ADVISORY COMMITTEE
ON
APPELLATE RULES

October 20, 2020

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of October 20, 2020
Via Microsoft Teams

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TAB 1

TAB 1A

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Members	Position	District/Circuit	Start Date	End Date
Jay S. Bybee Chair	C	Ninth Circuit	Member: 2017 Chair: 2020	---- 2023
Judith L. French	JUST	Ohio	2016	2022
Stephen J. Murphy III	D	Michigan (Eastern)	2015	2021
Stephen E. Sachs	ACAD	North Carolina	2016	2022
Danielle Spinelli	ESQ	Washington, DC	2017	2020
Jeffrey B. Wall*	DOJ	Washington, DC	----	Open
Paul J. Watford	C	Ninth Circuit	2018	2021
Lisa B. Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)	2019	2022
Edward Hartnett Reporter	ACAD	New Jersey	2018	2023

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TAB 1B

	FRAP Item	Proposal	Source	Current Status
7	18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting Draft approved for submission to Standing Committee 4/18 Draft approved for publication by Standing Committee 6/18 Discussed at 10/18 meeting Final approval for submission to Standing Committee 4/19 Approved by Standing Committee 6/19 Approved by Judicial Conference 9/19 Submitted to Supreme Court 10/19 Approved by Supreme Court 4/20
6	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Approved by Standing Committee 6/20
4	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 Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Remanded by Standing Committee 6/20
3	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Discussed at 4/19 meeting and subcommittee formed Discussed at 10/19 meeting and continued review Draft approved for submission to Standing Committee 4/20 Draft approved for publication by Standing Committee 6/20
1	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting and continued review Discussed at 4/19 meeting and continued review Discussed at 10/19 meeting and continued review

	FRAP Item	Proposal	Source	Current Status
				Discussed at 4/20 meeting and continued review
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed Discussed at 10/19 meeting Discussed at 4/20 meeting
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19 Discussed at 4/20 meeting and subcommittee formed
1	19-AP-G	Titles in Official Capacity Actions	Sai	Initial consideration 4/20 Discussed at 4/20 meeting and tabled pending Clerks' information
1	20-AP-A	Relation Forward of Notices of Appeal	Bryan Lammon	Initial consideration and subcommittee formed 4/20
1	None assigned	Rules for Future Emergencies	Congress (CARES Act)	Initial consideration and subcommittee formed 4/20
1	20-AP-B	Incorporate Civil Rule 11	Sai	Initial consideration 10/20
1	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration 10/20
1	20-AP-D	IFP Forms	Sai	Initial consideration 10/20
1	20-AP-E	Rule 3	Sai	Initial consideration 10/20
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21
0	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19 and subcommittee formed Discussed at 4/20 meeting and to be considered in 4/23
0	19-AP-H	Congressional Subpoenas	Wilcon	Initial consideration and removed from agenda 4/20

0 removed from agenda or deferred to future meeting
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

TAB 1C

Effective December 1, 2019

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2019)
- Approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changed 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 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to 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.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires 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. 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; clarifies 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.	

INTERIM BANKRUPCY RULES

Effective February 19, 2020

The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code – adding a subchapter V to chapter 11 – made by the Small Business Reorganization Act of 2019

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

Effective (no earlier than) December 1, 2020

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2020)

REA History:

- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)
- Approved by Standing Committee (June 2019)
- Approved by relevant advisory committee (Spring 2019)
- Published for public comment (unless otherwise noted, Aug 2018-Feb 2019)
- Approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment 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 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
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted 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. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Approved by Judicial Conference (Sept 2020)

REA History:

- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendment to Rule 3 addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendment to the proposed amendment to Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of 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).	
CR 16	Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

TAB 1D

Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ) *Co-Sponsors:* Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security • 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: The Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsors:* Booker (D-NJ) Cornyn (R-TX) Durbin (D-IL) Lee (R-UT) Paul (R-KY) Whitehouse (D-RI)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380es.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	• 5/8/19: introduced in the Senate; referred to Judiciary Committee • 5/20/20: reported out of Judiciary Committee and passed Senate without amendment by unanimous consent • 5/22/20: received in the House • 5/28/20: letter from Rules Committee Chairs sent to Judiciary Committee Chairman and Ranking Member • 9/21/20: passed House without amendment by voice vote
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	• 5/9/19: introduced in the Senate; referred to Judiciary Committee

	H.R. 3993 *Sponsor:* Johnson (D-GA) *Co-Sponsors:* Cohen (D-TN) Lieu (D-CA)	AP 29	Identical to Senate bill (see above)	• 7/25/19: introduced in the House; referred to Judiciary Committee • 8/28/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet
Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **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. 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." **Report:** None.	• 5/15/19: introduced in the Senate; referred to Judiciary Committee
	H.R. 5395 *Sponsor:* Bacon (R-NE) *Co-Sponsors:* Cook (R-CA) Graves (R-LA) Johnson (R-OH) Stivers (R-OH)		Identical to Senate bill (see above).	• 12/11/19: introduced in House; referred to Judiciary Committee • 1/30/20: Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security

Justice in Forensic Algorithms Act of 2019	**H.R. 4368** *Sponsor:* Takano (D-CA) *Co-Sponsors:* Evans (D-PA) Johnson (D-GA)		**Bill Text:** https://www.congress.gov/116/bills/hr4368/BILLS-116hr4368ih.pdf **Summary:** The stated purpose of the bill is, in part, "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings . . . ." The bill amends the Evidence Rules by adding two new rules and amends Criminal Rule 16(a)(1) by adding a new paragraph (H): • Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software. • Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence. • Criminal Rule 16(a)(1)(H). Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of the software,	• 9/17/19: introduced in the House; referred to Judiciary Committee and the Committee on Science, Space, and Technology • 10/2/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet

			necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include— (i) the name of the company that developed the software; (ii) the name of the lab where test was run; (iii) the version of the software that was used; (iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs; (v) documentation of procedures followed based on procedures outlined in internal validation; (vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and (vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards. **Report:** None.	

CARES Act	**H.R. 748**	CR (multiple)	**Bill Text (as enrolled):** https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf **Summary:** Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencings. Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act. **Report:** None.	• 3/27/20: became Public Law No. 116-136 • Spring 2020: Advisory Committees form subcommittees to study rules amendments to address emergency situations
Abuse of the Pardon Prevention Act	**H.R. 7694** *Sponsor:* Schiff (D-CA) *Co-Sponsor:* Nadler (D-NY)	CR 6	**Bill text:** https://www.congress.gov/116/bills/hr7694/BILLS-116hr7694ih.pdf **Summary:** Under Section 2, subsection (a), when the President grants an individual a pardon for a covered offense, within 30 days the Attorney General must provide Congress with "all materials obtained or prepared by the prosecution team, including the Attorney General and any United States Attorney, and all materials obtained or prepared by any investigative agency of the United States government, relating to the offense for which the individual was so pardoned." Subsection (b) states that "Rule 6(e) [which addresses recording and disclosing of grand jury proceedings] of the Federal Rules of Criminal Procedure may not be construed to prohibit the disclosure of information required by subsection (a) of this section." **Report:** None. **Related Bills:** H.R. 1627 (introduced 4/12/19) and S. 2090 (introduced 7/11/19)	• 7/21/20: introduced in House; referred to Judiciary Committee • 7/23/20: mark-up session held; reported out of Judiciary Committee

TAB 2

TAB 2A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 23, 2020

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) convened on June 23, 2020 by videoconference. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

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

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

Advisory Committee on Criminal Rules
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, 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 Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff Analysts; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

* Elizabeth J. Shapiro (Deputy Director, Federal Programs Branch, Civil Division) and Andrew D. Goldsmith (National Coordinator of Criminal Discovery Initiatives) represented the Department of Justice on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

OPENING BUSINESS

Professor Catherine Struve, Reporter to the Standing Committee, and Professor Daniel Coquillette, Consultant, honored Judge David Campbell for his 15 years of service with the Rules Committees and presented mementos to Judge Campbell on behalf of the Standing Committee's members, staff, and consultants and the advisory committee Chairs and Reporters. Three former Standing Committee Chairs (Judges Lee Rosenthal, Anthony Scirica, and Jeffrey Sutton) joined to congratulate Judge Campbell for a remarkable tenure with the Rules Committees. Department of Justice (DOJ) representative Elizabeth Shapiro presented a letter from Attorney General William P. Barr thanking Judge Campbell for his leadership in the rulemaking process and service to the federal judiciary. Judge Campbell thanked everyone for the kind comments and gifts of recognition.

Judge Campbell opened the meeting with a roll call and welcomed those listening to the meeting by telephone. Judge Campbell noted that the Chief Justice has extended until December 31, 2020 the terms of Rules Committees members scheduled to end on October 1, 2020. Judge Campbell welcomed a new member of the Standing Committee, Judge Patricia Millett of the D.C. Circuit, who fills the unexpired term of Judge Sri Srinivasan who recently became Chief Judge of the D.C. Circuit. Before her judicial service, Judge Millett had a distinguished career as a Supreme Court practitioner in the U.S. Solicitor General's Office and in private practice. Judge Campbell recognized those who have been newly appointed to serve as committee chairs beginning in the fall: Judge John Bates as Chair of the Standing Committee, Judge Robert Dow as Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee as Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz as Chair of the Advisory Committee on Evidence Rules. Judge Campbell thanked Judges Michael Chagares and Debra Livingston for their service as chairs.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on voice vote: **The Committee unanimously approved the minutes of the January 28, 2020 meeting.**

STATUS OF PENDING RULES AMENDMENTS

Ms. Rebecca Womeldorf reported that proposed amendments are proceeding through the Rules Enabling Act process without incident and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that, since the Committee's last meeting, the Supreme Court had adopted a package of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules. Those proposed amendments are before Congress, with a presumed effective date of December 1, 2020.

CONSIDERATION OF EMERGENCY RULES UNDER THE CARES ACT

Professor Struve provided an overview of the congressional directive in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to the Judicial Conference to consider potential rules amendments to ameliorate the effects on court operations of future emergencies. The

advisory committees have begun work on this effort, with each advisory committee focusing on its own rules set. Public comment on potential emergency procedures has been sought. The advisory committees are working on drafts for discussion at their fall 2020 meetings with the goal of presenting drafts to the Standing Committee with requests for publication in the summer of 2021. Professor Struve explained that Professor Daniel Capra will coordinate the advisory committees' collective efforts. Under the ordinary timeline of the Rules Enabling Act process, any such rules amendments could go into effect as early as December 1, 2023.

Professor Sara Beale reported on the Criminal Rules Advisory Committee's emergency rules work, which will proceed through a subcommittee, chaired by Judge James Dever. The reporters and subcommittee are conducting research and preparing for a miniconference to be held in July.

Judge John Bates provided a summary of the Civil Rules Advisory Committee's emergency rules work. A subcommittee, chaired by Judge Kent Jordan, was formed after Congress passed the CARES Act. The subcommittee has met by several times and will meet again in one week. The first task is gathering information from judges, clerks, practitioners, and the public. The reporters have examined much of that information. Judge Bates added that the question remains whether any amendments to the Civil Rules are needed and what shape they should take. Among the areas of review that have been identified generally are service issues, remote proceedings, time limits, and conducting trials. The subcommittee's goal is to have recommendations to present to the full Advisory Committee at its fall 2020 meeting.

Judge Dennis Dow reported that the Bankruptcy Rules Advisory Committee has formed a CARES Act subcommittee which has met several times. The subcommittee has discussed a general approach which would grant courts the authority to continue hearings and extend deadlines. An alternate approach would authorize courts to do so in individual cases by motion or sua sponte, notwithstanding other limitations and restrictions that may exist in the rules. The latter approach mirrors a similar approach being considered regarding possible changes to the bankruptcy code. The subcommittee has reviewed the Bankruptcy Rules and identified those with deadlines and provisions governing extensions. It found few, if any, impediments in the rules to a more general approach. Professor Elizabeth Gibson is preparing a draft for review at the subcommittee's next meeting. Judge Dow noted that, in the process of reviewing the rules and public submissions, several other areas have been identified. Those include electronic filing and online payment of fees by unrepresented parties, guidelines for using remote hearing technology, burdens imposed by signature verification requirements, and issues regarding service of process by mail. The subcommittee will continue study of these issues and others.

Judge Chagares reported on the work of the Appellate Rules Advisory Committee's subcommittee on emergency rules. Each subcommittee member reviewed the Appellate Rules to identify potential issues. Appellate Rule 2 provides helpful flexibility but only permits a court to suspend rules in individual cases. The subcommittee is considering an emergency provision for broader application. Rule 33 provides for appeal conferences in person or by telephone and may require revision to account for modern technology. The subcommittee expects to present any potential rules amendments at the Advisory Committee's next meeting.

Professor Capra explained that he and Judge Livingston reviewed the Evidence Rules and concluded that no amendments were necessary to address issues such as remote proceedings. Professor Capra conferred with state evidence rules committees, and they observed that evidence rules distinguish between testimony and physical presence in court. "Testimony" as used in the rules, encompasses remote testimony. Further, Rule 611 provides trial judges with authority to control the mode of testimony. Professor Capra noted that trial practice would be impacted by the use of remote testimony and the inability of juries to make credibility determinations in the same way. A remote trial renders Rule 615, which deals with sequestration of witnesses, irrelevant because witnesses will not be in the courtroom. For the past two years, the Advisory Committee has been considering whether to amend Rule 615 to clarify whether sequestration can extend beyond physical presence in the courtroom. Professor Capra added that the Advisory Committee will continue to monitor the rules for possible emergency issues. Judge Campbell repeated a question raised in a public submission regarding authentication of evidence, namely whether a faster procedure for authentication should be available to shorten remote trials. Professor Capra pointed to recent amendments to Rule 902(13) and (14), which may alleviate this problem, but stated the Advisory Committee will take another look. Finally, Professor Capra noted that remote trials may raise a face-to-face confrontation issue which will need to be considered by the rules committees generally.

A member of the Standing Committee asked whether there has been any coordination with other Judicial Conference committees on the possible implications of emergency rules. Judge Campbell explained that there has been significant coordination with the Committee on Court Administration and Case Management (CACM Committee) regarding CARES Act procedures and other accommodations. He added that this coordination should continue as the advisory committees begin formulating draft emergency rule amendments. He also suggested seeking input from the Committee on Defender Services and the Criminal Law Committee. Ms. Womeldorf noted that the Administrative Office staff supporting those Judicial Conference committees – as well as the CACM Committee and the Committee on Bankruptcy Administration – are monitoring the Rules Committees' response to the CARES Act directive to consider emergency rules.

MULTI-COMMITTEE REPORTS

Judge Chagares reported on the E-filing Deadline Joint Subcommittee which is exploring the possibility of an earlier-than-midnight deadline for electronic filing. The subcommittee continues to gather information, including data from the FJC about actual filing patterns, i.e., what time of day litigants are filing and who is filing. Judge Chagares explained that the subcommittee seeks to cast a wide net to gather as much input as possible and has reached out to law school deans, bar associations, paralegal associations, and legal assistant associations. Based on a survey conducted by the Lawyers Advisory Committee for the District of New Jersey, there are strong opinions on different sides of the electronic-filing deadline issue. The subcommittee will continue to study this issue closely.

Judge Bates reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee which was formed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction in the wake of the Supreme Court's decision in *Hall v. Hall*, 138

S. Ct. 1118 (2018). In *Hall*, the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions pursuant to Rule 42(a). The subcommittee, chaired by Judge Robin Rosenberg, is comprised of members from the Appellate Rules Advisory Committee and Civil Rules Advisory Committee. The subcommittee is looking at the effects of the *Hall* decision and developing information from the FJC. Empirical research on consolidated cases will inform the subcommittee's work to determine whether any rule change is needed. This process will take time.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Edward Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on April 3, 2020 by telephone conference. The Advisory Committee presented several action items and information items.

Action Items

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Chagares explained that the proposed amendment to Rule 42 would assure litigants that an appeal will be dismissed if the parties settle the case at the appellate level. The current rule provides that such an appeal "may [be] dismiss[ed]" by the circuit clerk and the proposed amendment would restructure the rule to remove ambiguity. Two legal entities filed comments after publication of the draft rule. The Association of the Bar of the City of New York (ABCNY) suggested that the Advisory Committee include language giving additional examples in proposed Rule 42(b)(3). Because the proposed amendment uses non-exclusive language, the Advisory Committee decided against providing additional examples. The ABCNY also suggested adding the phrase "if provided by applicable statute" to the amendment language. Because nothing in the rule permits courts of appeals to take actions by order that are not otherwise authorized by law, the Advisory Committee found the suggested addition unnecessary. The National Association of Criminal Defense Lawyers (NACDL) submitted a comment supporting the amendment as "well taken" but suggested additional language regarding the responsibilities of individual criminal defendants and defense counsel with respect to dismissals of appeals. The Advisory Committee decided against this suggestion, as the appellate rules generally do not address defense attorneys' responsibilities to clients.

Judge Chagares explained that the Advisory Committee made minor changes to the proposed amendment based on suggestions from Standing Committee members at the last meeting. First, the word "mere" was taken out of the proposed language in Rule 42(b)(3). Second, the Advisory Committee made a change to paragraph (3) to clarify that it applies only to dismissals under Rule 42(b) itself. Minor changes were also made in response to helpful suggestions by the style consultants. Judge Chagares sought final approval of the proposed amendment to Rule 42.

Referencing a comment filed by NACDL, Judge Bates flagged a concern that some local circuit rules will be inconsistent with the proposed rule's statement that a court "must" dismiss. He noted that several circuits' local rules contain other requirements (beyond those in Rule 42) for dismissal. The Fourth Circuit's local rule, for example, requires in criminal cases that a stipulation

of dismissal or motion for voluntary dismissal must be signed or consented to by the defendant. Another circuit's local rule requires an affidavit. Judge Chagares responded that the Advisory Committee had not addressed that issue. Professor Coquillette commented that a local rule which includes additional requirements beyond a uniform national rule may be considered inconsistent. Professor Capra clarified that unless a national rule prohibits additional requirements imposed by local rules, a local rule that does so is not necessarily inconsistent. Professors Coquillette and Capra agreed that local rule variances that do not facially contradict a uniform national rule have not been considered inconsistent historically. Judge Bates observed that the amendment might create uncertainty for attorneys practicing in circuits that have local rules that mandate requirements in addition to those in Rule 42 for dismissal. He asked whether language should be added to the committee note to address this potential problem. Professor Coquillette expressed concern about committee notes that change the meaning of the actual rule text. Professor Struve suggested that Judge Bates's question may warrant further consideration by the Advisory Committee, as it raises unexplored issues. She inquired whether discussion with circuit clerks may help resolve the question. Judge Campbell added that, unlike some other rules, proposed Rule 42 requires the circuit clerk to take an action rather than the parties. He recommended that the Advisory Committee take a closer look at local rules before moving forward with the proposal. Judge Chagares agreed.

Final Approval of Proposed Amendment to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares explained that the Advisory Committee began studying issues with notices of appeal in 2017. Research revealed inconsistency across the circuits in how designations in a notice of appeal are used to limit the scope of an appeal. In 2019, the Supreme Court stated in *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019), that the filing of a notice of appeal should be a "simple, non-substantive act." Consistent with *Garza*, the proposed amendments seek to simplify an

d make more uniform the process for filing a notice of appeal.

Professor Hartnett summarized the comments received on the proposal after publication. The first critical comment, submitted by Michael Rosman, asserted that the proposal was inconsistent with Civil Rule 54(b). In Mr. Rosman's view, there is no finality for appeal purposes (under 28 U.S.C. § 1291) until the district court enters a single document that recites the disposition of every claim by every party in an action; in this view, finality does not occur if the district court merely enters an order that disposes of all remaining claims. Professor Hartnett noted that neither the Advisory Committee nor the Standing Committee at its January meeting were persuaded by this critique, which had been submitted previously. The second critical comment, submitted by Judge Steven Colloton, urged abandonment of this project on the theory that litigants should be held to the choices made in their notice of appeal. In Judge Colloton's view, it is easy for a litigant to designate everything, and the Advisory Committee should not be encouraging counsel to seek to expand the scope of appeal beyond what is specified in the notice. The Advisory Committee considered this critique but was not persuaded.

Other comments urging suggestions for expanding or simplifying the proposed rule were considered and rejected by the Advisory Committee. Professor Hartnett explained that one of the suggestions, which proposed a simplification, might make the designation of a judgment or order completely irrelevant and might not overcome the problem initially identified. NACDL suggested

expanding proposed Rule 3(c)(5) to appeals in criminal cases. The provisions in paragraph (5) concern Appellate Rule 3's connection to Civil Rule 58. Professor Hartnett noted that NACDL did not identify a specific problem in criminal cases that such expansion would address. Instead, NACDL's concern was that a rule limited to civil cases might lead courts to adopt an expressio unius conclusion that a similar approach should not be taken in criminal cases. Rather than changing the proposed rule, the Advisory Committee added language to the committee note to explain that while similar issues might arise in criminal cases – and perhaps similar treatment may be appropriate – this rule is not expressing a view one way or the other about those issues. The Advisory Committee also received a suggestion regarding Rule 4(a)(4)(B)(ii)'s treatment of appeals from orders disposing of motions listed in Rule 4(a)(4)(A). The suggestion is that Rule 4(a)(4)(B)(ii) be amended to remove the requirement that appellants file a new or amended notice of appeal in order to challenge orders disposing of such motions. The Advisory Committee chose not to make changes in response to this suggestion, which would require further study and republication. This question, however, is closely related to a new suggestion to more broadly allow the relation forward of notices of appeal to cover decisions issued after the filing of the notice. The Advisory Committee decided that the best way to address these issues would be to roll them forward for future consideration.

At the Standing Committee's January 2020 meeting, members raised some concern that the proposed rule may inadvertently change the doctrine that treats a judgment as final notwithstanding a pending motion for attorneys' fees. To address this concern, the Advisory Committee added language to the committee note explaining that the proposed amendment has no effect on Supreme Court doctrine as laid out in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177 (2014). Professor Hartnett explained that these holdings – which treat attorneys' fees as collateral to the merits of the case for purposes of the final judgment rule – can coexist with the proposed amendment.

In response to Judge Colloton's submission, the Advisory Committee made one change to the rule text as published. Judge Colloton expressed concern about litigants filing (after the entry of final judgment) a notice of appeal designating only a prior interlocutory order. The Advisory Committee added language to proposed Rule 3(c)(7) that states an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after the entry of the judgment and designates an order that merged into that judgment.

One matter divided the Advisory Committee: whether to continue to permit a party to limit the scope of the notice of appeal. A minority of members concluded that such limitation should no longer be permitted. In their view, courts should look to the briefs to narrow the claims and issues on appeal. In contrast, most members found value in leaving this aspect of the proposal as published – allowing parties to limit the scope if expressly stated. For example, in multi-party cases, a party who has settled as to some claims may wish to appeal the disposition of other claims without violating a settlement agreement. The Advisory Committee voted to retain the feature permitting limitation and to revisit the issue in three years if problems develop. Judge Chagares observed that a provision in current Rule 3(c)(1)(B) permits the express limiting of a notice of appeal.

The Advisory Committee also sought final approval of conforming amendments to Rule 6 and Forms 1 and 2. Judge Chagares reported that the Chief Judge of the United States Tax Court has expressed approval for the proposed amendment to Form 2 (concerning notices of appeal from decisions of the Tax Court).

Professor Struve thanked Judge Chagares, Professor Hartnett, and the Advisory Committee for their work on this thorny problem. Judge Campbell offered suggestions regarding the committee note. First, he suggested that "and limit" be removed from the portion of the committee note that discusses the role of the briefs with respect to the issues on appeal. Second, he suggested clarification of two rule references in the note. These suggestions were accepted by Judge Chagares. A judge member recommended substitute language for the multiple uses of the term "trap" in the committee note. Professor Hartnett responded that the phrasing had been studied and that it is not pejorative or indicative of intentional trap-setting. Another member suggested adding "inadvertently" to the first sentence using the word "trap" in the committee note – thus: "These decisions inadvertently create a trap . . . ." Judge Chagares and Professor Hartnett accepted the suggestion and changed the committee note accordingly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3 and conforming amendments to Rule 6 and Forms 1 and 2 for final approval by the Judicial Conference.**

Publication of Proposed Amendment to Rule 25 (Filing and Service). The Advisory Committee sought publication of an amendment to Rule 25 to extend existing privacy protections to Railroad Retirement Act benefit cases. Judge Chagares explained that counsel for the Railroad Retirement Board requested protections for their litigants like those provided in Social Security benefit cases. Because Railroad Retirement Act benefit cases are appealed directly to the court of appeals, amending Civil Rule 5.2 would not work to extend privacy protections to those cases. The Advisory Committee made no changes to the draft amendment since the January 2020 Standing Committee meeting.

A judge member commented that, in other areas of the law such as ERISA, the Hague Convention, and medical malpractice, courts address privacy concerns on an ad hoc basis rather than with a categorical rule. This member expressed hesitation about picking out one area for categorical treatment without stepping back and looking comprehensively at balancing the public's right to access court records against individual privacy concerns. He also inquired whether such endeavor fell within the scope of the Committee's mandate. In response, Judge Chagares noted that Civil Rule 5.2(c) restricts only remote electronic access. He also explained that the Advisory Committee has focused on Railroad Retirement Act benefit cases because they are a close analog to Social Security benefit cases. In other cases that involve medical information, courts are still empowered to enter orders to protect that information. Judge Chagares further noted that the Supreme Court recently emphasized the close relation between the Social Security Act and the Railroad Retirement Act. Professor Hartnett explained that the Railroad Retirement Act benefit cases in the court of appeals mirror Social Security benefit cases in the district court, as they are essentially appellate in nature. Both types of cases involve administrative records full of sensitive information. Professor Edward Cooper recalled that when the Civil Rules Advisory Committee was working on Civil Rule 5.2, the Social Security Administration made powerful representations

regarding the filing of an administrative record. Under statute, it is required in every case to file a complete administrative record, which involves large amounts of sensitive information beyond the capacity of the court to redact. The Civil Rules Advisory Committee was persuaded that a categorical rule was appropriate for Social Security benefit cases. The judge member suggested that there are hundreds of ERISA disability cases every year that are almost identical to Social Security disability cases. Those cases also require the filing of an administrative record. The judge member asked whether the Rules Enabling Act publication process would reach stakeholders in other types of cases like ERISA proceedings. Judge Campbell suggested that the committees deliberately invite input from those stakeholders, as has been done with other rules in the past. The judge member agreed that such feedback would be beneficial, particularly from stakeholders not covered by the proposed amendment. Judge Chagares concurred in this approach.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved the proposed amendment to Rule 25 for publication with added request for comment from identified groups.**

Information Items

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares stated that the Advisory Committee is conducting a comprehensive study of Rules 35 and 40 with a view to reducing duplication and confusion.

Suggestion Regarding Decision on Grounds Not Argued. Judge Chagares described a suggestion submitted by the American Academy of Appellate Lawyers (AAAL) that would require the court to give notice and opportunity for additional briefing before deciding a case on unbriefed grounds. After studying this issue, the Advisory Committee concluded that it was not well-suited for rulemaking. Upon the Advisory Committee's recommendation, Judge Chagares wrote to each circuit chief judge with a copy of the AAAL's suggestion. He received feedback that unanimously concluded such a rule change was unnecessary. The Advisory Committee will reconsider this issue in three years.

Suggestion Regarding In Forma Pauperis Standards. Professor Hartnett noted that the Appellate Rules Advisory Committee continues to look into this issue. There remains a question whether rulemaking can resolve the issue. Professor Hartnett explained that, at the very least, the Advisory Committee could consider possible changes to Form 4 (the form for affidavits accompanying motions to appeal *in forma pauperis*).

Suggestion Regarding Rule 4(a)(2). Current Rule 4(a)(2) allows a notice of appeal filed after the announcement of a decision but before its entry to be treated as filed after the entry of decision. This provision allows modestly premature notices of appeal to remain viable. Professor Bryan Lammon's suggestion proposes broader relation forward. The Advisory Committee considered this question a decade ago and decided against taking action. In his suggestion, Professor Lammon argues that the issue has not resolved itself in the intervening decade. The Advisory Committee is looking to see if any rule change can be made to protect those who file their notice of appeal too early.

Suggestion Regarding Rule 43 (Substitution of Parties). Judge Chagares described a suggestion regarding amending Rule 43 to require use of titles instead of names of government officers sued in their official capacities. The Advisory Committee decided to table this suggestion while its clerk representative gathers information from clerks of court.

Review of Recent Amendments. Judge Chagares reviewed the impact of two recent amendments to the Appellate Rules. In 2019, Rule 25(d)(1) was amended to eliminate the requirement for proof of service when service is made solely through the court's electronic-filing system. At least two circuits continue to require certificates of service, despite the rule change. The Advisory Committee's clerk representative agreed to reach out to the clerks of court to resolve the issue. In 2018, Rule 29(a)(2) was amended to permit the rejection or striking of an amicus brief that would result in a judge's disqualification. The Advisory Committee polled the clerks to find out if any amicus briefs had been stricken under the new rule. At least three circuits have stricken such amicus briefs since the amendment became effective.

Judge Chagares thanked everyone involved during his tenure with the Rules Committees and wished everyone and their families well.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Laura Bartell delivered the report of the Bankruptcy Rules Advisory Committee, which last met on April 2, 2020 by videoconference. The Advisory Committee presented several action items and two information items.

Action Items

Final Approval of Proposed Amendment to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Judge Dow explained that Rule 2005 deals generally with the apprehension of debtors for examination under oath. The last subpart deals with release of debtors. Current Rule 2005(c) refers to provisions of the criminal code that have since been repealed. The proposed change substitutes a reference to the relevant section in the current criminal code. The proposed amendment was published in August 2019. The Advisory Committee received no comments of substance. The National Conference of Bankruptcy Judges expressed a general indication of support for the proposed amendment. Judge Dow stated that the Advisory Committee recommends that the Standing Committee approve the proposed amendment to Rule 2005 as published. There were no comments from members of the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 2005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3007 (Objections to Claims). Judge Dow next introduced the proposed amendment to Rule 3007, which deals generally with objections to claims filed by creditors. The subpart at issue – Rule 3007(a)(2)(A) – deals with service of those objections on creditors. It generally provides for service by first-class mail. Rule 3007(a)(2)(A)(ii) imposes a heightened service requirement for "insured depository institution[s]." "Insured

depository institution" has two different definitions in the bankruptcy rules and bankruptcy code. Rule 7004(h) imports a definition for "insured depository institution" from the Federal Deposit Insurance Act (FDIA). The FDIA definition (which is incorporated into Rule 7004(h)) does not encompass credit unions because credit unions are insured by the National Credit Union Administration rather than by the Federal Deposit Insurance Corporation. The bankruptcy code also defines "insured depository institution," in 11 U.S.C. § 101(35), and the Code's definition expressly does include credit unions. The Code definition applies to the Bankruptcy Rules pursuant to Rule 9001.

Several years ago, Rule 3007 was revised to make clear that generally standard service was adequate for purposes of the rule. But the Rule, as amended, provides that if the claimant is an insured depository institution, service must also be made according to the method prescribed by Rule 7004(h). The Advisory Committee recognized the exception to conform to the congressional desire for enhanced service on entities included under the FDIA definition. The Advisory Committee, however, did not think there was any congressional intent to afford enhanced service to entities that fall outside the FDIA definition. For purposes of consistency with other bankruptcy rules, and to conform to what the Advisory Committee understands as the congressionally-intended scope for enhanced service, the proposed amendment to Rule 3007(a)(2)(A)(ii) inserts a reference to the FDIA definition. The Advisory Committee received one comment, and it expressed support for the proposed amendment. There were no comments or questions from the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3007 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7007.1 (Corporate Ownership Statement). Rule 7007.1 deals with disclosure of corporate ownership information in adversary proceedings. Judge Dow explained that the proposed amendment to Rule 7007.1 seeks to conform to the language in related rules: Appellate Rule 26.1, Bankruptcy Rule 8012, and Civil Rule 7.1. As published, the proposed amendment would amend Rule 7007.1(a) to encompass nongovernmental corporations that seek to intervene, would make stylistic changes to the rule, and would change the title of Rule 7007.1 from "Corporate Ownership Statement" to "Disclosure Statement." The Advisory Committee received two comments in response to publication. One comment suggested that the word "shall" in Rule 7007.1 be changed to "must." While the Advisory Committee agreed with the suggestion, it concluded that such word change will be considered when Part VII is restyled. The other comment, from the National Conference of Bankruptcy Judges, suggested that Rule 7007.1 retain the title and language referring to "corporate ownership statement." The comment offered two reasons: (1) "disclosure statement" is a term of art in bankruptcy law; and (2) five other bankruptcy rules refer to the same document as a corporate ownership statement. The Advisory Committee was persuaded by this and voted to approve Rule 7007.1 with the current title ("Corporate Ownership Statement") retained and the word "disclosure" in subparagraph (b) changed to "corporate ownership," with the other features of the proposed amendments remaining unchanged since publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 7007.1 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 9036 (Notice and Service Generally). Professor Gibson introduced the proposed amendment to Rule 9036. She explained that the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic service and noticing in the bankruptcy courts. One amendment to Rule 9036 became effective on December 1, 2019. When the 2019 amendment to Rule 9036 was published for public comment in 2017, related proposed amendments to Rule 2002(g) and Official Form 410 were also published. The proposed amendments to Rule 2002(g) and Official Form 410 would have authorized creditors to designate an email address on their proof of claim for receipt of notices and service. Based on comments received during the 2017 publication period, the Advisory Committee decided to hold the proposed amendments to Rule 2002(g) and Official Form 410 in abeyance.

The current proposed amendment to Rule 9036 was published in August 2019 and would encourage the use of electronic noticing and service in several ways. First, the rule would recognize the court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts. This program, set up through the Administrative Office, would inform high-volume paper-notice recipients to register for electronic noticing. The proposed amendment would acknowledge this process and authorize notice in that manner. Anticipating that the Advisory Committee would move forward with the earlier-mentioned amendments to Rule 2002(g) and Official Form 410, Professor Gibson explained that the rule as published would have allowed courts and parties to provide notice to a creditor at an email address indicated on the proof of claim.

The Advisory Committee received seven sets of comments on the published proposal to amend Rule 9036. Commenters expressed concern about the proposed amendments to Rule 9036 as well as about the earlier-published proposals to amend Rule 2002(g) and Official Form 410. There was, however, enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. The commenters included the Bankruptcy Noticing Working Group, the Bankruptcy Clerks Advisory Group, an ad hoc group of 34 clerks of court, and individual court staff members. Their concerns fell into three categories: clerk monitoring of email bounce-backs; the administrative burden of the proof-of-claim opt-in form for email noticing, and the interplay of the proposed amendments to Rules 2002(g) and 9036. Because the same provision regarding bounce-backs is in the version of Rule 9036 that went into effect last December and in Rule 8011(c)(3), the Advisory Committee decided not to change the language in the published version of Rule 9036(d); but it did add a new sentence to that subdivision stating that the recipient has a duty to keep the court informed of the recipient's current email address.

The greatest concern was the administrative burden of allowing creditors to opt-in to email noticing and service on their proof-of-claim form (Official Form 410). Some commenters asserted that without an automated process for extracting email addresses from proofs of claim, the burden of checking each proof of claim would be too great. Others suggested that, even with automation, the process would be time consuming and burdensome (given that paper proofs of claim would continue to be filed). Persuaded by this reasoning, at its spring 2020 meeting, the Advisory Committee voted not to pursue the opt-in check-box option on the proof of claim form. Accordingly, it revised the proposed amendment to Rule 9036 so as to omit the reference to

Rule 2002(g)(1). Professor Gibson further explained that the Advisory Committee's ultimate approach here does not give any benefit to parties because parties do not have access to the Bankruptcy Noticing Center. Future improvements to CM/ECF may allow entry of email addresses in a way that will be accessible to parties. The language in proposed Rule 9036(b)(2) would allow for parties to take advantage of that future development.

Judge Campbell observed that the Advisory Committee's revisions to the Rule 9036 proposal provide a good illustration of the value of the Rules Enabling Act's public-comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 9036 for approval by the Judicial Conference.**

Retroactive Approval of Amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1. Enacted in March 2020, the CARES Act made certain changes to the bankruptcy code, which required changes to five Official Forms. Because the law took effect immediately, the Advisory Committee acted under its delegated authority to make conforming changes to Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. Professor Gibson explained the two main changes the CARES Act made to the bankruptcy code, both of which will sunset in one year from the effective date of the Act. First, the Act provided a new definition of "debtor" for purposes of subchapter V of Chapter 11. The new one-year definition raised the debt limit for a debtor under subchapter V from $2,725,625 to $7,500,000. As a result of that legislative change, there are at least three categories of Chapter 11 debtors: (1) A debtor that satisfies the definition of small business debtor, with debts of at most $2,725,625; (2) a debtor with debts over $2,725,625 but not more than $7,500,000; and (3) a debtor that doesn't meet either definition, and proceeds as a typical Chapter 11 debtor. The court will separately need to know which category a debtor falls within to know whether special provisions apply. The Advisory Committee thus amended two bankruptcy petition forms – Official Forms 101 and 201 – to accommodate these changes.

Second, the CARES Act changed the definition of "current monthly income" in the Bankruptcy Code to add a new exclusion from computation of currently monthly income for federal payments related to the Coronavirus Disease 2019 (COVID-19) pandemic. An identical exclusion was also inserted in § 1325(b)(2) for computing disposable income. Both changes are effective for one year, unless extended by Congress. These changes effect eligibility for Chapter 7 and the required payments under Chapter 13. As a result, the Advisory Committee added a new exclusion in Official Forms 122A-1, 122B, and 122C-1.

Judge Campbell asked whether the Advisory Committee would seek to reverse these amendments if Congress did not extend the sunset date of the relevant CARES Act provisions. Professor Gibson replied in the affirmative.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Publication of Restyled Parts I and II of the Bankruptcy Rules. Professor Bartell introduced the first two parts of the restyled Bankruptcy Rules. She observed that the restyling process should get easier over time, as the first two parts required the Advisory Committee to resolve issues that will recur in subsequent parts. She noted that the style consultants have been wonderful to work with, and their work has made the restyled Bankruptcy Rules much easier to understand. For the restyling process, the Advisory Committee endorsed five basic principles. First, the Advisory Committee will avoid any substantive changes, even where some may be needed. Second, the restyled rules will not modify any term defined in the bankruptcy code. This does not include terms used, but not defined, in the code. Third, the restyled rules will preserve terms of art. There was some disagreement between the Advisory Committee and the style consultants on what constitutes a term of art. Fourth, all Advisory Committee members would remain open to new ideas suggested by the style consultants. Finally, the Advisory Committee will defer to the style consultants on matters of pure style.

Professor Bartell addressed one substantive issue that arose. In the past, Congress has directly amended certain bankruptcy rules. Rule 2002(o) (Notice for Order of Relief in Consumer Case) is a result of legislative amendment and was originally designated as Rule 2002(n) as set forth in the legislation. A subsequent amendment adding a provision earlier in the list of subdivisions in the rule resulted in changing the designation of Rule 2002(n) to 2002(o), and minor stylistic changes have been made since the provision was legislatively enacted. The question arose whether the Advisory Committee had authority to make stylistic changes to or revise the designation of the rule. The Advisory Committee concluded that any congressionally enacted rules should be left as Congress enacted them.

Judge Campbell thanked Judge Marcia Krieger for her work and leadership as Chair of the Restyling Subcommittee, as well as Professor Bartell and the style consultants, Professors Bryan Garner, Joe Kimble, and Joe Spaniol. Judge Dow echoed this sentiment and opined that the bankruptcy rules will be much improved by this process. Judge Dow also noted that progress has been made on Parts III and IV of the rules. Professors Garner and Kimble expressed their appreciation for being involved in the restyling process and the work done so far. A judge member of the Standing Committee said that the restyled rules are much more readable.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the Restyled Parts I and II of the Bankruptcy Rules.**

Publication of SBRA Rules and Official Forms. The Advisory Committee is seeking publication of the rules and forms amendments previously published and issued on an expedited basis as interim rules, in response to the Small Business Reorganization Act (SBRA). The interim rules include amendments to the following Bankruptcy Rules: 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019. Professor Gibson noted that the only change made to the interim rules was stylistic. In response to suggestions by the style consultants, the Advisory Committee made stylistic changes to Rule 3017.2. The Advisory Committee did not make the suggested style changes to Rule 3019(c) because they would have created an inconsistency among the subheadings in the rule. Professor Gibson explained that the headings would be reconsidered as part of the restyling process.

Professor Gibson also introduced the changes made to Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A. Under its delegated authority, the Advisory Committee previously made technical and conforming amendments to all but one of these forms in response to the SBRA. Despite these already having taken effect, the Advisory Committee seeks to republish them for a longer period and in conjunction with the proposed amendments to the SBRA rules. The package of forms prepared for summer 2020 publication includes one addition beyond the forms initially amended in response to the SBRA: Form 122B needed to be amended to update instructions related to individual debtors proceeding under subchapter V.

Judge Campbell commended the Advisory Committee for this impressive work. Congress passed the SBRA with a short window before its effective date. Despite this, the Advisory Committee managed to produce revised rules and forms, get them approved by the Standing Committee and by the Executive Committee of the Judicial Conference, and distribute them to all the bankruptcy courts before the SBRA took effect so they could be adopted as local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 and Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A.**

Publication of Proposed Amendment to Rule 3002(c)(6) (Time for Filing Proof of Claim). Judge Dow next addressed the proposed amendment to Rule 3002(c)(6), which provides that the court may extend the deadline to file a proof of claim if the notice of the need to file a claim was insufficient to give the creditor a reasonable time to file because the debtor failed to file the required list of creditors. The Advisory Committee identified several problems with this provision. First, the rule would almost never come into play because a failure to file the list of creditors required by Rule 1007 is also cause for dismissal. Because such a case would likely be dismissed, there would be no claims allowance process. Second, under the language of paragraph (c)(6), the authorization to grant an extension is extremely narrow. For example, there is no provision for notices that omit a creditor's name or include an incorrect address. Further, Professor Bartell's research revealed a split in the caselaw. The proposed amendment seeks to resolve these problems by stating a general standard for the court's authority to grant an extension if the notice was insufficient to give a creditor reasonable time to file a claim. This same standard currently applies to creditors with foreign addresses. The proposed amendment would bring consistency to domestic creditors and provide more flexibility for the courts to offer relief as warranted.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rule 3002.**

Publication of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Professor Bartell explained that Rule 9036 allows clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by electronic filing. She then introduced proposed amendment to Rule 5005. Rule 5005(b) governs transmittal of papers to the U.S. trustee and requires that such papers be mailed or delivered to an office of, or another place designated by, the U.S. trustee. It also requires the entity transmitting the paper file as proof of transmittal a verified statement. The Advisory Committee consulted with the Executive Office for U.S. Trustees

about whether Rule 5005 accurately reflects current practice and whether it could be conformed more closely to the practice under Rule 9036. The proposed amendment, which is supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means and eliminate the requirement to file a verified statement.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 5005.**

Publication of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). A committee note to Rule 7004's predecessor, Rule 704, specified that in serving a corporation or partnership or other unincorporated association by mail, it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title. When Rule 704 became Rule 7004, that committee note was dropped and no longer included in the published version of Rule 7004. Professor Bartell explained that, as a result, courts have divided over whether a notice addressed to a position or title is effective under Rule 7004. The Advisory Committee's proposal would insert a new subdivision (i), which inserts the substance of the previous committee note for Rule 704 into Rule 7004.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 7004.**

Publication of Proposed Amendment to Rule 8023 (Voluntary Dismissal). Professor Bartell introduced the proposed amendment to Rule 8023, which is based on Appellate Rule 42(b), regarding voluntary dismissal of appeals. She indicated that the Standing Committee's deferred consideration of the proposed amendments to Appellate Rule 42(b) should not affect the Standing Committee's decision to approve the proposed amendment to Bankruptcy Rule 8023 for publication. She noted that the version of the proposed amendment to Rule 8023 in the agenda book needed two minor additional changes to conform to Appellate Rule 42(b). First, the phrase "under Rule 8023(a) or (b)" should be added to subdivision (c). Second, the word "mere" should be eliminated from subdivision (c). The resulting rule text for Rule 8023(c) would read ". . . for any relief under Rule 8023(a) or (b) beyond the dismissal of an appeal . . . ." Professor Bartell also suggested that publication of the proposed amendment to Rule 8023 should not preclude the Advisory Committee from making further changes if Appellate Rule 42(b) is changed.

Judge Campbell asked whether a decision by the Appellate Rules Advisory Committee not to move forward with the proposed amendments to Appellate Rule 42(b) would affect the Bankruptcy Rules Advisory Committee's desire to move forward with the proposed amendment to Bankruptcy Rule 8023. Professor Bartell responded affirmatively and clarified that the proposed amendment to Rule 8023 is purely conforming. Because Appellate Rule 42(b) has already been published and is being held at the final approval stage, the Bankruptcy Rules Advisory Committee can publish the conforming amendment to Bankruptcy Rule 8023 and be ready for final approval if Appellate Rule 42(b) is later approved.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 8023.**

Information Items

Amendment to Interim Rule 1020. As previously noted, the CARES Act altered the definition of "debtor" under subchapter V of Chapter 11. This change required an amendment of interim Rule 1020, which was previously issued in response to the SBRA. The Advisory Committee drafted the amendment to the interim rule to reflect the definition of debtor in § 1182(1) of the Bankruptcy Code. The Standing Committee approved the amendment, and the Executive Committee of the Judicial Conference authorized its distribution to the courts. Professor Gibson noted that Rule 1020 is one of the rules that the Advisory Committee is publishing as part of the SBRA rules package. The version being published with the SBRA rules is the original interim Rule 1020. Because the version amended in response to the CARES Act will sunset in one year, it will no longer be applicable by the time the published version of Rule 1020 goes into effect.

Director's Forms for Subchapter V Discharge. The Advisory Committee approved three Director's Forms for subchapter V discharges. One is for a case of an individual filing for under subchapter V and in which the plan is consensually confirmed. The other two apply when confirmation is nonconsensual. These forms appear on the Administrative Office website.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Richard Marcus provided the report of the Civil Rules Advisory Committee, which last met on April 1, 2020 by videoconference. The Advisory Committee presented three action items and several information items.

Actions Items

Judge Bates introduced the proposed amendment to Civil Rule 7.1 (Disclosure Statement) for final approval. The proposed amendment to Rule 7.1(a)(1) parallels recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. The technical change to Rule 7.1(b) conforms to the change to subdivision (a). Judges Bates stated that the amendment to subdivision (b) was not published but is appropriate for final approval as a technical and conforming amendment. The new provision in Rule 7.1(a)(2) seeks to require timely disclosure of information that is necessary to ensure diversity of citizenship for jurisdictional purposes. Problems have arisen with certain noncorporate entities – particularly limited liability companies (LLCs) – because of the attribution rules for citizenship. Many courts and individual judges require disclosure of this citizenship information.

Most public comments received supported the proposed amendment. In response to the comments, the Advisory Committee revised the language concerning the point in time that is relevant for purposes of the citizenship disclosure. Judge Bates explained that the time relevant to determining citizenship is usually when the action is either filed in or removed to federal court. The proposed language also accommodates other times that may apply for determining jurisdiction. The comments opposing the amendment expressed hope that the Supreme Court or Congress would address the issue of LLC citizenship. The Advisory Committee believes that

action through a rule amendment is warranted. Judge Bates noted that in response to a concern previously raised by a member of the Standing Committee, a sentence was added to the committee note to clarify that the disclosure does not relieve a party asserting diversity jurisdiction from the Rule 8(a)(1) obligation of pleading grounds for jurisdiction.

A member of the Standing Committee asked whether the language regarding other relevant times can be made more precise. Professor Cooper responded that the language is deliberately imprecise to avoid trying to define the relatively rare circumstances when a different time becomes controlling for jurisdiction. He provided examples of such circumstances. He also noted that a defendant in state court who is a co-citizen of the plaintiff cannot create diversity jurisdiction by changing his or her domicile and then removing the case to federal court. The law prohibits this, even though at the time of removal there would be complete diversity. Professor Cooper explained that the Advisory Committee sought to avoid more definite language based on the twists and turns of diversity jurisdiction and removal.

A judge member asked how the provision in question interplays with Rule 7.1(b) (Time to File). What triggers the obligation to file under subdivision (b) if there is another time that is relevant to determining the court's jurisdiction? This member observed that it was unclear whether a party or intervenor is obliged to refile or supplement under subdivision (b). Professor Cooper explained that two distinct concepts are at play: the time at which the disclosure is made and the time of the existent fact that must be disclosed. He provided an example. A party discloses the citizenship of everyone that is attributed to it, as an LLC. Later on, the party discovers additional information that was in existence (but not known to the party) at the time for determining diversity. Paragraph (b)(2) would trigger the obligation to supplement.

Another member suggested it would be better to require a party at the outset to disclose known information and impose an obligation to update that disclosure within a certain time if there is a change in circumstances that affects the previous disclosure. He also expressed concern about the language in Rule 7.1(a)(2) that places "at another time that may be relevant" with the conjunction "or" between subparagraphs (A) and (B). Professor Cooper explained that Rule 7.1(b)(1) sets the time for disclosure up front and Rule 7.1(a)(2)(B) refers to the citizenship that is attributed to that party at some time other than the time for disclosure. Judge Campbell commented that he understood Rule 7.1(a) as the "what" of what must be disclosed and Rule 7.1(b) as the "when." Professor Cooper confirmed that Judge Campbell's understanding aligned with the intent of the proposed amendment. Judge Campbell suggested revising Rule 7.1(a)(2)(B) to state "at any other time relevant to determining the court's jurisdiction." Discussion followed on the possibility of collapsing subparagraphs (A) and (B) into one provision.

A judge member echoed similar concerns regarding subparagraph (B)'s vagueness. This member suggested using as an alternative "at some other time as directed by the court." On the rare occasions when this arises, he explained, presumably the issue of the relevant time will be litigated, and the court can issue an order specifying it. This member also observed that, although subparagraph (B) would require a lawyer to make a legal determination as to what another relevant time may be, the rule does not require the lawyer to specify what that moment in time was.

Another judge member asked whether subparagraphs (A) and (B) are intended to qualify "file" or "attributed." Professor Cooper responded that the provisions are intended to qualify "attributed." A different member shared concerns about the "or" structure of Rule 7.1(a)(2)(A) and (B). This structure leaves it to the discretion and understanding of the filers whether they fall into the category that applies most often or some other category. This member favored a version that would reflect that most cases will be governed by subparagraph (A) and include a carve-out provision such as "if ordered by the court or if an alternative situation applies." He also suggested some of this uncertainty may be best resolved through commentary rather than rule language. Another judge member asked about the purpose of "unless the court orders otherwise" earlier in Rule 7.1(a)(2). This member suggested that this language might play into the resolution of subparagraph (B).

Professor Cooper then proposed a simplification of paragraph (2): "is attributed to that party or intervenor at the time that controls the determination of jurisdiction." Judge Bates noted that this proposal would still require the lawyer to make a legal determination. Judge Campbell offered an alternative, namely to instruct the parties that if the action is filed in federal court, they must disclose citizenship on the date of filing. If the action is removed to federal court, they must disclose citizenship on the date of removal. This alternative makes it clear what the parties' obligations are when they are making the disclosure and leaves it to judges to ask for more. Judge Bates agreed that this suggestion provides a clearer approach than trying to address a very rare circumstance in the rule. He also responded to a question raised earlier regarding "unless the court orders otherwise." The committee note addresses situations in which a judge orders a party not to file a disclosure statement or not to file publicly for privacy and confidentiality reasons.

A different member suggested that ambiguity remained whether subparagraphs (A) and (B) qualify "file" or "attributed." This member suggested breaking up paragraph (2) into two sentences to make clear that the latter provisions qualify "attributed." A judge member asked whether the committee note could resolve the ambiguity, but Judge Campbell noted that the committee note is not always read.

Judge Campbell recapped what the proposal would look like based on suggestions so far. Rule 7.1(a)(2) would state "In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement at the time provided in subdivision (b) of this rule." A second sentence would then state that the disclosure statement must name and identify the "citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court." Another judge member pointed out that this proposal raises issues regarding an intervenor, whose attributed citizenship may not be relevant at the time of filing or removal.

In response to an earlier suggestion about using the committee note to resolve the issue, Professor Garner noted that many textualist judges will not look to committee notes. Such judges will consider a committee note on par with legislative history. Professor Coquillette agreed and observed that it is not good rulemaking practice to include something in a note that could change the meaning of the rule text. A judge member agreed and encouraged simpler rule language.

Judge Campbell recommended that the Advisory Committee continue working on the draft amendment to Rule 7.1 to consider the comments and issues raised. Judge Bates agreed and stated that the Advisory Committee would resubmit a redrafted rule in the future.

Publication of Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). Judge Bates then introduced the proposed Supplemental Rules for Social Security Review Actions. He noted that this project raises the issue of transsubstantivity. The subcommittee, chaired by Judge Sara Lioi, has been working on this for three years. The initial proposal came from the Administrative Conference of the United States. The Social Security Administration has strongly supported adoption of rules specific to Social Security review cases. Both the DOJ and the claimants' bar groups have expressed modest opposition. The Advisory Committee received substantial input – generally supportive – from district court judges and magistrate judges. The proposed rules recognize the essentially appellate nature of Social Security review proceedings. The cases are reviewed on a closed administrative record. These cases take up a substantial part of the federal docket. Judge Bates explained that the proposed rules are modest and simple. The Advisory Committee rejected the idea of considering supplemental rules for all administrative review cases given the diversity of that case category and the complicated nature of some types of cases.

The Supplemental Rules provide for a simplified complaint and answer. The proposed rules also address service of process and presentation of the case through a briefing process. Judge Bates noted several examples of civil or other rules that address specific areas separately from the normal rules. Some are narrow, while others are broad. The Rules Enabling Act authorizes general rules of practice and procedure. Here, the Advisory Committee is dealing with a unique yet voluminous area in which special rules can increase efficiency. When applied in Social Security review cases, the Civil Rules do not fit perfectly, a conclusion supported by magistrate judges and the Social Security Administration. The Advisory Committee submits that the benefits of these Supplemental Rules outweigh the risks and that the Rules Enabling Act will be able to protect against future arguments for more substance-specific rules of this kind.

The DOJ's opposition to the proposal stems from the possibility of these Supplemental Rules opening the door to more requests for subject-specific rules in other areas. After close study by the subcommittee and input from stakeholders, the Advisory Committee believed that publication and resulting comment process will shed light on whether the transsubstantivity concerns should foreclose adoption of this set of supplemental rules. Remaining issues are not focused on the specific language of the proposed rules, but rather on whether special rules for this area are warranted at all.

Judge Bates further clarified that the proposed Supplemental Rules would apply only to Social Security review actions under 42 U.S.C. § 405(g). They would not cover more complicated Social Security review matters that do not fit this framework (e.g., class actions). Professor Cooper added that the subcommittee worked very hard on this proposal, holding numerous conference calls and hosting two general conferences attended by representatives of interested stakeholders. The subcommittee has significantly refined the proposal. Professor Coquillette commended the work of the subcommittee and Advisory Committee. He also expressed his support for the decision

to draft Supplemental Rules, rather than to build a special rule into the Civil Rules themselves. The risk of transsubstantivity problems is much less under this approach.

A member of the Standing Committee commented that the decision here involves weighing the benefit that these rules would bring against the erosion of the transsubstantivity principle. He asked what kind of input the Advisory Committee received regarding the upside of this proposal. Judge Bates responded that one intended benefit is consistency among districts in handling these cases. Professor Cooper added that many judges already use procedures like the proposed Supplemental Rules with satisfactory results. He noted that the claimants' bar representatives have expressed concern that the proposed Supplemental Rules will frustrate local preferences of judges that employ different procedures.

A member noted that no one is criticizing the content of the proposed Supplemental Rules – a reflection of the care and time put in by the subcommittee. And no one is saying that the proposed rules favor a particular side. The debate largely surrounds transsubstantivity and form. A judge member generally agreed, but raised the concern expressed by some magistrate judges that the content of Supplemental Rules will limit their flexibility in case management. For example, in counseled cases some magistrate judges require a joint statement of facts. Who files first might be determined by whether the claimant has counsel: if so, then the claimant files first, but if not, then the government files first. In this judge's district the deadlines are a lot longer than those in the proposed rules. This member suggested a carve-out provision – "unless the court orders otherwise" – in the Supplemental Rules to give individual courts more leeway. He clarified that he did not oppose publication of the proposal but anticipated additional criticism and pushback.

Professor Coquillette commended the work of the subcommittee. He recognized that the Rules Committees are sensitive to the issue of transsubstantivity. One possible issue is Congress taking Supplemental Rules like this as precedent to carve out other parts of the rules. He inquired whether this issue was the basis of the DOJ's modest opposition to the proposal. Judge Bates confirmed that it was.

Judge Campbell expressed his support for publication. This situation is unique in that a government agency, the Administrative Conference of the United States, approached the Rules Committees and asked for this change. Another government agency, the Social Security Administration, has said this rule change would produce a significant benefit. The Supplemental Rules are drafted in a way that reduces the transsubstantivity concern. He cautioned against adding a carve-out provision that would allow courts to deviate, as that would not produce the desired benefit.

A DOJ representative clarified that, despite the Department's mild opposition to the proposed rules, the Department does not oppose publication. The Department may formally comment again after publication. An academic member commended the Advisory Committee and subcommittee for their elegant approach to a very difficult problem. A judge member asked whether the Supplemental Rules should be designated alphabetically rather than numerically. Professor Cooper explained that some sets of supplemental rules use letters to designate individual rules, while other sets use numbers. Professor Cooper added that his preference is to use numbers for these proposed Supplemental Rules. The judge member suggested that using letters might help

to avoid confusion, as lawyers might be citing to both the Civil Rules and the Supplemental Rules in the same submission. Judge Bates stated that the Advisory Committee will consider this issue during the publication and comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).**

Publication of Proposed Amendment to Rule 12(a)(4). Judge Bates introduced the proposed amendment to Rule 12(a)(4), which was initiated by a suggestion submitted by the DOJ. The proposed amendment would expand the time from 14 days to 60 days for U.S. officers or employees sued in an individual capacity to file an answer after the denial of a Rule 12 motion. This change is consistent with and parallels Rule 12(a)(3), as amended in 2000, and Appellate Rule 4(a)(1)(B)(iv), added in 2011. The extension of time is warranted for the DOJ to determine if representation should be provided or if an appeal should be taken. Judge Bates noted that the proposed language differs from the language proposed by the DOJ but captures the substance.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 12(a)(4).**

Information Items

Report of the Subcommittee on Multidistrict Litigation (MDL). Judge Bates stated that the subcommittee, chaired by Judge Robert Dow, has been at work for over three years. The subcommittee is actively discussing and examining three primary subjects. The subcommittee's work is informed by members of the bar, academics, and judges.

The first area of focus is early vetting of claims. This began with plaintiff fact sheets and defense fact sheets, secondarily. It has evolved to looking at initial census of claims. The FJC has researched this subject and indicated that plaintiff fact sheets are widely used in MDL proceedings, particularly in mass tort MDLs. Plaintiff fact sheets are useful for early screening and jumpstarting discovery. Initial census forms have evolved as a preliminary step to plaintiff fact sheets and require less information. Four current MDLs are utilizing initial census forms as a kind of pilot program to see how effective they are. Whether this results in a rule amendment or a subject for best practices, there is strong desire to preserve flexibility for transferee judges.

The second area is increased interlocutory review. The subcommittee is actively assessing this issue. The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs' bar has strongly opposed it, arguing that 28 U.S.C. § 1292(b) and other routes to review exist now, and it is not clear that these are inadequate. Judge Bates explained that delay is a major concern, as with any interlocutory review for these MDL proceedings. Another question concerns the scope of any increased interlocutory review. Should it be available in a subset of MDLs, all MDLs, or even beyond MDLs to capture other complex cases? The role of the district court is another issue that the subcommittee is considering. The subcommittee recently held a miniconference, hosted by Emory Law School and Professor Jaime Dodge, on the topic of increased interlocutory review. The miniconference

involved MDL practitioners, transferee judges, appellate judges, and members of the Judicial Panel on Multidistrict Litigation. Judge Bates stated that the miniconference was a success and will be useful for the subcommittee. A clear divide remains between the defense bar and plaintiffs' bar regarding increased interlocutory review, with the mass tort MDL practitioners being the most vocal. The judges at the miniconference were generally cautious about expanded interlocutory appeal and concerned about delay.

The third and newest area of concentration by the subcommittee is settlement review. The question is whether there should be some judicial supervision for MDL settlements, as there is under Rule 23 for class action settlements. Leadership counsel is one area of examination. As with the interlocutory review subject, one issue here is the scope of any potential rule. Judge Bates further noted that defense counsel, plaintiffs' counsel, and transferee judges have expressed opposition to any rule requiring greater judicial involvement in MDL settlements. Academic commenters are most interested in enhancing the judicial role in monitoring settlements in MDLs. The subcommittee continues to explore these questions and has not reached any decision as to whether a rule amendment is appropriate.

A member asked what research was available on interlocutory review in MDL cases. This member observed while Rule 23(f) was likely controversial when it was adopted, it has had a positive effect. He also stated that interlocutory review in big cases would be beneficial because most big cases settle, and the settlement value is affected by the district court rulings on issues that are not subject to appellate review. Judge Bates responded that the subcommittee is looking at Rule 23(f), but that rule's approach may not be a good fit. Professor Marcus noted that information on interlocutory review in MDL cases is difficult to identify, but research has been done and practitioners on both the plaintiffs' side and defense side have submitted research to the subcommittee. A California state-court case-gathering mechanism may be worth study. He noted that initial proposals sought an absolute right to interlocutory review but proposals under consideration now are more nuanced. One member affirmed the difficulty of identifying the information sought. Concerning § 1292(b), this member suggested that generally district judges want to keep these MDLs moving and promote settlement. A district judge may effectively veto a § 1292 appeal; however, under Rule 23(f), parties can make their application to the court of appeals. Professor Marcus noted that materials in the agenda book reflected these varying models regarding the district judge's role. The member suggested that the subcommittee survey appellate judges on whether Rule 23(f) has been an effective or burdensome rule.

A judge member expressed wariness about rulemaking in the MDL context. She asked whether most of the input from judges has been from appellate judges or transferee judges, and who would be most helped by a rule providing for increased interlocutory review. Regarding settlement review, she questioned whether this is a rule issue or one more appropriately addressed by best practices. Another member opined that, of the issues discussed, the settlement review issue least warrants further study for rulemaking. Professor Marcus responded that even if the subcommittee's examination of these issues does not produce rules amendments, there is much to be gained. For example, current efforts may support best practices recommendations included in a future edition of the *Manual for Complex Litigation*. Judges Bates noted that the only area of focus that may not be addressed by a best practices approach is the issue of increased interlocutory review. A member agreed with Judge Bates. This member also raised a different issue – "opt outs"

– for the subcommittee to consider. In his MDL experience, both the defense lawyers and district judges often spend more time dealing with the opt-outs than the settlement.

A judge member emphasized that, in the interlocutory review area, the big question is whether existing avenues – mandamus, Rule 54(b), and § 1292(b) – are adequate. He suggested that § 1292(b) is a poor fit for interlocutory review in MDL cases. This member also shared that several defense lawyers have indicated hesitation to filing a § 1292(b) motion because the issue is not a controlling issue of law. Another judge member stated that the interlocutory review issue does not seem like a problem specific to MDLs. There are some non-MDL mass tort cases that raise similar key legal questions that could also benefit from some expedited interlocutory review. It is very clear that appellate judges do not want to be put in a position where they are expected to give expedited review. At the same time, district judges feel that they should have a voice in how issues fit into their complicated proceedings and whether appellate review would enhance the ultimate resolution of the case.

Another member suggested that the subcommittee look at what state courts are doing in this area. Some states have what are essentially MDLs by a different name. For example, in California, certification by the trial judge is not dispositive either way with respect to appellate review.

A judge member recalled the experience with Rule 23(f). The rule is beneficial, and its costs may not be as great as they seem. For instance, in many cases, the district court proceeding will carry on while the Rule 23(f) issue is under consideration. He also suggested that a court of appeals decision whether to grant interlocutory review can itself provide helpful feedback to the parties and district court. In his view, § 1292(b) is more a tool for the district court judge than it is for a party who believes the judge may have erred on a major issue in the case. He suggested a district court, even without a veto, could have input on the effect of delay on the case or the effect of a different ruling. Regarding the Rule 23(f) model, he pointed out that not all MDL proceedings have the same characteristics. If the subcommittee focused on a specific subset of issues likely to be pivotal but often not reviewed, perhaps the Rule 23(f) model would work in this context.

Another member stated that class certification decisions are always the subject of a Rule 23(f) petition in his experience. Only one petition has been granted, and none has changed the direction of the litigation. If this avenue for interlocutory appeal is opened, it will likely be used frequently. Absent a screening mechanism, the provision will not be invoked selectively.

Judge Campbell shared several comments. He stated his support for the subcommittee's consideration of a proposal submitted by Appellate Rules Advisory Committee member, Professor Steven Sachs, as reflected in the agenda book materials. Delay is one of the biggest issues in MDL cases in his experience. The issues that are most likely to go up on appeal are those that come up shortly before trial (e.g., *Daubert* or preemption motions). If there is a two-year delay, the case must be put on hold because, otherwise, the district court is ready to move forward with bellwether trials. He acknowledged that appellate judges do not relish the notion of expediting, but the importance of the issue could factor into their decision. If the issue is very important, they may find it justified to expedite an appeal. Professor Marcus observed that appellate decision times vary considerably among the circuits.

Judge Bates thanked the Standing Committee members for their feedback which reflects many of the discussions the subcommittee has had with judges and members of the bar. The subcommittee will continue to consider whether any of these issues merit rules amendments.

Suggestion Regarding Rule 4(c)(3) and Service by the U.S. Marshals Service in In Forma Pauperis Cases. The suggestion regarding Rule 4(c)(3) is still under review. There is a potential ambiguity with respect to service by the U.S. Marshals Service in *in forma pauperis* cases. The Advisory Committee is considering a possible amendment that would resolve the ambiguity.

Suggestion Regarding Rule 12(a) (Time to Serve a Responsive Pleading). The suggestion regarding Rules 12(a)(1), (2), and (3) is under assessment. Rules 12(a)(2) and (3) govern the time for the United States, or its agencies, officers, or employees, to respond. Rules 12(a)(2) and (3) set the time at 60 days, but some statutes set the time at 30 days. There is some concern among Advisory Committee members as to whether a rule amendment is warranted.

Suggestion Regarding Rule 17(d) (Public Officer's Title and Name). The Advisory Committee continues to consider a suggestion regarding Rule 17(d). Judge Bates explained that potential advantages exist to amending Rule 17(d) to require designation by official title rather than by name.

Judge Bates noted in closing that the agenda book reflects items removed from the Advisory Committee's agenda relating to Rules 7(b)(2), 10, and 16.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raymond Kethledge and Professors Beale and Nancy King presented the report of the Criminal Rules Advisory Committee, which met on May 5, 2020 by videoconference. The Advisory Committee presented one action item and one information item.

Action Items

Publication of Proposed Amendment to Rule 16 (Discovery Concerning Expert Reports and Testimony). Judge Kethledge introduced the proposed amendment to Rule 16. The core of the proposal does two things. First, it requires the district court to set a deadline for disclosure of expert testimony and includes a functional standard for when that deadline must be. Second, it requires more specific disclosures, including a complete statement of all opinions. This proposal is a result of a two-year process which included, at Judge Campbell's suggestion, a miniconference. The miniconference was a watershed in the Advisory Committee's process and largely responsible for the consensus reached. Judge Kethledge explained that the DOJ has been exemplary in the process, recognizing the problems and vagueness in disclosures under the current rule. He thanked the DOJ representatives who have been involved: Jonathan Wroblewski, Andrew Goldsmith, and Elizabeth Shapiro.

There have been changes to the proposal since the last Standing Committee meeting. The draft that the Advisory Committee presented in January required both the government and the

defense to disclose expert testimony it would present in its "case-in-chief." Following Judge Campbell's suggestion at the last meeting, the Advisory Committee considered whether the rule should refer to evidence "at trial" or in a party's "case-in-chief." The Advisory Committee concluded that "case-in-chief" was best because that phrase is used throughout Rule 16. But the Advisory Committee added language requiring the government to disclose testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." Additionally, the Advisory Committee made several changes to the committee note. One, suggested by Judge Campbell, clarifies that Rule 16 does not require a verbatim recitation of expert opinion. The Advisory Committee does not seek to import Civil Rule 26's much more detailed disclosure requirements into criminal practice. In response to a point previously raised by a Standing Committee member, the Advisory Committee revised the committee note to reflect that there may be instances in which the government or a party does not know the identity (but does know the opinions) of the expert whose testimony will be presented. In those situations, the note encourages that party to seek a modification of the discovery requirement under Rule 16(d) to allow a partial disclosure. Judge Kethledge explained that the Advisory Committee did not want to establish an exception in the rule language to account for these situations.

Professor Beale described other revisions to the committee note. New language was added to make clear that the government has an obligation to disclose rebuttal expert evidence that is intended to respond to expert evidence that the defense timely disclosed. The note language emphasizes that the government and defense obligations generally mirror one another. The Advisory Committee also added a parenthetical in the note clarifying that where a party has already disclosed information in an examination or test report (and accompanying documents), the party need not repeat that information in its expert disclosure so long as it identifies the information and the prior report. Finally, the committee note was restructured to follow the order of the proposed amendment.

A judge member commended the Advisory Committee on the proposal. She also raised a question regarding committee note language referring to "prompt notice" of any "modification, expansion, or contraction" of the party's expert testimony. She suggested that "contraction" might be beyond what is required by Rule 16(c), which the note language refers to. Professor King responded that the committee note includes that language because Rule 16(c) does not speak to correction or contraction but only to addition. The Advisory Committee believed it was important to address all three circumstances. Subdivision (c) is cross-referenced in the note because it provides the procedure for such modifications. Professor Beale emphasized that the key language in the note is "correction." The rule is intended to cover fundamental modifications. Professor King added that the issue of contraction came up at the miniconference. Some defense attorneys shared experiences where expert disclosures led them to prepare for multiple experts, but the government only presented one. The judge member observed that the "contraction" language could lead to a party being penalized for disclosing too much. This member recommended removing "contraction" from the note, unless something in the rule text explicitly instructs parties of their duty to take things out of their expert disclosures. Judge Kethledge suggested the word "modification," which encapsulates contraction and expansion, be substituted in the committee note language. He added that some concern was expressed regarding the supplementation requirement and the potential for parties to intentionally delay supplementation to gain an advantage. The Advisory Committee will be alert to any public comments raising this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 16.**

Information Items

Proposals to Amend Rule 6 (The Grand Jury). The Advisory Committee received two suggestions to modify the secrecy provisions in Rule 6(e) to allow greater disclosure for grand jury materials, particularly for cases of historical interest. The two suggestions – one from Public Citizen Litigation Group and one from Reporters Committee for Freedom of the Press – are very different. Public Citizen proposes a limited rule with concrete requirements. The Reporters Committee identifies nine factors that should inform the disclosure decision.

Judge Kethledge explained that Justice Breyer previously suggested that the Rules Committees examine the issue, and a circuit split exists. A subcommittee, chaired by Judge Michael Garcia, has been formed to consider the issue. Judge Kethledge noted that the DOJ will submit its formal position on the issue to the subcommittee. One question that came up in 2012 may be relevant now: whether the district court has inherent authority to order disclosure. Judge Kethledge advised against the Advisory Committee opining on the issue, which he described as an Article III question rather than a procedural issue.

Judge Campbell agreed that it is not the Advisory Committee's role to provide advisory opinions on what a court's power is. He stated that it may be relevant, however, for a court to know whether Rule 6 was intended to set forth an exclusive list of exceptions. Judge Kethledge observed that if the Advisory Committee states its intention for the Rule to "occupy the field" or not, that in itself could constitute taking a position on the inherent-power question. In response, Judge Campbell noted that under the Rules Enabling Act, the rules have the effect of a statute and supersede existing statutes on procedural matters. It may be relevant to a court in addressing its inherent power, in an area where Congress has legislated, to ask whether Congress intended to leave room for courts to develop common law or intended to occupy the field. When Civil Rule 37(e) was adopted in 2015 to deal with spoliation, the intent was to resolve a circuit split in the case law. The committee note stated that the rule amendment intended to foreclose a court from relying on inherent power in that area. Judge Campbell emphasized that the Advisory Committee's intent will likely be a relevant consideration in the future. Professor Coquillette added that if the Advisory Committee addresses exclusivity of the grand jury secrecy exceptions, that should be stated in the rule text rather than in a committee note. A DOJ representative explained that the core of the circuit split is whether courts have inherent authority to deviate from the list of exceptions in Rule 6(e), so avoiding the inherent authority issue in addressing the rule might be impossible.

Judge Kethledge suggested that the Advisory Committee can decide whether the disclosure of historical material is lawful without opining on the existence of inherent authority. He interpreted Justice Breyer's previous statement as encouraging the Advisory Committee to state whether the rule provides for disclosure of historical material, not necessarily whether the courts have inherent authority to do so. Judge Kethledge added that this discussion provides good food for thought as the Advisory Committee considers the Rule 6 proposals.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee did not hold a spring 2020 meeting. Judge Livingston thanked everyone for the opportunity to be a part of the rulemaking process. Professor Capra thanked both Judge Livingston and Judge Campbell for their leadership and counsel over the years.

Judge Livingston noted that the proposed amendment to Rule 404(b) is now before Congress and scheduled to take effect on December 1, 2020, absent congressional action. The Advisory Committee will decide soon whether to bring to the Standing Committee for publication any proposed amendments to Rules 106, 615 or 702.

Judge Livingston indicated that the Advisory Committee continues to seek consensus on a possible amendment to Rule 106, the rule of completeness. The question is whether to propose a narrow or broad revision to Rule 106. Professor Capra added that the Advisory Committee has discussed for years how far an amendment to Rule 106 should go.

Consideration of possible amendments to Rule 615 on excluding witnesses remains ongoing. Professor Capra explained the uncertainty reflected in caselaw concerning whether Rule 615 empowers judges to go beyond simply excluding witnesses from the courtroom. Clarity would benefit all litigants. Professor Capra noted the potential application of the rule to remote trials. Extending a sequestration order beyond the confines of the courtroom raises issues concerning lawyer conduct and professional responsibility. The committee note to any proposed rule amendment would acknowledge that the rule does not address that question.

The Advisory Committee continues its consideration of possible amendments to Rule 702 concerning expert testimony. Judge Livingston noted that the DOJ asked the Advisory Committee to delay any proposed rule amendments to Rule 702 to allow the Department to demonstrate the effectiveness of its recent reforms concerning forensic feature evidence.

The Advisory Committee frequently hears the complaints that many courts treat Rule 702's requirements of sufficient basis and reliable application as questions of weight rather than admissibility, and that courts do not look for these requirements to be proved by a preponderance of the evidence under Rule 104(a). The Advisory Committee has received numerous submissions from the defense bar with citations to cases in which some courts do not apply Rule 702 admissibility standards. Judge Livingston noted that at the symposium held by the Advisory Committee in October 2019, several judges expressed concern regarding potential amendments to Rule 702.

Judge Campbell commented that the Advisory Committee's discussion of *Daubert* motions requiring consideration of the Rule 702 requisites under the Rule 104(a) preponderance-of-the-evidence standard made *Daubert* determinations easier for him. He suggested that clarification of that process – whether in rule text, committee note, or practice guide – will result in clearer *Daubert* briefing and decisions. It was suggested that Rule 702 could be amended to add a cross-reference to Rule 104(a). Judge Livingston responded that the Advisory Committee worries

whether such an amendment would carry a negative inference vis-à-vis other evidence rules (given that there are many rules with requirements that should be analyzed under Rule 104(a)). But perhaps the committee note could explain why a cross-reference to Rule 104(a) would be added in Rule 702 and not in other rules.

OTHER COMMITTEE BUSINESS

Judge Campbell reported on the five-year update to the *Strategic Plan for the Federal Judiciary*, which is presented in the agenda book as a redlined version of the *Strategic Plan* and is being revised under the leadership of Judge Carl Stewart. Suggestions for improvement are encouraged and will be passed on to Judge Stewart.

Ms. Wilson reported on several legislative developments (in addition to the CARES Act issues that had been discussed at length earlier in the meeting). Ms. Wilson directed the Committee to the legislative tracking chart in the agenda book. Ms. Wilson highlighted that the Due Process Protections Act (S. 1380) would directly amend Criminal Rule 5. Since the last meeting of the Standing Committee, the Senate passed the bill, but the House has taken no action. In anticipation of the House taking up the bill, Judges Campbell and Kethledge submitted a letter to House leadership on May 28 expressing the Rules Committees' preference that any rule amendment occur through the Rules Enabling Act process. The letter also detailed the Criminal Rules Advisory Committee's prior consideration of this issue. In 2012, when legislation on this topic was being considered, the then-Chair of the Criminal Rules Advisory Committee, Judge Reena Raggi, submitted 900 pages of materials reflecting the Criminal Rules Advisory Committee's consideration of the question of prosecutors' discovery obligations.

Ms. Wilson also reported on the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), which would create an Article I tribunal for copyright claims valued at $30,000 or less. Proceedings would be streamlined, and judicial review would be strictly limited. This is similar to the Federal Arbitration Act. The legislation has been passed by the House and a companion bill (S. 1273) has been reported out of the Senate Judiciary Committee. The Office of Legislative Affairs at the Administrative Office expects some movement in the future. The Committee on Federal-State Jurisdiction (Fed-State Committee) has been tracking the CASE Act and has asked the Rules Committees to stay involved. The Fed-State Committee may ultimately recommend that the Judicial Conference adopt a formal position opposing the legislation and, with input from the Rules Committees, suggest alternatives to the creation of a separate tribunal for copyright claims.

Ms. Wilson noted that on June 25, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing titled "Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future." Judge Campbell will be the federal judiciary's witness at the hearing. His testimony will include a rules portion that details the Rules Committees' work on emergency rules.

Judge Campbell pointed to the agenda book materials summarizing efforts of federal courts and the Administrative Office to deal with the pandemic. Professor Marcus noted that the report mentions an emergency management staff at the Administrative Office and asked what other types

of emergency situations that staff has focused on in the past. Ms. Womeldorf explained that past efforts have focused on weather-related events, and she will continue to monitor the work of the Administrative Office's COVID-19 Task Force to inform the future work of this Committee.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on January 5, 2021.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2B

Agenda E-19 (Summary)
Rules
September 2020

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 and 6, and Forms 1 and 2 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. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 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..... pp. 5-8

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

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 by videoconference on June 23, 2020, due to the Coronavirus Disease 2019 (COVID-19) pandemic. All members participated.

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

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; and John S.

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five rules advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on pending legislation that would affect the rules and the judiciary's response to the COVID-19 pandemic.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3 and 6, and Forms 1 and 2, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were published for public comment in August 2019.

Rule 3 (Appeal as of Right—How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendment to Rule 3 revises the requirements for a notice of appeal. Some courts of appeals, using an *expressio unius* rationale, have treated a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that

order, rather than reaching all of the interlocutory orders that merge into the judgment. In order to reduce the loss of appellate rights that can result from such a holding, and to provide other clarifying changes, the proposed amendment changes the language in Rule 3(c)(1)(B) to require the notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken." The proposed amendment further provides that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The proposal also accounts for situations in which a case is decided by a series of orders over time and for situations in which the notice is filed after entry of judgment but designates only an order that merged into the judgment. Finally, the proposed amendment explains how an appellant may limit the scope of a notice of appeal if it chooses to do so. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment.

The comments received regarding Rule 3 were split, with five comments supporting the proposal (with some suggestions for change) and two comments criticizing the proposal. No comments were filed regarding the proposed amendments to Rule 6, and the only comments regarding Forms 1 and 2 were style suggestions. Most issues raised in the comments had been considered by the Advisory Committee during its previous deliberations. The Advisory Committee added language in proposed Rule 3(c)(7) to address instances where a notice of appeal filed after entry of judgment designates only a prior order merged into the judgment and added a corresponding explanation to the committee note. The Advisory Committee also expanded the committee note to clarify two issues and made minor stylistic changes to Rule 3 and Forms 1 and 2.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 3 and 6, and Forms 1 and 2, be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 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.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 25 (Filing and Service), with a request that it be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 25(a)(5) responds to a suggestion regarding privacy concerns for cases under the Railroad Retirement Act. The proposed amendment would extend the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. The Advisory Committee will identify specific stakeholder groups and seek their comments on the proposed rule amendment.

Information Items

The Advisory Committee met by videoconference on April 3, 2020. Agenda items included continued consideration of potential amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) in an effort to harmonize the rules. The Advisory Committee decided not to pursue rulemaking to address appellate decisions based on unbriefed grounds. It tabled a suggestion to amend Rule 43 (Substitution of Parties) to require the use of titles rather than names in cases seeking relief against officers in their official capacities, pending inquiry into the practice of circuit clerks. The Advisory Committee also decided to establish two new subcommittees to consider suggestions to regularize the standards and procedures governing

in forma pauperis status and to amend Rule 4(a)(2), the rule that addresses the filing of a notice of appeal before entry of judgment, to more broadly allow the relation forward of notices of appeal.

The Advisory Committee will reconsider a potential amendment to Rule 42 (Voluntary Dismissal) following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 42 was published in August 2019. As published, the proposed amendment would have required the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. (The amendment would accomplish this by replacing the word "may" in the current rule with "must.") The proposed amendment would have also added a new paragraph (a)(3) providing that a court order is required for any relief beyond the dismissal of an appeal, and a new subdivision (c) providing that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. At the Standing Committee meeting, a question was raised concerning the proposed amendment's effect on local circuit rules that impose additional requirements before an appeal can be dismissed. The Advisory Committee will continue to study Rule 42, with a particular focus on the question concerning local rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036. The amendments were published for public comment in August 2019.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

The proposed amendment to Rule 2005(c) replaces the current reference to "the provisions and policies of title 18, U.S.C., § 3146(a) and (b)" – sections that have been repealed

– with a reference to "the relevant provisions and policies of title 18 U.S.C. § 3142" – the section that now deals with the topic of conditions of release. The only comment addressing the proposal supported it. Accordingly, the Advisory Committee unanimously approved the amendment as published.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007(a)(2)(A)(ii) clarifies that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. The clarification addresses a possible reading of the rule that would extend such special service not just to banks, but to credit unions as well. The only relevant comment supported the proposed amendment and the Advisory Committee recommended final approval of the rule as published.

Rule 7007.1 (Corporate Ownership Statement)

The proposed amendment extends Rule 7007.1(a)'s corporate-disclosure requirement to would-be intervenors. The proposed amendment also makes conforming and stylistic changes to Rule 7007.1(b). The changes parallel the recent amendment to Appellate Rule 26.1 (effective December 1, 2019), and the proposed amendments to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020) and Civil Rule 7.1 (published for public comment in August 2019).

The Advisory Committee made one change in response to the comments. It agreed to retain the terminology "corporate ownership statement" because "disclosure statement" is a bankruptcy term of art with a different meaning. With that change, it recommended final approval of the rule.

Rule 9036 (Notice and Service Generally)

The proposed amendment to Rule 9036 would encourage the use of electronic noticing and service in several ways. The proposed amendment recognizes a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. The proposed amendment also reorganizes Rule 9036 to separate methods of electronic noticing and service available to courts from those available to parties. Under the amended rule, both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. But only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program.

The proposed amendment differs from the version previously published for comment. The published version was premised in part on proposed amendments to Rule 2002(g) and Official Form 410. As discussed below, the Advisory Committee decided not to proceed with the proposed amendments to Rule 2002(g) and Official Form 410.

The Advisory Committee received seven comments regarding the proposed amendments, mostly from court clerks or their staff. In general, the comments expressed great support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. But commenters opposed several other aspects of the proposed amendment. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

The Advisory Committee addressed concerns about clerk monitoring of email bounce-backs by adding a sentence to Rule 9036(d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

The Advisory Committee was persuaded by clerk office concerns that the administrative burden of a proof-of-claim opt-in outweighed any benefits, and therefore decided not to go forward with the earlier proposed amendments to Rule 2002(g) and Official Form 410 and removed references to that option that were in the published version of Rule 9036. This decision also eliminated the concerns raised in the comments about the interplay between the proposed amendments to Rules 2002(g) and 9036. With those changes, the Advisory Committee recommended final approval of Rule 9036.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 2005, 3007, 7007.1, and 9036 be approved and transmitted to the Judicial Conference

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 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.

Rules and Official Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to three categories of rules and forms with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The three categories are: (1) proposed restyled versions of Parts I and II of the Bankruptcy Rules; (2) republication of the Interim Rule and Official Form amendments previously approved to implement the Small Business Reorganization Act of 2019 (SBRA); and (3) proposed amendments to Rules 3002(c)(6), 5005, 7004, and 8023.

Restyled Rules, Parts I and II

At its fall 2018 meeting, after an extensive outreach to bankruptcy judges, clerks, lawyers and organizations, the Advisory Committee began the process of restyling the bankruptcy rules. This endeavor follows similar projects that produced comprehensive restyling of 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. The Advisory Committee now proposes publication of restyled drafts of approximately one third of the full bankruptcy rules set consisting of the 1000 series and 2000 series of rules. The proposed restyled rules are the product of intensive and collaborative work between the style consultants who produced the initial drafts, and the reporters and the Restyling Subcommittee who provided comments to the style consultants on those drafts. In considering the subcommittee's recommendations, the Advisory Committee endorsed the following basic principles to guide the restyling project:

1. *Make No Substantive Changes*. Most of the comments the reporters and the subcommittee made on the drafts were aimed at preventing an inadvertent substantive change in meaning by the use of a different word or phrase than in the existing rule. The rules are being restyled from the version in effect at the time of publication. Future rule changes unrelated to restyling will be incorporated before the restyled rules are finalized.

2. *Respect Defined Terms*. Any word or phrase that is defined in the Code should appear in the restyled rules exactly as it appears in the Code definition without restyling, despite any possible flaws from a stylistic standpoint. Examples include the unhyphenated terms "equity security holder," "small business case," "small business debtor," "health care business," and "bankruptcy petition preparer." On the other hand, when terms are used in the Code but are not defined, they may be restyled in the rules, such as "personal financial-management course," "credit-counseling statement," and "patient-care ombudsman."

3. *Preserve Terms of Art*. When a phrase is used commonly in bankruptcy practice, the Advisory Committee recommended that it not be restyled. Such a phrase that was often used in Part I of the rules was "meeting of creditors."

4. *Remain Open to New Ideas*. The style consultants suggested some different approaches in the rules, which the Advisory Committee has embraced, including making references to specific forms by form number, and listing recipients of notices by bullet points.

5. *Defer on Matters of Pure Style*. Although the subcommittee made many suggestions to improve the drafting of the restyled rules, on matters of pure style the Advisory Committee committed to deferring to the style consultants when they have different views.

The Advisory Committee also decided not to attempt to restyle rules that were enacted by Congress. As a result, the restyled rules will designate current Rule 2002(o) (Notice of Order for Relief in Consumer Case) as 2002(n) as set forth in Section 321 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, and the Advisory Committee will not recommend restyling the wording as it was set forth in the Act. Other bankruptcy rules that were enacted by Congress in whole or in part are Rule 2002(f), 3001(g), and 7004(h).

Although the Advisory Committee requested that the Part I and II restyled rules be published for public comment in August 2020, those proposed amendments will not be sent forward for final approval until the remaining portions of the Bankruptcy Rules have been restyled. Work has already begun on a group of rules expected to be published in 2021, and the Advisory Committee anticipates that the final batch of rules will be published for comment in 2022. After all the rules have been restyled, published, and given final approval by the Standing Committee, the Rules Committees hope to present the full set of restyled Bankruptcy Rules to the Judicial Conference for approval at its fall 2023 meeting.

SBRA Rules and Forms

On August 23, 2019, the President signed into law the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, which creates a new subchapter V of chapter 11 for the reorganization of small business debtors, an alternative procedure that small business debtors can elect to use. Upon recommendation of the Standing Committee, on December 16, 2019, the

Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, authorized the distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so they could be adopted locally, prior to the February 19, 2020 effective date of the SBRA, to facilitate uniformity of practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. The Advisory Committee has now begun the process of promulgating national rules governing cases under subchapter V of chapter 11 by seeking publication of the amended and new rules for comment in August 2020, along with the SBRA form amendments.

The SBRA rules consist of the following:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits),
- Rule 1020 (Small Business Chapter 11 Reorganization Case),
- Rule 2009 (Trustees for Estates When Joint Administration Ordered),
- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting),
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case),
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The Advisory Committee recommended publishing the SBRA rules as they were recommended to the courts for use as interim rules with some minor stylistic changes to Rule 3017.2.

Unlike the SBRA interim rules, the SBRA Official Forms were issued on an expedited basis under the Advisory Committee's delegated authority to make conforming and technical amendments to official forms (subject to subsequent approval by the Standing Committee and notice to the Judicial Conference, (JCUS-MAR 16, p. 24)). Nevertheless, the Advisory Committee committed to publishing the forms for comment in August 2020, along with the SBRA rule amendments, in order to ensure that the public has an opportunity to review the rules and forms together.

The SBRA Official Forms consist of the following:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy),
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy),
- Official Form 309E-1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)),
- Official Form 309E-2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)),
- Official Form 309F-1 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)),
- Official Form 309F-2 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships under Subchapter V)),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan), and
- Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

In addition, the Advisory Committee recommends one additional SBRA-related form amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). The instructions to that form currently require that it be filed "if you are an individual and are filing for bankruptcy under Chapter 11." This statement is not accurate if the debtor is an individual filing under subchapter V of Chapter 11. The proposed amendment to the form clarifies that it is not applicable to subchapter V cases.

Rules 3002(c)(6), 5005, 7004, and 8023

Rule 3002 (Filing Proof of Claim or Interest). Under Rule 3002(c)(6)(B), an extension of time to file proofs of claim may be granted to foreign creditors if "the notice was insufficient

under the circumstances to give the creditor a reasonable time to file a proof of claim." The Advisory Committee recommended an amendment that would allow a domestic creditor to obtain an extension under the same circumstances.

Rule 5005 (Filing and Transmittal of Papers). The Advisory Committee recommended publication of an amendment to Rule 5005(b) that would allow papers to be transmitted to the U.S. trustee by electronic means and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Rule 7004 (Process; Service of Summons, Complaint). The Advisory Committee recommended publication of a new subsection (i) to clarify that Rule 7004(b)(3) and Rule 7004(h) permit use of a title rather than a specific name in serving a corporation or partnership, unincorporated association or insured depository institution. Service on a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the "Chief Executive Officer," "President," "Officer for Receiving Service of Process," or "Officer" (or other similar titles) or, in the case of Rule 7004(b)(3), directed to the attention of the "Managing Agent," "General Agent," or "Agent" (or other similar titles) suffices, whether or not a name is also used or such name is correct.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to changes currently under consideration for Appellate Rule 42(b). As noted earlier in this report, the proposed amendment to Appellate Rule 42 was published for comment in August 2019, but the amendment is not yet moving forward for final approval because the Advisory Committee will study further the amendments' implications for local circuit provisions that impose additional requirements for dismissal of an appeal. The proposed amendment to Rule 8023 will be published for comment in the meantime.

Information Items

The Advisory Committee met by videoconference on April 2, 2020. In addition to its recommendations for final approval and for public comment discussed above, it recommended five official form amendments and one interim rule amendment in response to the CARES Act.

Notice of Conforming Changes to Official Forms 101, 201, 122A-1, 122B, and 122C-1

The CARES Act made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the COVID-19 pandemic. For the one-year period after enactment, the definition of "debtor" for subchapter V cases is changed, requiring conforming changes to Official Forms 101 and 201. For the same one-year time period, the definitions of "current monthly income" and "disposable" income are amended to exclude certain payments made under the CARES Act. These changes required conforming amendments to Official Forms 122A-1, 122B, and 122C-1. The Advisory Committee approved the necessary changes at its April 2, 2020 meeting pursuant to its authority to make conforming and technical changes to Official Forms subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee approved the amendments at its June 23, 2020 meeting, and notice is hereby provided to the Judicial Conference. The amended forms are included in Appendix B. These amendments have a duration of one year after the effective date of the CARES Act, at which time the former version of these forms will go back into effect.

Interim Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V)

One of the interim rules that was adopted by courts to implement the SBRA, Interim Rule 1020, required a temporary amendment due to the new definition of a Chapter 11, subchapter V debtor that was introduced by the CARES Act.

The Advisory Committee voted unanimously at its spring meeting to approve the proposed amendment to Interim Rule 1020 for issuance as an interim rule for adoption by each

judicial district. By email vote concluding on April 11, the Standing Committee unanimously approved the Advisory Committee's recommendation, and, on April 14, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, approved the request. Because the CARES Act definition of a subchapter V debtor will expire in 2021, the temporary amendment to Interim Rule 1020 is not incorporated into the proposed amendments to Rule 1020 that are recommended for public comment (under the Rules Enabling Act, permanent amendments to Rule 1020 to address the SBRA would not take effect before December 1, 2022).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 12, as well as new Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

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

The proposed amendment to Rule 12(a)(4) extends the time to respond (after denial of a Rule 12 motion) when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Under the current rule, the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or has postponed its disposition until trial is 14 days. The DOJ, which often represents federal employees or officers sued in an individual capacity, submitted a suggestion urging that the rule be amended to extend the time to respond in these types of actions to 60 days.

The Advisory Committee agreed that the current 14-day time period is too short. First, personal liability suits against federal officials are subject to immunity defenses, and a denial of a

qualified or absolute immunity defense at the Rule 12 motion-to-dismiss stage can be appealed immediately. The appeal time in such circumstances is 60 days, the same as in suits against the federal government itself. In its suggestion, the DOJ points out that, under the current rule, when a district court rejects an immunity defense, a responsive pleading must be filed before the government has determined whether to appeal the immunity decision.

The suggestion is a logical extension of the concerns that led to the adoption several years ago of Rule 12(a)(3), which sets the time to serve a responsive pleading in such individual-capacity actions at 60 days, and Appellate Rule 4(a)(1)(B)(iv), which sets the time to file an appeal in such actions at 60 days.

Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) is the result of three years of extensive study by the Advisory Committee.

This project was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of 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)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

A subcommittee was formed to consider the suggestion. The subcommittee's first tasks were to gather additional data and information from the various stakeholders and to determine whether the issues revealed by the Administrative Conference's study could – or should – be

corrected by rulemaking. With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules for discussion.

Over time, the draft rules were revised and simplified. During this process, the subcommittee continued to discuss whether a better approach might be to develop model local rules or best practices. Ultimately, with feedback from the Advisory Committee, the Standing Committee, and district and magistrate judges, the subcommittee determined to press forward with developing proposed rules for publication. A continuing question that has been the focus of discussion in both the Advisory Committee and the Standing Committee is whether the benefits of the proposed supplemental rules would outweigh the costs of departing from the usual presumption against substance-specific rulemaking. The federal rules are generally trans-substantive and the Rules Committees have, with limited exceptions, avoided promulgating rules applicable to only a particular type of action.

The proposed supplemental rules – eight in total – are modest and drafted to reflect the unique character of § 405(g) actions. The proposed rules set out simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of presenting the actions as appeals to be decided on the briefs and the administrative record. While trans-substantivity concerns remain, the Advisory Committee believes the draft rules are an improvement over the current lack of uniform procedures and looks forward to receiving comments in what will likely be a robust public comment period.

Information Items

The Advisory Committee met by videoconference on April 1, 2020. In addition to the action items discussed above, the agenda included a report by the Multidistrict Litigation (MDL) Subcommittee and consideration of suggestions that specific rules be developed for MDL

proceedings. As previously reported, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members have also participated in numerous conferences hosted by different constituencies, most recently a virtual conference focused on interlocutory appeal issues in MDLs hosted by the Institute for Complex Litigation and Mass Claims at Emory University School of Law. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

The Advisory Committee will continue to consider a potential amendment to Rule 7.1, the disclosure rule, following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 7.1(a) was published for public comment in August 2019. The proposed amendment to Rule 7.1(b) is a technical and conforming amendment and was not published for public comment. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to the recent amendment to Appellate Rule 26.1 (effective December 1, 2019) and the proposed amendment to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity that is attributed to a party.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed amendment to Criminal Rule 16 (Discovery and Inspection), with a request that it be published for public

comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would expand the scope of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

In considering the suggestions and developing a proposed amendment, the Advisory Committee drew upon two informational sessions. First, at the Advisory Committee's fall 2018 meeting, representatives from the DOJ updated the Advisory Committee on the DOJ's development and implementation of policies governing disclosure of forensic and non-forensic evidence. Second, in May 2019, the Rule 16 Subcommittee convened a miniconference to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. At the miniconference, defense attorneys identified two problems with the current rule: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors.

Over the next year, the subcommittee worked on drafting a proposed amendment. Drafts were discussed at Advisory Committee meetings and at the Standing Committee's January 2020 meeting. The proposed amendment approved for publication addresses the two shortcomings in the current rule identified at the miniconference – the lack of timing and the lack of specificity – while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

Information Item

The Advisory Committee met by videoconference on May 5, 2020. In addition to finalizing for publication the proposed amendment to Rule 16, the Advisory Committee formed a subcommittee to consider suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012.

The Advisory Committee has received two suggestions that the secrecy provisions in Rule 6(e) be amended to allow for disclosure of grand jury materials under limited circumstances. A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In addition to these two suggestions, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee did not hold a spring 2020 meeting, but is continuing its consideration of several issues, including: various alternatives for an amendment to Rule 106 (the rule of completeness); Rule 615 and the problems raised in case law and in practice

regarding the scope of a Rule 615 order; and forensic expert evidence, *Daubert*, and possible amendments to Rule 702. The DOJ has asked that the Rules Committees hold off on amending Rule 702 in order to allow time for the DOJ's new policies regarding forensic expert evidence to take effect. The Advisory Committee will discuss this request along with other issues related to Rule 702 at its upcoming meetings.

OTHER ITEMS

An additional action item before the Committee was a request by the Judiciary Planning Coordinator that the Committee review a draft update to the *Strategic Plan for the Federal Judiciary* for the years 2020-2025. The Committee did so and had no changes to suggest.

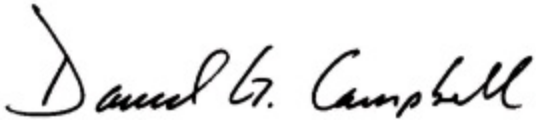
The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Finally, the Committee discussed the CARES Act, including its impact on criminal proceedings and its directive to consider the need for court rules to address future emergencies. On March 29, 2020, on the joint recommendation of the chairs of this Committee and the Committee on Court Administration and Case Management, the Judicial Conference found that emergency conditions due to the national emergency declared by the President under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, with respect to the COVID-19 pandemic will materially affect the functioning of the federal courts. Under § 15002(b) of the CARES Act,

this finding allows courts, under certain circumstances, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings.

Section 15002(b)(6) of the CARES Act directs the Judicial Conference to develop measures for the courts to address future emergencies. In response to that directive, the Committee heard reports on the subcommittees formed by each advisory committee to consider possible rules amendments that would provide for procedures during future emergencies. As a starting point, the advisory committees solicited public comments on challenges encountered during the COVID-19 pandemic in state and federal courts from lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. Over 60 substantive comments were received. The Standing Committee asked each advisory committee to identify rules that should be amended to account for emergency situations and to develop discussion drafts of proposed amendments at the committees' fall meetings for consideration by the Standing Committee at its January 2021 meeting.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Jeffrey A. Rosen
William J. Kayatta Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps

TAB 3

Minutes of the Spring 2020 Meeting of the

Advisory Committee on the Appellate Rules

April 3, 2020

By telephone conference call

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 3, 2020, at 10:00 a.m.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Judge Paul Watford, Justice Judith L. French, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, and Lisa B. Wright. Solicitor General Noel Francisco was represented by Thomas Byron, Assistant Director of Appellate Staff, Department of Justice.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Bernice Donald, Member, Advisory Committee on the Bankruptcy Rules, and Liaison Member, Advisory Committee on the Appellate Rules; Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Alison Bruff, Rules Law Clerk, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

I. Introduction

Judge Chagares opened the meeting and welcomed everyone. He expressed the hope that all are healthy. He noted that it is awkward to meet by phone, but that it was necessary under the circumstances.

II. Report on Status of Proposed Amendments and Legislation

Judge Chagares directed the committee's attention to the rules tracking chart in the agenda book (pages 25-28) and noted that amendments took effect in December of 2019 modernizing the rules to take account of electronic filing and to amend the disclosure requirements of Rule 26.1. In addition, amendments to Rules 35 and 40

are on track to take effect in December of 2020. Additional proposed amendments are out of public comment and will be discussed later in the meeting.

As for pending legislation, Judge Chagares stated that the proposed AMICUS Act does not appear at this time to be moving in Congress. The subcommittee does not believe that any action is necessary now but has asked for research to be done into ascertaining the number of parties that would be covered by the proposed Act. It will continue to monitor the status of the bill.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act has been enacted. As it pertains to the judiciary, the CARES Act authorizes teleconferences in certain criminal matters. While the bill was pending, Judge Chagares and Professor Hartnett were asked to review the Federal Rules of Appellate Procedure to see if any emergency amendments were needed to deal with COVID-19 pandemic. They found nothing that needed immediate attention. The CARES Act directs the judiciary to consider possible amendments through the Rules Enabling Act process in case of future emergencies. Accordingly, Judge Chagares formed a subcommittee to review the Federal Rules of Appellate Procedure for possible amendments. Professor Sachs, Tom Byron, and Judge Watford agreed to serve on this subcommittee. As usual, the Chair and the Reporter will serve as well.

Judge Campbell provided a bit of background on the CARES Act. An earlier version would have directly amended the Federal Rules of Criminal Procedure. The judiciary asked Congress to please not do so, but instead to simply authorize certain procedures during this emergency; and if Congress wanted something more permanent, to direct that the Rules Enabling Act process be used to address the matter. Congress chose to do what the judiciary requested. To implement that directive, subcommittees of each advisory committee should meet before the fall 2020 meeting to consider possible amendments. Any proposed amendments would be refined before the spring 2021 meeting, so that any proposed amendments would be published for public comment in the summer of 2021 and be on track to take effect in December 2023. The criminal rules committee is considering proposing some amendments; other committees may or may not.

Professor Coquillette noted that Judge Campbell had acted very quickly and had done a great job. Judge Chagares stated that we are all grateful for Judge Campbell's leadership.

III. Consent Agenda

Judge Chagares invited a motion to approve the consent agenda, consisting of approval of the minutes of the fall meeting on October 29, 2019, and the removal of

the suggestion regarding Congressional subpoenas (19-AP-H) from the agenda. The motion was made and approved with none opposed.

IV. Discussion of Matters Published for Public Comment (16-AP-D and 17-AP-G)

A. Rule 3

The Reporter presented the subcommittee report regarding Rule 3. Proposed amendments have been published for public comment. Two comments, if accepted, would derail the project. One was considered at the last meeting; a second was received since the last meeting.

At the last meeting, the committee considered the comments of Mr. Rosman, whose critique is based on his reading of Civil Rule 54. No committee member was persuaded last time, no member of the standing committee expressed concern, and the subcommittee did not see any need to revisit the issue. The Reporter emphasized that this was the last call for committee members to speak up on the issue. None did.

The Reporter then turned to the second comment that would, if accepted, derail the project. Judge Colloton has urged the committee to abandon the proposal. Judge Colloton points to cases across the circuits, written by illustrious judges, that appropriately read the existing rule to hold appellants to their choices to limit the notices of appeal. He observes that it isn't hard for appellants to designate everything for appeal and does not think we should encourage appellate counsel to expand the scope of the appeal beyond what was in the notice.

The subcommittee concluded that if the rule leads to the decisions reflected in the Rules Clerk memo, we need to change the rule. In contrast to Judge Colloton, the comment submitted by the National Association of Criminal Defense Lawyers (NACDL) emphasizes the importance of appellate counsel being able to review record material that may not be available at the time the notice of appeal is filed—as does the Supreme Court decision in *Garza*.

Finally, Judge Colloton urged that if the project goes forward, references to "trap for the unwary" should be deleted from the committee note as pejorative. The subcommittee does not view that phrase as pejorative. As reflected in Black's Law Dictionary, a trap can exist even if no one intended to set it.

In response to a question from Judge Chagares, the Reporter stated that he planned to address another concern raised by Judge Colloton—dealing with whether the proposal itself creates a trap for the unwary—later in the discussion.

No member of the committee suggested abandoning the project or eliminating the phrase "trap for the unwary" from the committee note.

The Reporter then turned to smaller issues, ones that might call for some adjustments but not abandonment of the project.

First, the Reporter stated that the Standing Committee had raised a concern whether the proposal might inadvertently change the rule that there is an appealable final judgment even though a motion for attorney's fees is outstanding. Discussion at the Standing Committee suggested that perhaps the proposal should use the conjunction "or" rather than "and" in connecting "claims" with "rights and liabilities" or perhaps the phrase "rights and liabilities" should be deleted.

The subcommittee recommended that neither change be made. While part of Civil Rule 54(b) uses the conjunction "or," the last sentence of 54(b) uses the conjunction "and." Keeping "rights and liabilities" preserves the intended connection between the proposal and Civil Rule 54(b). Instead, the subcommittee recommended adding to the committee note a statement that the amendment does not change the principle established in the Supreme Court decisions *Budinich* and *Ray Haluch*.

The subcommittee also considered a related question about Civil Rule 58(e), a rule that allows a district court to treat a motion for attorney's fees as if it were a Civil Rule 59 new trial motion for purposes of Appellate Rule 4(a)(4)(A). The subcommittee concluded that this situation is covered by Rule 4(a)(4)(A)(iii) because such a district court order is effectively an extension of time and Civil Rule 58(e) is the intended reference of subsection (iii).

The Reporter also discussed a comment from Professor Lammon proposing a way to simplify the proposal. The subcommittee did not recommend the proposed simplification, viewing it as both too broad and too narrow.

The committee accepted all of these recommendations by the subcommittee without further discussion.

The Reporter then turned to an issue that has been a significant recurring question: whether to allow the designation to limit the scope of the notice of appeal or to leave any such narrowing to the briefs. At the last meeting, members of the committee voiced differences about this issue but decided on allowing such limitation in the proposed amendment that was published for public comment.

The issue was raised at the Standing Committee and was the subject of public comment. The Council of Appellate Lawyers favored the opposite approach: not allowing the designation to limit the scope of the notice of appeal but leaving any such

narrowing to the briefs. The Association of the Bar of the City of New York (ABCNY) did not make such a recommendation, but did suggest adding an "except" clause to proposed subsection (c)(4) to make clear that the ability to limit the scope of the notice of appeal in subsection (6) operates as an exception to the general principle of subsection (4).

The subcommittee presented the committee with two alternatives. One alternative was the proposed amendment as published, with (c)(6) allowing limitation of the scope of the notice of appeal if done expressly. The other alternative would delete (c)(6) as published and add a sentence to (c)(4): "Specific designations do not limit the scope of the notice of appeal." Corresponding changes to the committee note would also be made.

Mr. Byron made a pitch for the "cleaner" alternative of deleting (c)(6) and adding the sentence to (c)(4). This approach would create less uncertainty and avoid inadvertent loss of appellate rights. He saw good arguments on both sides of this issue, yet thought that the concerns supporting the retention of proposed (c)(6) could be managed in other ways. For example, in multi-party cases where some parties settle, assurance that the appealing party is not breaching the settlement agreement could be provided in other ways, separate from the text of the notice of appeal. Similarly, issues regarding the ability of a district court to modify existing rulings could be handled on a case-by-case basis. A motion in the district court, or a statement in a brief, could signal to the courts and parties the limits of what was sought to be raised on appeal. In response to the argument that if proposed (c)(6) would lead to abuses, then we should see abuses now, Mr. Byron observed that the reason for this project as a whole is to respond to cases that have resulted in the inadvertent loss of appellate rights.

Judge Chagares noted that the existing rule permits parties to designate "a part thereof."

An academic member urged the committee to retain proposed (c)(6). He observed that current law allows limited notices of appeal, and that the point of the current project is to avoid miscommunication, not to change what a party can and can't do. Retaining the ability to expressly limit the scope of the notice of appeal is valuable, and there is utility in binding oneself in the notice of appeal rather than with some assurance on the side. If a matter has been appealed, the district court can only make an indicative ruling. Putting the question on the committee's calendar to review at some point in the future is better than taking away the ability to expressly limit the scope of the notice of appeal.

Mr. Byron moved to delete proposed (c)(6) and add the sentence to (c)(4). The motion failed by a vote of 3 to 5. (Byron, Wright, and Watford in favor; Bybee, Murphy, French, Sachs, and Spinelli opposed).

The Reporter then turned to another concern raised by Judge Colloton: whether the proposed amendment might create a new trap for the unwary if an appellant designates only a prior interlocutory order. To meet this concern, the material in the agenda book suggested an addition to (c)(7), providing that an appeal should not be dismissed for improperly designating the judgment if the intent is otherwise clear. But subsequent discussion with Judge Chagares led the Reporter to a different phrasing: that an appeal should not be dismissed "for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment."

A judge member asked whether any change was necessary, given proposed (c)(4). The Reporter replied that he hoped that judges would read proposed (c)(4) the way the judge member did, but was concerned that not all judges would do so. Judge Chagares explained that some might read (c)(4) to require that the judgment be designated, and if this threshold requirement is not met, the appellant is going nowhere.

An academic member suggested that the proposed language would be better placed in (c)(5) as a rule of construction rather than in (c)(7) as a simple prohibition on dismissal of the appeal. Professor Struve agreed, and particularly noted that the phrasing now under discussion was an improvement over the one in the agenda book.

Mr. Byron thought the language would be better in (c)(7), because a court might conclude that appellate jurisdiction is lacking altogether, while (c)(5) addresses what sort of designations count as designating the final judgment. An academic member noted that this was a fair point.

Judge Chagares stated that there appeared to be a consensus to keep the language in (c)(7).

Discussion then turned to whether the new language should be limited to "the judgment" or should extend to "appealable orders." The Reporter stated that he had considered adding that phrase, but doing so would add complexity by inserting "appealable order" in three places—"for failure to properly designate the judgment *or appealable order* if the notice of appeal was filed after entry of the judgment *or appealable order* and designates an order that merged into that judgment *or appealable order*"—that did not appear worth it in light of the likelihood of the problem arising in the context of an appealable order. An academic member agreed

that the problem would not be likely to arise in that context, and that the provision is designed as a failsafe only to prevent complete loss of appellate rights.

Mr. Byron favored leaving out "appealable order." Like the Reporter, he did not envision a case in which the problem would arise in that context. With no problem identified, there is no need to go too far afield.

Judge Campbell suggested that the phrase "entry of" should be deleted. The Reporter stated that retaining the phrase "entry of" would connect the new provision to Rule 4(a) while deleting it could leave the relevant date uncertain. Mr. Byron agreed with Judge Campbell that the phrase "entry of" should not be included. An academic member suggested that the addition of a committee note stating that this provision should be read consistently with Rule 4(a)(2) and 4(b)(2). The committee decided, without dissent, to reject the phrasing in the agenda book and to adopt the phrasing discussed above, including the phrase "entry of."

The Reporter presented two ideas for expanding the project that had been suggested in public comments.

The first, suggested by Professor Lammon, was to provide that there was no need to file a new or amended notice of appeal, after the denial of a Rule 4(a)(4)(A) motion. The subcommittee thought that this suggestion would require further review and republication. It recommended rolling this suggestion into the new agenda item, to be discussed later, 20-AP-A. The committee agreed.

The second, suggested by the NACDL, was to expand proposed Rule 3(c)(5) to cover criminal cases. The subcommittee similarly thought that this proposed expansion would require further review and republication. The NACDL did not point to a particular problem currently occurring in criminal cases, and indicated that there are not many criminal cases where the issue addressed by proposed (c)(5) is presented. Its concern was that a rule limited to civil cases might lead some courts, using an expressio unius rationale, to abandon their current precedent that takes an approach in criminal cases similar to that of the proposed rule. The subcommittee suggested an addition to the committee note stating that similar issues may arise in a small number of criminal cases, but that no inference should be drawn from the new provision about how such issues should be handled in criminal cases.

A lawyer member expressed concern about this note, fearing that it could be read to suggest that the criminal rule should be stricter. Maybe it would be better to not add this to the committee note. Or maybe it could be added to the text in (c)(5).

Mr. Byron noted that, for appellate purposes, the nature of the order rather than the nature of the case determines whether it is treated as civil or criminal.

Professor Struve agreed that it is the nature of the act for which review is sought that determines treatment as civil or criminal.

The Reporter clarified that there are some orders that the NACDL is concerned about, such as a denial of a motion to dismiss on double jeopardy grounds, that are plainly criminal for purposes of appeal. Even though some appeals in criminal cases will be addressed by the existing proposal, not all will.

The Reporter suggested adding the clause, "and similar treatment may be appropriate" to the committee note. An academic member urged retention of the "no inference should be drawn" language, pointing out that it is less clear on the civil side when there is a final judgment, and that Rule 4(b) allows appeals from the denial of certain motions without an amended notice of appeal. Without further study, we shouldn't suggest that courts do anything other than what they are doing on the criminal side.

The lawyer member who raised this concern agreed, emphasizing that the concern was that the proposal in the agenda book suggests that similar treatment might not be appropriate.

Mr. Byron urged both keeping the "no inference" language and adding the "similar treatment may be appropriate" language.

The committee agreed without dissent, charging the subcommittee with finalizing the language.

The committee further agreed, without dissent, to send the proposed amendment, as modified by the discussions at this meeting, to the Standing Committee for final approval.

Judge Chagares thanked the subcommittee, consisting of Mr. Byron, Judge French, and Professor Sachs.

B. Rule 42

Judge Bybee presented the subcommittee report regarding the proposed amendment to Rule 42(b) that was published last summer for public comment. It would make dismissal of appeals mandatory in certain circumstances. Two comments were received, one from the ABCNY, the other from NACDL. Both comments proposed adding language.

ABCNY suggested additional language dealing with agency orders, particularly by the SEC. NACDL suggested additional language dealing with the

obligations of defense counsel. The subcommittee recommended neither addition. There is no need to add qualifications to the rule as published.

The subcommittee did, however, recommend eliminating the word "mere." The Reporter added that the subcommittee also recommended adding references to Rule 42(b)(1) and (b)(2) to clarify the scope of the amendment.

The committee agreed, without dissent, to send the proposed amendment, as presented in the agenda book, to the Standing Committee for final approval.

Judge Chagares thanked the subcommittee, consisting of Judge Bybee and Christopher Landau (now United States Ambassador to Mexico).

V. Discussion of Matters Before Subcommittees

A. Proposed Amendments to Rules 35 and 40 (18-AP–A)

Judge Chagares presented the subcommittee's report regarding Rules 35 and 40. He stated that the committee had previously rejected doing a thorough re-write of these rules, and so reported to the Standing Committee. Accordingly, the subcommittee presented more modest changes. But some members of the subcommittee favored a more thorough re-write, and he suggested that the committee address that question as a threshold matter. He noted that the committee could produce better rules, but there has been no real complaint or problem; if it ain't broke don't fix it.

Mr. Byron made a pitch for a more thorough re-write. The current rules have lots of duplication that arose inadvertently, traceable to the days when parties could not petition for rehearing en banc, but only suggest it. Once the two rules were aligned in that regard—so that a party could petition for rehearing en banc as well as petition for panel rehearing, frequently in a single document—it made sense to eliminate duplication. Lots of streamlining can be done.

A lawyer member agreed. The existing rules are confusing to someone who hasn't encountered them before. Two judge members favored taking a look at the rules.

The committee voted 5-2 to send the matter back to the subcommittee to consider the more thorough re-write. (French, Spinelli, Bybee, Wright, and Sachs in favor; Murphy and Watford opposed).

B. Proposed Amendment to Rule 25 in Railroad Retirement Act Cases (18-AP–E, 18-CV-EE)

Judge Chagares presented the subcommittee's report regarding privacy concerns in Railroad Retirement Act cases. A working draft was discussed at the last meeting and presented to the Standing Committee. One question that arose was whether it was redundant to refer to both the Railroad Retirement Board and the Railroad Retirement Act. But since the Railroad Retirement Board also issues decisions under the Railroad Unemployment Act, the subcommittee recommended no change to the working draft.

The committee, without dissent, agreed to send the proposed amendment to the Standing Committee for possible publication seeking public comment.

C. Unbriefed Grounds (19-AP-B)

Judge Chagares presented the subcommittee's report regarding decisions on unbriefed grounds. The subcommittee thought that there is a legitimate concern, but it was not a matter for rulemaking. Rulemaking could increase the time to decision and invite disputes about what was briefed. In addition, rehearing is available. Instead, the subcommittee recommended sending a letter to Chief Circuit Judges about the issue and including the letter from the American Academy of Appellate Lawyers, which expressed concern about courts deciding cases on grounds that had not been briefed.

Mr. Byron noted his support for the concern. The Department of Justice has encountered the same problem, and it is very frustrating. Perhaps a precatory rule encouraging supplemental briefing would be helpful while avoiding disputes about whether such briefing is required. A judge member agreed that it is a legitimate issue, but writing a rule would be ineffective and create further problems. A letter from the committee chair would be better.

Judge Chagares stated that the subcommittee's proposal, if adopted, would do that. He'd like to think that the Chief Judges would share the letter with their respective courts. Perhaps the committee could monitor the issue to see if it remains a continuing concern.

An academic member suggested sending a letter and calendaring the matter for the future. Mr. Byron agreed.

The committee, without dissent, adopted the proposal to send a letter and calendar the matter for the future. The matter will remain on the agenda to be revisited in three years.

VI. Discussion of Matters Before Joint Subcommittees

Judge Chagares stated that reports on matters before joint subcommittees are in the agenda book materials.

VII. Discussion of Recent Suggestions

The Reporter presented a discussion of recent suggestions.

A. IFP Standards (19-AP-C)

The Reporter noted that this committee has expressed the most interest in the suggestion regarding IFP standards and suggested that the next step would be the appointment of a subcommittee. Judge Chagares appointed a subcommittee consisting of Justice French, Judge Watford, and Ms. Wright.

B. Use of Titles in Official Capacity Actions (19-AP-G)

The Reporter stated that Sai suggested that the use of titles rather than names in official capacity suits be made mandatory. In particular, Sai suggested that the word "may" in Appellate Rule 43 and Civil Rule 17 be changed to "shall." The Reporter noted that this change could promote clarity, but that there is a possible worry about how it would interact with *Ex parte Young* and the Eleventh Amendment. He also noted that Sai had submitted a response to the memo in the agenda book and that this response had been circulated to the committee in advance of the meeting. The Reporter invited discussion, asking whether there is a real problem that needs to be addressed and whether the concerns about the Eleventh Amendment are overblown.

An academic member stated that he had no strong views. It could promote clarity, but at some downside risk. He shared the concern about sovereign immunity, but thought that it could be avoided. He slightly favored the formation of a subcommittee.

Mr. Byron noted that since the civil rules committee had kept it on its agenda, we should as well, but that he did not feel strongly. A judge member suggested that we wait for the civil rules committee; the Reporter said that it seemed like civil rules committee had a similar reaction, waiting for us.

The Reporter asked for comments on whether there was a problem that needed to be addressed. Ms. Dodszuweit responded that the Clerk's Office in the Court of Appeals for the Third Circuit currently uses titles rather than names. Judge Chagares suggested that the matter be tabled pending inquiry by Ms. Dodszuweit regarding the practice by other circuit clerks. The committee agreed without dissent.

C. Relation Forward of Notices of Appeal (20-AP-A)

Professor Lammon has suggested that premature notices of appeal relate forward. Current Rule 4(a)(2) allows relation forward when the notice of appeal is filed after the announcement of a decision but prior to entry. The committee considered this matter about a decade ago and decided against taking action; Professor Lammon contends that things have not gotten better since then.

The Reporter said that his sense from reading the prior minutes was that the committee was concerned about inviting premature notices of appeal, and added his concern about the disruption of district court proceedings. He suggested that there might be a way to avoid these problems by drafting a narrower provision that draws on the practice that allows a district court to certify that an appeal is frivolous.

Judge Chagares appointed a subcommittee to consider this suggestion, consisting of Judge Bybee, Judge Murphy, Ms. Spinelli, and Mr. Byron.

VII. Recent Rule Changes

Judge Chagares turned to a review of the impact and effectiveness of recent rule changes.

The 2019 amendment to Rule 25(d) eliminated the requirement of proof of service when service is made through a court's electronic-filing system. Some local rules have not yet been amended to conform to this new Rule, and continue to require proof of service, but the expectation is that this will change with a bit more time. Ms. Dodszuweit offered to follow-up with the Clerks of circuits that have not yet changed their rules or practices.

The 2018 amendment to Rule 29(a)(2) permits the rejection or striking of an amicus brief that would result in a judge's disqualification. This has happened in three circuits so far.

VIII. New Business and Updates on Other Matters

Judge Chagares invited any other suggestions that would result in the just, speedy, and inexpensive resolution of cases or any new business. None was immediately forthcoming.

Judge Campbell noted that other committees had covered a lot of ground and added that the Reporters will share information with each other.

IX. Adjournment

Judge Chagares thanked everyone for their contributions to the meeting and wished them good health in these uncertain times. He stated that the next meeting would be on October 20, 2020, and is scheduled to be held in Washington, DC.

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

TAB 4

TAB 4A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Date: September 24, 2020

Re: Proposed Amendments to FRAP 42 (17-AP-G)

At the last meeting of the Advisory Committee, in April of 2020, the Committee gave its final approval to proposed amendments to FRAP 42.

Here is the proposed text as approved by the Committee:

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

This Committee had decided not to make any changes in response to a comment by the National Association of Criminal Defense Lawyers that the dismissal of appeals in criminal cases should not be approved unless the court is satisfied that the appellant personally has approved the motion to dismiss with full knowledge of the right being waived and the consequences of the dismissal. The Committee reasoned that the Federal Rules of Appellate Procedure do not generally address the particular responsibilities that counsel owe to criminal defendants, leaving that to other bodies of law.

The Standing Committee was concerned, however, about how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal. Because Rule 42(b) is addressed to the Clerk, rather than to the parties, it is different than other rules. It decided to withhold approval until local rules were examined.

I have located four local rules that are directly relevant. Second Circuit Local Rule 42.2 provides:

> A stipulation or motion to voluntarily dismiss a counseled defendant's criminal appeal must be accompanied by the defendant's signed statement that (a) counsel has explained the effect of voluntary dismissal of the appeal, (b) the defendant understands counsel's explanation, and (c) the defendant desires to withdraw and voluntarily dismiss the appeal.

Similarly, Fourth Circuit Local Rule 42 provides:

> In civil cases, the stipulation of dismissal or motion for voluntary dismissal may be signed by counsel. In criminal cases, however, the agreement or motion must be signed or consented to by the individual party appellant personally or counsel must file a statement setting forth the basis for counsel's understanding that the appellant wishes to dismiss the appeal and the efforts made to obtain the appellant's written consent. Counsel must serve a copy of this statement on appellant.

And Eighth Circuit Local Rule 42A provides:

> A criminal appeal may be dismissed only with the consent of the defendant. No motion to voluntarily dismiss a criminal appeal will be granted unless the defendant either signs the motion or consents, in a written attachment to the motion, to dismissal of the appeal.

Eleventh Circuit Local Rule 27-1(a)(7) reaches more broadly, but also covers voluntary dismissals:

> Both retained and appointed counsel who seek leave to withdraw from or to dismiss a criminal appeal must recite in the motion that the party they represent has been informed of the motion and either approves or disapproves of the relief sought and show service of the motion on the party they represent.

To guard against the risk that these local rules might be superseded by the proposed amendment, I suggest adding the following:

> **(d) Criminal Cases.** A court may, by local rule, impose requirements to ensure that a defendant consents to the dismissal of an appeal in a criminal case.

TAB 4B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Date: September 24, 2020

Re: Proposed Amendments to FRAP 25 (18-AP-E)

At the last meeting of the Advisory Committee, in April of 2020, the Committee agreed to seek Standing Committee approval to publish for public comment a proposed amendment to FRAP 25. This amendment would extend the privacy protection given to Social Security and immigration cases to Railroad Retirement Act cases.

The Standing Committee approved, and the proposed amendment, as published for public comment, follows this memo.

To date, only one comment has been received. That comment, in its entirely, states:

> all rules proposed sollely by lawyers need to be reviewed for their ability to be understood and used by the general public, which has a l2 year old recognition of the english language (or less). they need to be made simple, fully explained and should never be accepted unless they ar—e so written and passed for inclusion in rules books. the courts are there for all americna citizens not just for lawyers, who use the rules far too often to scam the general public. and we need a rule that judgs are not to favor lawyers and disregard all documents presented by the general public.

In addition, some concern was raised at the Standing Committee about whether other cases—such as ERISA cases and Hague Convention cases—might warrant the same treatment as Social Security, immigration, and Railroad Retirement Act cases. Outreach to relevant stakeholders was suggested. It would seem that any change to deal with such cases would involve an amendment to Civil Rule 5.2, not the Appellate Rules. The only reason for the pending amendment is because Railroad Retirement Act cases come directly to the courts of appeals. Nevertheless, because the concern was raised in connection with this proposal, I have begun some outreach, but do not yet have any response.

TAB 4C

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 25. Filing and Service

(a) Filing

* * * * *

(5) **Privacy Protection**. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote access in

[1] New material is underlined in red; matter to be omitted is lined through.

Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

TAB 5

TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: CARES Act subcommittee

Re: Rule emergencies

Date: September 25, 2020

As part of its response to the coronavirus pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, or "CARES Act," Pub. L. No. 116-136, March 27, 2020, 134 Stat 281. Section 15002 of that Act provides:

> The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

In accordance with that provision, subcommittees of each of the Advisory Committees have considered what amendments, if any, would be appropriate.

Efforts have been made to coordinate the actions of the subcommittees where possible. But the needs of the Civil and Criminal Rules, for example, are quite different than the needs of the Appellate Rules. Civil and Criminal need to take account of the need to conduct trials, including the constitutionally protected jury trial. Criminal has additional constitutional constraints, including the Confrontation Clause. Appellate has far fewer constraints, as reflected by the existing Appellate Rule 2—titled "Suspension of Rules".

Uniformity regarding the kind of emergency that can trigger rule suspension seems possible, and the Appellate subcommittee accepted the relevant language from the Criminal subcommittee. But while other subcommittees are focused on listing particular Rules that can be suspended in an emergency, the Appellate subcommittee has taken a broader approach. The members of the Appellate subcommittee began by reviewing every Federal Rule of Appellate Procedure to evaluate which ones might be appropriate candidates for amendment, but the subcommittee ultimately concluded that the best approach for the Appellate Rules was simply an amendment to Federal Rule of Appellate Procedure 2.

The subcommittee has also reviewed the Federal Rules of Appellate Procedure to see if there are any Appellate Rules that should *not* be liable to suspension in an emergency. We have not found any. That's largely because of the breadth of existing Rule 2: It is hard to say that a Rule that can be suspended in a particular case for good cause cannot be suspended in an emergency. There are certainly Rules that are

quite unlikely to be suspended in an emergency, but that's typically because they already have sufficient flexibility built in such that suspension would be unnecessary, rather than because compliance with them is so important even in an emergency.

Here is the draft amendment to Rule 2 recommended by the subcommittee:

Rule 2. Suspension of Rules

(a) **Particular Cases.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) **Rule Emergencies**. If extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court of appeals, substantially impair the ability of a court of appeals to perform its functions in compliance with these Rules, the Chief Circuit Judge may suspend any provision of these Rules in that circuit. The Chief Circuit Judge must end the suspension when the substantial impairment no longer exists. The Judicial Conference of the United States may exercise this same power to suspend in one or more circuits, and may review and revise any determination by a Chief Circuit Judge under this Rule.

Note

The amendment adds a new Rule 2(b) providing emergency authority for a temporary suspension of provisions in the Federal Rules of Appellate Procedure. From the very beginning of the Federal Rules of Appellate Procedure, Rule 2 has always broadly permitted the suspension of nearly any Federal Rule of Appellate Procedure in particular cases. That authority is sufficient to deal with short term emergencies affecting a limited number of cases. It might be thought to be sufficient to deal with long term emergencies dealing with all pending cases for an extended period as well, but that might stretch the concept of "a particular case" and start to look like a local Rule. *See* Rule 47; 28 U.S.C. § 2071.

The new emergency authority is available if extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court of appeals, substantially impair its ability to perform its functions in compliance with these Rules, but only so long as the substantial impairment persists. The authority may be exercised in

that circuit by the Chief Circuit Judge or Judicial Conference of the United States. The Judicial Conference may also act in multiple circuits, and may review and revise any determination by a Chief Circuit Judge.

Existing Rule 2 does not permit suspension of the Rules governing the time to appeal, to petition for leave to appeal, or to seek review of an administrative agency. *See* Rule 26(b). The emergency authority is not so limited because there might be emergency situations that call for relaxation of these time limits in the Rules. The emergency authority, however, does not authorize the suspension of statutory time limits that constrain the jurisdiction of a court of appeals. *See, e.g., Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017) (discussing difference between mandatory claims processing Rule in Rule 4 and jurisdictional time limit in 28 U.S.C. § 2107).

The amendment does not dictate which Rules should be suspended in an emergency; that will depend on the nature of the emergency. Some that may prove appropriate candidates for suspension in certain circumstances include:

- Rule 4: extending the time to appeal (but not beyond what is permitted by statute)
- Rule 4(c): extending the time to comply with the prisoner's mailbox Rule (but not beyond what is permitted by statute)
- Rule 25(a)(2)(B): permitting or requiring the use of electronic filing
- Rule 25(e): changing the number of copies of a document required or permitted to be filed
- Rule 26(a)(3): declaring a clerk's office inaccessible for purposes of computing time, and providing for a filing window after the clerk's office becomes accessible (alternatively, providing for the exclusion of time under Rule 26(a)(1)(B))
- Rule 26(b): extending time, other than to appeal
- Rule 34: declaring that oral argument may be conducted entirely remotely, while providing for some form of public access

- Rule 45(a)(2): declaring that the clerk's office need not have a person physically in attendance.

* * *

The subcommittee's review of the Federal Rules of Appellate Procedure in light of the experience of the pandemic has also led it to suggest some changes without regard to a rules emergency.

FRAP 4(c)

The subcommittee recommends providing for situations where a prison mail system is unavailable.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an institution's internal mail system is not available on the last day for filing, an inmate who files a notice of appeal on the first day that it becomes available receives the benefit of this rule.

~~(2)~~ (3) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

~~(3)~~ (4) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its

> notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

If this change is made to FRAP 4(c), a parallel change to FRAP 25(a) might also be appropriate.

FRAP 26(a)(3)

The subcommittee considered defining "inaccessibility" of the clerk's office in a way that takes account of the possibility that electronic filing might be unavailable. But further research led us to recommend *not* making any revision to FRAP 26(a)(3). That's because the 2009 amendment removed the reference to "weather or other conditions" precisely to account for the possibility of inaccessibility of electronic filing. As the Committee Note explains:

> The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g., Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf*. William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure* , 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing.

Perhaps it would be appropriate to be more explicit. But given the express decision in 2009 to not define inaccessibility, the subcommittee suggests that it is appropriate to leave this Rule alone.

FRAP 33

The subcommittee recommends permitting an appeal conference to be conducted "remotely."

Rule 33. Appeal Conferences

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or remotely ~~by telephone~~. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

FRAP 34(b)

The subcommittee recommends providing that argument may be held in a courtroom as usual, but with some participants joining in remotely and, more broadly, permitting the court to set the "manner" of oral argument

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date~~,~~ and time~~, and place~~ for it, and the time allowed for each side. If oral argument will be heard in person, the clerk must advise all parties of the place for it. If oral argument will be heard remotely, in whole or in part, the clerk must advise all parties of the manner in which it will be heard. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

FRAP 34(g)

The subcommittee recommends providing that the rules governing use of physical exhibits applies only if argument is held in person.

> **(g) Use of Physical Exhibits at Argument; Removal.** Counsel intending to use physical exhibits other than documents at ~~the~~ an in-person argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

FRAP 45(a)

The subcommittee looked into clarifying the interplay between a court being "open" under Rule 45 and the clerk's office being "inaccessible" under Rule 26.

The provision in Rule 45 for the court to be "always open" echoes a statute:

> All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.
>
> The continued existence or expiration of a session of a court in no way affects the power of the court to do any act or take any proceeding.

28 U.S.C. § 452. And the current statute has its roots in a statute from 1842:

> That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits.

Act of August 23, 1842, §5, 5 Stat. 517, 518.

The purpose appears to have been to empower courts to act between terms (that is, in vacation), and perhaps to enable judges to act in chambers as well as in open court. As Wright and Miller explains:

> In 19th-century treatises, predecessor provisions are mentioned sometimes in the course of discussions concerning the terms of court, and sometimes during discussions of jurisdiction. Both contexts suggest that the purpose of courts-always-open provisions was to address the power of the courts to act. This was the view taken in the House Report concerning the 1948 legislation that codified the present Section 452: "The phrase 'always open' means 'never closed' and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is 'always open,' there is no time when the court is without power to act."

16AA Fed. Prac. & Proc. Juris. § 3991 (4th ed.) (citations omitted). *See also* Judiciary Act of 1789, § 14 ("And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."); Equity Rule 1 (1842) ("The Circuit Courts as courts of equity shall be deemed always open for the purpose of filing bills answers and other pleadings for issuing and returning mesne and final process and commissions and for making and directing all interlocutory motions orders rules and other proceedings preparatory to the hearing of all causes upon their merits."); Equity Rule 3 (1842) ("Any judge of the Circuit Court as well in vacation as in term may at chambers or on the rule days at the clerk's office make and direct all such interlocutory orders rules and other proceedings preparatory to the hearing of all causes upon their merits in the same manner and with the same effect as the Circuit Court could make and direct the same in term.").

Given this history and apparent purpose, the subcommittee suggests leaving the "always open" provision in place rather than making any change to it.

On the other hand, it is difficult to see how the requirement that the clerk or a deputy be in attendance during business hours can be reconciled with the possibility envisioned by Rule 26 that the clerk's office might be inaccessible—unless one imagines that the clerk or a deputy clerk could somehow always get to the office in (say) a snow storm even though no one else could. Prior to restyling, the word used was "shall," rather than "must," and "shall" often carries some element of discretion. *See* Joseph Kimble, *The Many Misuses of Shall*, 3 Scribes J. Legal Writing 61, 75 (1992) ("To review: shall can mean 'absolutely must' or 'should' or 'may.'").

But the stylists banned the word "shall," so this became a "must." Rather than trying to restore "shall"—as was done for Civil Rule 56 in 2010—the subcommittee recommends leaving the word "must," but imposing the duty only whenever reasonably possible.

(2) When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. Whenever reasonably possible, the ~~The~~ clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

TAB 5B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Rule 35/40 Subcommittee

Re: Working Draft of Amended Rule 40 (18-AP-A)

Date: September 24, 2020

Prior to its last meeting in April of 2020, the Committee had decided not to undertake a comprehensive revision of Rule 35 and 40, on the "if it ain't broke, don't fix it" theory. Instead, the Committee was focused on a smaller change aimed at preventing a panel from blocking access to the full court. At the April 2020 meeting, however, the Committee revisited this decision and asked the subcommittee to prepare a comprehensive revision for its consideration.

The subcommittee has prepared a working draft of that comprehensive revision. The working draft follows this memo. It includes several bracketed items, with comments briefly noting the competing reasons to include or not include those bracketed items.

The working draft brings panel rehearing and rehearing en banc together in a single rule. The resulting single rule is substantially clearer than the existing Rules 35 and 40. But even a substantially clearer rule creates transition costs, including the need to change local rules, and risks unintended consequences. The question for the Committee—and decision makers further up the chain in the rule making process—is whether the gains in clarity are worth it.

Some particulars: Rule 35 is abrogated in its entirety. Its substance is moved to Rule 40, with considerable duplication avoided. Rule 40 deals with both panel rehearing and rehearing en banc. Rule 40(a) and (b) make clear that panel rehearing is the way to deal with ordinary contentions that the panel missed something, and that rehearing en banc is disfavored and limited to unusual circumstances. Rule 40(c) covers the problem the Committee had been dealing with before, of how a party would seek rehearing after a court revises its decision. It provides that a new 14-day clock (or 45-day clock in civil cases involving the United States) starts after the entry of a new or amended decision. It also makes clear that a party's en banc rehearing petition does not stop the panel from trying to fix the problem instead. Rule 40(d) preserves the rules about initial en banc proceedings. That's a little odd chronologically, since initial en bancs come before judgment rather than after. But the procedure is so extraordinary (and the desire not to highlight its existence by limiting Rule 35 to initial en banc hearings is sufficiently strong), that an obscure placement is appropriate.

A line-by-line analysis and redline follows the working draft.

TAB 5C

[Rule 35. En Banc Determination] (Abrogated.)

Rule 40. Petition for Panel Rehearing; En Banc Determination.

(a) In General. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or a petition for either form of rehearing. Panel rehearing is the ordinary means of reconsidering a panel decision, and en banc rehearing is not favored.

(b) Criteria.

(1) Petition for Panel Rehearing. A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc [must satisfy Rule 40(b)(1) and] must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(3) When Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. A vote need not be taken to determine whether the case will be reheard en banc unless a judge calls for a vote. [An en banc rehearing is not favored and ordinarily will not be ordered unless:

(A) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(B) the proceeding involves a question of exceptional importance.]

(c) Time to File; Form and Length; Response; Action by the Court if Granted; Panel's Authority.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment, or, if the court subsequently amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended decision. But in a

Commented [EAH1]: This provision is not in the current Rule 35. Adding it can serve as a reminder not to skip the obvious in an en banc petition.

On the other hand, not adding this language helps to distinguish panel rehearing (which is designed for matters that have been overlooked or misunderstood) from rehearing en banc (which is designed for resolving conflicts and questions of exceptional importance). A panel may not have overlooked or misunderstood anything, but it may have revealed a conflict that calls out for the full court to resolve or dealt with a question of exceptional importance.

Commented [EAH2]: This provision is in the current Rule 35. Keeping it underscores the difficulty of securing rehearing en banc. It also directly establishes the criteria for rehearing en banc (whether on a party's petition or sua sponte) rather than indirectly through the required statement of (b)(2). Deleting it from the current Rule risks diluting the message that en banc rehearing is disfavored, and some redundancy of the message is useful.

On the other hand, this language is largely redundant, particularly with the addition of the sentence "En banc rehearing is not favored" to FRAP 40(a).

civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after such entry if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes, but the number of copies to be filed of a petition addressed to the court en banc must be prescribed by local rule and may be altered by order in a particular case. Except by the court's permission:

(A) a petition produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition must not exceed 15 pages.

(3) Response. Unless the court requests, no response to the petition is permitted. Ordinarily the petition will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(c)(2) apply to the response. [Oral argument is not permitted.]

(4) Action by the Court. If a petition for rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order [, including an order that no further petitions for [panel] rehearing will be entertained].

(5) Panel's Authority. A petition for rehearing en banc of a panel decision does not limit the panel's authority to grant relief under Rule 40(c)(4).

(d) Initial Hearing En Banc. An appeal or other proceeding may be heard initially en banc, and a party may petition for such a hearing. The petition must be filed by the date when the appellee's brief is due. The provisions of Rule 40(b)(3) apply to an initial hearing en banc, and those of Rule 40(b)(2) and (c)(2)–(3) apply to a petition therefor.

Commented [EAH3]: This provision is in current Rule 40. Retaining it likely deters some motions seeking argument, and might arm lawyers with something to point to when a client asks why they don't get to argue the rehearing petition, while deleting it might encourage requests for oral argument or prompt local rulemaking to state that oral argument is not permitted.

On the other hand, the provision is not necessary; courts have ample authority to decline to hear oral argument.

Commented [EAH4]: This provision is not in the current Rule 40. Adding it empowers a panel to determine that it has heard enough and, if the inner bracketed word "panel" is omitted, that the full court has been adequately informed and has heard enough.

On the other hand, the major concern of the full Committee at prior meetings has been to prevent a panel from precluding a litigant from seeking rehearing en banc.

TAB 5D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Rule 35/40 Subcommittee

Re: Line-by-Line Explanation and Working Drafts (18-AP-A)

Date: September 24, 2020

Below is a line-by-line explanation of the subcommittee's proposal, followed by clean and redlined copies of the proposed rules. Red text is added; blue text is deleted; green text is moved; gray text reflects changes already approved by the Court and due to go into effect on December 1; gray highlighted text reflects comments.

[Rule 35. En Banc Determination] (Abrogated.)

~~**(a) When Hearing or Rehearing En Banc May Be Ordered**. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:~~

~~(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or~~

~~(2) the proceeding involves a question of exceptional importance.~~

~~**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.~~

~~(1) The petition must begin with a statement that either:~~

~~(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or~~

~~(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.~~

~~(2) Except by the court's permission:~~

~~(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and~~

~~(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.~~

~~(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.~~

~~**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.~~

~~**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.~~

~~**(e) Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.~~

~~**(f) Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.~~

These provisions are abrogated, with their substance preserved in Rule 40(b)–(d).

Rule 40. Petition for Panel Rehearing; En Banc Determination.

(a) In General. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or a petition for either form of rehearing. Panel rehearing is the ordinary means of reconsidering a panel decision, and en banc rehearing is not favored.

Rule 40 now addresses two topics: the process of petitioning for panel rehearing, and en banc determination, whether on hearing or rehearing. Rule 40(a) is new. It explains to parties which types of rehearing are available, and it reminds them that panel rehearing—not en banc rehearing—is the ordinary means of reconsidering a panel decision. It also obviates the need for the single-document rule of the current Rule 35(b)(3).

(b) Criteria.

(1) Petition for Panel Rehearing. A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.

This provision preserves the substance of the current Rule 40(c)(2).

(2) Petition for Rehearing En Banc. A petition for rehearing en banc [must satisfy Rule 40(b)(1) and] must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

This provision preserves the substance of the current Rule 35(b)(1) as to rehearing.

It also adds, in brackets, an optional new provision requiring that en banc rehearing petitions satisfy the requirements for panel rehearing petitions, of stating with particularity any errors assigned to the panel and of arguing in support of the petition. Adding this language may serve as a reminder not to skip the obvious in an en banc petition. On the other hand, not adding this language helps to distinguish panel rehearing (which is designed for matters that have been overlooked or misunderstood) from rehearing en banc (which is designed for resolving conflicts and questions of exceptional importance). A panel may not have overlooked or misunderstood anything, but it may have revealed a conflict that calls out for the full court to resolve or dealt with a question of exceptional importance.

(3) When Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. A vote need not be taken to determine whether the case will be reheard en banc unless a judge calls for a vote. [An en banc rehearing is not favored and ordinarily will not be ordered unless:

(A) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(B) the proceeding involves a question of exceptional importance.]

This provision preserves the substance of the current Rule 35(a) and (f) as to rehearing en banc.

It also adds, in brackets, the option of removing language on the standard for en banc rehearing. Keeping it underscores the difficulty of securing rehearing en banc. It also directly establishes the criteria for rehearing en banc (whether on a party's petition or sua sponte) rather than indirectly through the required

statement of (b)(2). Deleting it from the current Rule risks diluting the message that en banc rehearing is disfavored, and some redundancy of the message is useful. On the other hand, this language is largely redundant, particularly with the addition of the sentence "En banc rehearing is not favored" to FRAP 40(a).

(c) ~~(a)~~ Time to File; ~~Contents~~ Form and Length; ~~Answer~~ Response; Action by the Court if Granted; Panel's Authority.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for ~~panel~~ rehearing may be filed within 14 days after entry of judgment, or, if the court subsequently amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended decision. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after ~~entry of judgment~~ such entry if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

This provision preserves the substance of the current Rule 40(a). It also includes new language addressing the problem the subcommittee had previously considered, of how a party might seek rehearing after a court revises its decision. It provides that a new 14-day rehearing clock (or 45 days in civil cases involving the United States as a party) starts after the entry of each amended decision. Thus, if the court revises its opinion, and if that revised opinion makes some other error worthy of rehearing, a party may seek it. The proposed language is not limited to substantive amendments to a decision, on the theory that courts are sufficiently able to deny meritless rehearing petitions, obviating the need for litigation over a rule-imposed distinction between substantive and nonsubstantive amendments. This language also applies to en banc decisions as well as to panel decisions. It must be extremely rare for an en banc court to make an error worthy of en banc rehearing. However, if the error is real, a party can ask for it to be corrected; if not, the meritless petition can be ignored without any judge calling for a vote.

(2) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes, but the number of copies to be filed of a petition addressed to the court en banc must

be prescribed by local rule and may be altered by order in a particular case. Except by the court's permission:

(A) a petition ~~for panel rehearing~~ produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition ~~for panel rehearing~~ must not exceed 15 pages.

This provision preserves the substance of the current Rule 35(b)(2), 35(d), and 40(b).

~~**Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.~~

This language is now found in the proposed Rule 40(b)(1) and (c)(3).

(3) ~~Answer~~ Response. Unless the court requests, no ~~answer~~ response to ~~a~~ the petition ~~for panel rehearing~~ is permitted. ~~But o~~ Ordinarily ~~rehearing~~ the petition will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40~~(b)~~(c)(2) apply to the response. [Oral argument is not permitted.]

This provision preserves the substance of the current Rules 35(e) and 40(a)(3), as modified by the pending amendments. It would newly apply to en banc rehearing petitions the existing provision that panel rehearing petitions are ordinarily not granted in the absence of a request for a response.

The provision, currently in Rule 40(a)(2), that oral argument on a petition is not permitted is placed in optional brackets. Retaining it likely deters some motions seeking argument, and might arm lawyers with something to point to when a client asks why they may not argue the rehearing petition. Deleting it might encourage requests for oral argument or prompt local rulemaking to state that oral argument is not permitted. On the other hand, the provision is not necessary; courts have ample authority to decline to hear oral argument.

(4) Action by the Court. If a petition for ~~panel~~ rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order [, including an order that no further petitions for [panel] rehearing will be entertained].

This provision extends to rehearing en banc the existing language of Rule 40(a)(4) concerning action by the court following a petition for panel rehearing. The en banc court would have the same options for response as the panel.

The optional bracketed provision is new. Adding it empowers a panel to determine that it has heard enough and, if the inner bracketed word "panel" is omitted, that the full court has been adequately informed and has heard enough. On the other hand, the major concern of the full Committee at prior meetings has been to prevent a panel from precluding a litigant from seeking rehearing en banc..

(5) Panel's Authority. A petition for rehearing en banc of a panel decision does not limit the panel's authority to grant relief under Rule 40(c)(4).

This provision is new. It ensures that a party's petition for en banc rehearing would not prevent a panel from attempting to fix any errors assigned to the decision. However, if a party is dissatisfied with the panel's amended decision, it would still have time to seek a new round of rehearing under the proposed Rule 40(c)(1) above.

~~**(b) Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:~~

~~(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and~~

~~(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.~~

This language is preserved in Rule 40(c)(2) above.

(d) Initial Hearing En Banc. An appeal or other proceeding may be heard initially en banc, and a party may petition for such a hearing. The petition must be filed by the date when the appellee's brief is due. The provisions of Rule 40(b)(3) apply to an initial hearing en banc, and those of Rule 40(b)(2) and (c)(2)–(3) apply to a petition therefor.

This provision preserves all of the provisions concerning initial hearing en banc in Rule 35. Discussing initial hearing en banc at the end of Rule 40 may seem odd chronologically, as initial hearings en banc occur before judgment rather than after. However, the procedure is so extraordinary that one shouldn't worry that its location is somewhat obscure. The language of "appeal or other proceeding" is preserved from the current Rule 35(a). The time limit for such petitions is preserved from the current Rule 35(c); per Rule 20, the term "appellee" in "appellee's brief"

includes a respondent. The cross-reference to the proposed Rule 40(b)(3) applies the same rules as in rehearing en banc concerning voting and calling for a vote; the cross-reference to 40(b)(2), the same rules concerning the content of the petition; and the cross reference to 40(c)(2)–(3), the same rules regarding form, number of copies, length, responses, and oral argument.

The following pages contain clean and redlined copies of the proposed rules.

[Rule 35. En Banc Determination] (Abrogated.)

Rule 40. Petition for Panel Rehearing; En Banc Determination.

(a) In General. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or a petition for either form of rehearing. Panel rehearing is the ordinary means of reconsidering a panel decision, and en banc rehearing is not favored.

(b) Criteria.

(1) Petition for Panel Rehearing. A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc [must satisfy Rule 40(b)(1) and] must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(3) When Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. A vote need not be taken to determine whether the case will be reheard en banc unless a judge calls for a vote. [An en banc rehearing is not favored and ordinarily will not be ordered unless:

(A) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(B) the proceeding involves a question of exceptional importance.]

(c) Time to File; Form and Length; Response; Action by the Court if Granted; Panel's Authority.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment, or, if the court subsequently amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended decision. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after such entry if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes, but the number of copies to be filed of a petition addressed to the court en banc must be prescribed by local rule and may be altered by order in a particular case. Except by the court's permission:

(A) a petition produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition must not exceed 15 pages.

(3) Response. Unless the court requests, no response to the petition is permitted. Ordinarily the petition will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(c)(2) apply to the response. [Oral argument is not permitted.]

(4) Action by the Court. If a petition for rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order [, including an order that no further petitions for [panel] rehearing will be entertained].

(5) Panel's Authority. A petition for rehearing en banc of a panel decision does not limit the panel's authority to grant relief under Rule 40(c)(4).

(d) Initial Hearing En Banc. An appeal or other proceeding may be heard initially en banc, and a party may petition for such a hearing. The petition must be filed by the date when the appellee's brief is due. The provisions of Rule 40(b)(3) apply to an initial hearing en banc, and those of Rule 40(b)(2) and (c)(2)–(3) apply to a petition therefor.

[Rule 35. En Banc Determination] (Abrogated.)

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) Number of Copies. The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

Rule 40. Petition for Panel Rehearing; En Banc Determination.

(a) In General. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or a petition for either form of rehearing. Panel rehearing is the ordinary means of reconsidering a panel decision, and en banc rehearing is not favored.

(b) Criteria.

(1) Petition for Panel Rehearing. A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc [must satisfy Rule 40(b)(1) and] must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(3) When Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. A vote need not be taken to determine whether the case will be reheard en banc unless a judge calls for a vote. [An en banc rehearing is not favored and ordinarily will not be ordered unless:

(A) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(B) the proceeding involves a question of exceptional importance.]

(c) ~~(a)~~ Time to File; ~~Contents~~ Form and Length; ~~Answer~~ Response; Action by the Court if Granted; Panel's Authority.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for ~~panel~~ rehearing may be filed within 14 days after entry of judgment, or, if the court subsequently amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended decision. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after ~~entry of judgment~~ such entry if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes, but the number of copies to be filed of a petition addressed to the court en banc must be prescribed by local rule and may be altered by order in a particular case. Except by the court's permission:

(A) a petition ~~for panel rehearing~~ produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition ~~for panel rehearing~~ must not exceed 15 pages.

~~**Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.~~

(3) ~~Answer~~ Response. Unless the court requests, no ~~answer~~ response to ~~a~~ the petition ~~for panel rehearing~~ is permitted. ~~But o~~ Ordinarily ~~rehearing~~ the petition will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40~~(b)~~(c)(2) apply to the response. [Oral argument is not permitted.]

(4) Action by the Court. If a petition for ~~panel~~ rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order [, including an order that no further petitions for [panel] rehearing will be entertained].

(5) Panel's Authority. A petition for rehearing en banc of a panel decision does not limit the panel's authority to grant relief under Rule 40(c)(4).

~~**(b) Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:~~

~~(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and~~

~~(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.~~

(d) Initial Hearing En Banc. An appeal or other proceeding may be heard initially en banc, and a party may petition for such a hearing. The petition must be filed by the date when the appellee's brief is due. The provisions of Rule 40(b)(3) apply to an initial hearing en banc, and those of Rule 40(b)(2) and (c)(2)–(3) apply to a petition therefor.

TAB 5E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: IFP Subcommittee

Re: Status Report (19-AP-C)

Date: September 24, 2020

This subcommittee is considering a suggestion submitted by Sai to establish more consistent criteria for granting IFP status and to revise the FRAP Form 4 to be less intrusive. The Civil Rule Committee has removed the item from its agenda but referred the matter to the Committee on Court Administration and Case Management (CACM) for possible revision of the Administrative Office Forms used in the district court. The Criminal Rules Committee has decided against taking the lead but has expressed some interest if others take the lead. This Committee expressed the most interest in the issue, in part because FRAP Form 4 is a form adopted through the Rules Enabling Act, not a form created by the AO.

Professor Andrew Hammond of the University of Florida has studied IFP practice in the district court and reports that "there is a dizzying degree of variation across and within the ninety-four U.S. district courts." Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L. J. 1478, 1482 (2019). He proposes that IFP status be granted to anyone who has net income at or below 150% of federal poverty level and assets less than $10,000, excluding home and vehicle, or who is eligible for public assistance. Id. at 1522.[1]

The governing statute, as amended by the Prison Litigation Reform Act, makes little sense. It provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then

[1] He also proposes that IFP status be granted if a party is represented by a pro bono attorney, and that judicial discretion be retained to grant IFP status based on a determination that fees and costs cannot be paid without substantial hardship. The former seems too broad, given the range of cases for which pro bono counsel might be available, and the latter does little to establish more consistent criteria.

back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP statute to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

It might be possible to use rulemaking to guide the application of this statute—including, perhaps, to distinguish between prisoners and nonprisoners—but this would be an unusual use of authority under the Rules Enabling Act.

It might even be possible to use rulemaking to supersede the statutory process for filing IFP. See 28 U.S.C. § 1292(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); *Henderson v. United States*, 517 U.S. 654, 672 (1996) ("[I]n view of the uniform system Rule 4 of the Federal Rules of Civil Procedure provides, we are satisfied that the service 'forthwith' provision of Suits in Admiralty Act, 46 U.S.C. § 742, has been displaced by Rule 4, and therefore has no current force or effect."); *Waterman S. S. Corp. v. Gay Cottons*, 419 F.2d 372, 373 (9th Cir. 1969) ("28 U.S.C. § 1923(c), which limits to $75.00 the costs allowable for printing briefs in an admiralty appeal where the amount involved exceeds $5,000 . . . was wiped out by Rule 39(c), F.R.App.P."). A Federal Rule of Appellate Procedure has already been held to supersede an aspect of the Prison Litigation Reform Act. *Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999) (holding that a 1998 amendment to Federal Rule of Appellate Procedure 24 superseded provisions of the Prison Litigation Reform Act). There is, however, considerable reluctance in the subcommittee to taking this approach.

In addition, or alternatively, it might be possible to streamline FRAP Form 4. Certainly if the AO changes the forms used in the district court, the subcommittee would want to evaluate Form 4 in light of those changes. As far as the subcommittee has been able to learn thus far, however, it does not appear that there is any movement on this at CACAM or the AO (at least yet).

Attached to this memo are two forms to consider as potential points of comparison. The first is the form suggested by Professor Hammond. The second is the form used in state courts in Ohio.

The subcommittee is seeking to gather further information about IFP practice in the courts of appeals, including what standard or standards are used and what information from Form 4 is actually useful and what information is not.

The subcommittee is also considering trying to gather information about IFP practice in the Supreme Court, because the Supreme Court relies on FRAP Form 4. A 2011 memo by Cathie Struve stated:

> The 1998 amendments [to Form 4] transformed what had previously been a short and simple form into the detailed questionnaire that exists today. The amendments responded to two factors. One was a request

> from William Suter, the Clerk of the Supreme Court, who apparently suggested that Form 4 should require more detailed information. The other was the enactment in 1996 of the Prison Litigation Reform Act, which amended 28 U.S.C. § 1915.

See page 162, n.3 of this agenda book:

https://www.uscourts.gov/sites/default/files/fr_import/AP2011-04.pdf

The subcommittee will continue to explore these potential avenues and will report back to the Committee.

TAB 5F

APPENDIX B: PROPOSED IN FORMA PAUPERIS FORM[235]

UNITED STATES DISTRICT COURT

for the _____

_____
(Plaintiff/Petitioner)

v. Case No._____

_____
(Defendant/Respondent)

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS

I am a plaintiff, defendant, petitioner, or respondent in a case involving (*explain the nature of the case)*

_____.

I declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested. In support of this application, I answer the following questions under penalty of perjury and acknowledge that a false statement may result in a dismissal of my case.

I. Eligibility

1. Do you receive SNAP, Medicaid, or SSI (please specify)?
2. Are you represented by a lawyer from a legal aid organization (please specify)?
   If you answered Yes to either of the above, please skip to the bottom of the page and sign.
   If you answered No to both, please proceed.

II. Income and Assets

3. Are you currently employed? Yes / No
4. What is your monthly income from employment and any other sources? $ _____
5. What are your total assets excluding the home you live in? $ _____

III. Expenses

6. How much are your monthly housing costs (rent/mortgage payments)? $ _____
7. How much do you pay in utilities each month? $ _____
8. How much (if any) are your monthly medical expenses? $ _____
9. How much do you spend on food each month? $ _____
10. Do you have any other monthly expenses? $ _____
11. **Total** Average Monthly Expenses (Add Answers #6 through #10): $ _____

12. Do you have anyone who lives with you and is dependent on you for support? If so, list the initials and age: _____

If there is anything else that you feel impacts your ability to pay the filing fee, please feel free to explain below or attach a written statement.

DATE: _____ SIGNATURE: _____

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235. The author and publisher expressly disclaim any copyright ownership in this IFP form. However, all other contents of this Article are protected under copyright law and are the exclusive property of the author and publisher.

TAB 5G

FORM 20. CIVIL FEE WAIVER AFFIDAVIT AND ORDER

IN _____

_____

	)	CASE NO.
	)	
Plaintiff,	)	JUDGE
	)	
vs.	)	
	)	**FINANCIAL DISCLOSURE / FEE-**
	)	**WAIVER AFFIDAVIT**
Defendant.	)	**AND ORDER**

Pursuant to R.C. 2323.311, the below-named Applicant requests that the Court determine that the Applicant is an indigent litigant and be granted a waiver of the prepayment of costs or fees in the above captioned matter. The Applicant submits the following information in support of said request.

Personal Information	
Applicant's First Name	Applicant's Last Name
Applicant's Date of Birth	Last 4 Digits of Applicant's SSN
Applicant's Address	

Other Persons Living in Your Household			
First Name	Last Name	Is this person a child under 18?	Relationship (Spouse or Child)
		☐ Yes ☐ No	
		☐ Yes ☐ No	
		☐ Yes ☐ No	

Public Benefits

I receive the following public benefits and my gross income, including the cash benefits marked below, does not exceed **187.5%** of the federal poverty guidelines.

Place an "X" next to any benefits you receive.

Ohio Works First[1]: ___ SSI[2]: ___ Medicaid[3]: ___ Veterans Pension Benefit[4]: ___ SNAP / Food Stamps[5]: ___

Monthly Income

I am **NOT** able to access my spouse's income ☐

	Applicant	Spouse (If Living in Household)	Total Monthly Income

Gross Monthly Employment Income, including Self-Employment Income (Before Taxes)	**$**	**$**	**$**
Unemployment, Worker's Compensation, Spousal Support (If Receiving)	**$**	**$**	**$**
		TOTAL MONTHLY INCOME	**$**

Liquid Assets	
Type of Asset	**Estimated Value**
Cash on Hand	**$**
Available Cash in Checking, Savings, Money Market Accounts	**$**
Stocks, Bonds, CDs	**$**
Other Liquid Assets	**$**
Total Liquid Assets	**$**

Monthly Expenses

Column A			**Column B**	
Type of Expense	**Amount**		**Type of Expense**	**Amount**
Rent / Mortgage / Property Tax / Insurance	**$**		Insurance (Medical, Dental, Auto, etc.)	**$**
Food / Paper Products/Cleaning Products/Toiletries	**$**		Child or Spousal Support that You Pay	**$**
Utilities (Heat, Gas, Electric, Water / Sewer, Trash)	**$**		Medical / Dental Expenses or Associated Costs of Caring for a Sick or Disabled Family Member	**$**
Transportation / Gas	**$**		Credit Card, Other Loans	**$**
Phone	**$**		Taxes Withheld or Owed	**$**
Child Care	**$**		Other (e.g. garnishments)	**$**
Total Column A Expenses	**$**		**Total Column B Expenses**	**$**
TOTAL MONTHLY EXPENSES (Column A + Column B)				

I, _____, hereby certify that the information I have provided on
(Print Name)
this financial disclosure form is true to the best of my knowledge and that I am unable to prepay the costs or fees in this case.

_____
Signature

NOTARY PUBLIC:
Sworn to before me and signed in my presence this _____ day of _____, 20_____, in _____ County, Ohio.

_____
Notary Public (Signature)

_____
Notary Public (Printed)
My Commission expires:_____

If available, an individual duly authorized to administer this oath at the Clerk of Court's Office will do so at no cost to the Applicant.

ORDER

☐ Upon the request of the Applicant and the Court's review, the Court finds that the Applicant IS an indigent litigant and **GRANTS** a waiver of the prepayment of costs or fees in this matter. Pursuant to R.C. 2323.311(B)(3), upon the filing of a civil action or proceeding and the affidavit of indigency under division (B)(1) of this section, the clerk of the court shall accept the action, motion, or proceeding for filing.

☐ Upon the request of the Applicant and the Court's review, the Court finds that the Applicant is NOT an indigent litigant and **DENIES** a waiver of the prepayment of costs or fees in this matter. Applicant is granted thirty (30) days from the issuance of this Order to make the required advance deposit or security. Failure to do so within the time allotted may result in dismissal of the applicant's filing.

IT IS SO ORDERED

_____ _____

Judge / Magistrate Date

[Effective: April 15, 2020.]

APPENDIX

2020 FEDERAL POVERTY LIMIT (FPL)

Persons in family/household	100% Poverty	100% Poverty Monthly Gross Income	187.5% Poverty	187.5% Poverty Monthly Gross Income
1	$12,760	$1,063.33	$23,925	**$1,993.74**
2	$17,240	$1,436.67	$32,325	**$2,693.75**
3	$21,720	$1,810	$40,725	**$3,393.75**
4	$26,200	$2,183.33	$49,125	**$4,093.75**
5	$30,680	$2,556.67	$57,525	**$4,793.75**
6	$35,160	$2,930	$65,925	**$5,493.75**
7	$39,640	$3,303.33	$74,325	**$6,193.75**
8	$44,120	$3,676.67	$82,725	**$6,893.75**

R.C. 2323.311(B)

(4) A judge or magistrate of the court shall review the affidavit of indigency as filed pursuant to division (B)(2) of this section and shall approve or deny the applicant's application to qualify as an indigent litigant. The judge or magistrate shall approve the application if the applicant's gross income does not exceed one hundred eighty-seven and five-tenths per cent of the federal poverty guidelines as determined by the United States department of health and human services for the state of Ohio and the applicant's monthly expenses are equal to or in excess of the applicant's liquid assets as specified in division (C)(2) of section 120-1-03 of the Administrative Code, as amended, or a substantially similar provision. If the application is approved, the clerk shall waive the advance deposit or security and the court shall proceed with the civil action or proceeding. If the application is denied, the clerk shall retain the filing of the action or proceeding, and the court shall issue an order granting the applicant whose application is denied thirty days to make the required advance deposit or security, prior to any dismissal or other action on the filing of the civil action or proceeding.

(6) Nothing in this section shall prevent a court from approving or affirming an application to qualify as an indigent litigant for an applicant whose gross income exceeds one hundred eighty-seven and five-tenths per cent of the federal poverty guidelines as determined by the United States department of health and human services for the state of Ohio, or whose liquid assets equal or exceed the applicant's monthly expenses as specified in division (C)(2) of section 120-1-03 of the Administrative Code, as amended, or a substantially similar provision.

---

[1]Ohio Works First Income Limit: 50% FPL (R.C. 5107.10(D)(1)(a))
[2]SSI Income Limit: cannot have countable income that exceeds the Federal Benefit Rate (FBR). 2019 FBR: $771 monthly for single disabled individual; $1157 monthly for disabled couple (20 CFR 416.1100)
[3]Medicaid Income Limit:
Modified Adjusted Gross Income (MAGI):138% FPL (OAC 5160:1-4-01; 42 USC 1396a(a)(10)(A)(i)(VIII))
Aged, Blind or Disabled: $791 for single person; $1177 for disabled couple
[4]Veterans Pension Benefit Income Limit: $13,535 annually / $1,127 monthly for a single person; $17,724 annually / $1,477 monthly for a veteran with one dependent
[5]Supplemental Nutrition Assistance Program (SNAP) Income Limit: 130% FPL for assistance groups with nondisabled/nonelderly member; 165% FPL for elderly and disabled assistance groups (OAC 5101:4-4-11; Food Assistance Change Transmittal No. 61)

TAB 5H

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Cumulative Finality / Relation Forward Subcommittee

Re: Status Report (20-AP-A)

Date: September 24, 2020

This subcommittee is considering a suggestion submitted by Professor Bryan Lammon to broadly permit the relation forward of notices of appeal. In his suggestion to the Committee and in his law review article, *Cumulative Finality*, 52 Ga. L. Rev. 767 (2018), he argues that there are splits between and within circuits regarding the circumstances in which subsequent events save a premature notice of appeal.

Current FRAP 4(a)(2), governing appeals in civil cases, provides:

> A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.[1]

Professor Lammon points out that courts are divided regarding both the interpretation of Rule 4(a)(2) and whether the Rule provides the exclusive means to save a premature notice of appeal. *See also* 16A Wright & Miller, Fed. Prac. & Proc. Juris. § 3950.5 (5th ed.) (noting the division in the courts of appeals). His proposed solution is to broadly allow the relation forward of notices of appeal:

> A notice of appeal filed before the court enters a judgment or appealable order is treated as filed on the date of and after the entry of that judgment or order.

The subcommittee's first concern is to try to ascertain the scope of the problem and whether it warrants any action. In particular, the subcommittee seeks to determine how frequently an appeal is dismissed due to a premature notice of appeal that could be saved by Professor Lammon's proposed rule.

His article, which is fairly comprehensive but doesn't claim to be exhaustive, identifies a little more than a dozen such cases. In addition, he reports that so far in 2020, he has identified three. *Donahue v. Federal National Mortgage Ass'n*, 971 F.3d

[1] Current Rule 4(b)(2), governing appeals in criminal cases, is very similar:

> A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

1 (1st Cir. 2020); *Striblin v. Killian*, 797 F. App'x 172 (5th Cir. 2020); *Norton v. High*, 793 F. App'x 218 (4th Cir. 2020).

The cases largely fall into three broad categories.

The first category consists of appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. At this point, all courts of appeals to address the issue will allow a belated Rule 54(b) certification to save a premature notice of appeal. But there is disagreement as to whether subsequent resolution of the rest of the case saves a premature notice of appeal. That subsequent resolution might be adjudication by the district court of the remaining claims, or it might be voluntary dismissal of the remaining claims.

This category is perhaps the most compelling: If a belated Rule 54(b) certification—a direction to enter final judgment as to a claim because there is no just reason for delay—is sufficient to save a premature notice of appeal, one might think that entry of a final judgment in the entire action should do so as well. How could there be any just reason for delay at that point? On the other hand, saving premature notices of appeal in these circumstances might invite more premature notices of appeal, and risk disruption of district court proceedings caused by the notice of appeal. Almost every circuit has cases that save a notice of appeal in these circumstances, but not all circuits do so consistently.

Donahue and *Striblin* fall into this category. And *Donahue*, while refusing to save the premature notice of appeal, acknowledged the circuit split. *Donahue*, 971 F.3d at 5. ("That is not to say that Donahue is without any authority on her side. In *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1055 & n.5 (2d Cir. 1993), for example, the Second Circuit treated the plaintiff's notice of appeal of an otherwise non-final district court decision as one that was 'premature' when filed but that 'ripened' into a valid notice of appeal upon the voluntary dismissal of the remaining party.").

The second category consists of cases where the district court has made a determination of liability (on the merits, for attorney's fees, or for some kind of sanction) but had not yet determined the precise remedy (damages, amount of attorney's fees, terms of the sanction). The party held liable filed a premature notice of appeal, and before the court of appeals decided the case, the district court had determined the precise remedy. *Norton* falls into this category.

This category is less compelling. It is clearly established that a determination of liability without a determination of damages is not appealable—and cannot even be certified for immediate appeal under Rule 54(b). *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976). Professor Lammon contends, however, that the punishment of losing one's appellate rights is excessive and doesn't fit the crime where there is no prejudice to the appellee. Most courts, but not all, do not save a notice of appeal in

these circumstances. *See, e.g., DL Res., Inc. v. FirstEnergy Sols. Corp.*, 506 F.3d 209, 215 (3d Cir. 2007) (saving a premature notice of appeal based on prior circuit precedent) (Chagares, J.).

The final category consists of cases where a magistrate judge issued a report and recommendation, a party filed a premature notice of appeal to the court of appeals, and the district court later adopted the report and recommendation. This is the least compelling category, and there do not appear to be any cases in which a court of appeals has saved a premature notice of appeal in these circumstances.[2] Nevertheless, Professor Lammon sees no harm in saving the appeal, and notes that this mistake is one made by pro se litigants.

When the full Committee considered this matter a number of years ago, it declined to act, apparently because it did not want to encourage premature notices of appeal. The subcommittee shares that concern, and therefore does not recommend adoption of Professor Lammon's broad proposal. One way to limit this danger might be to limit the scope of the appeal to decisions rendered before the notice was filed. But this risks a series of premature notices of appeal. And it does nothing to prevent the potential disruption of district court proceedings caused by a premature notice of appeal. But some narrower approach, perhaps keyed to the particular categories discussed above, might be appropriate.

An important aspect of this problem remains to be explored: how does it happen?

In some cases, the unresolved claims may have been forgotten by the parties and treated as abandoned. In such cases, once someone (perhaps the court of appeals) notices the unresolved claims, they are dismissed.

But cases where the parties continue to litigate in the district court, and the district court continues to adjudicate, are harder to understand. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

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[2] *Cf.* 16A Wright & Miller, Fed. Prac. & Proc. Juris. § 3950.5 (5th ed.) ("The Second Circuit did hold in one case that a notice of appeal filed after a magistrate judge's disposition but prior to disposition of the case by the district court related forward, but it appears likely that the court was swayed by the facts of the case: The magistrate judge's disposition was entered as a 'judgment,' which made it reasonable for the pro se appellant to think that it was time to file a notice of appeal.").

However, "the principle that a pending appeal ousts district court jurisdiction has been softened so as to guard against the risk that a litigant might manipulate the doctrine for purposes of delay. The weight of authority holds that an appeal from a clearly non-appealable order fails to oust district court authority . . . . An appeal that is premature because the district court has yet to resolve all claims with respect to all parties in the case does not oust the district court's authority to resolve the remaining claims." 16A Wright & Miller, Fed. Prac. & Proc. Juris. § 3949.1.

It would seem, then, that when parties and district courts proceed with a case after a premature notice of appeal, either they (1) are unaware of the notice of appeal, (2) are unaware of its jurisdictional significance, or (3) conclude that the notice of appeal was clearly ineffective.

The appellant obviously knows about the notice of appeal; the other parties and the district court should know about it because it is served on the parties and filed in the district court. Perhaps in some cases the time frame is so short between the notice of appeal and the subsequent adjudication that the notice of appeal is overlooked. The district court, at the very least, should know about the jurisdictional significance of the notice of appeal. In some cases, perhaps the district court acts on a determination that the premature notice of appeal was ineffective, but the appellant doesn't share that perspective.

Further consideration of how the problem arises may suggest solutions that could minimize how often it happens rather than try to ameliorate it when it does. Perhaps a clear signal on the docket warning all filers (including the district court) that a notice of appeal has been filed and suggesting consideration of whether the district court has jurisdiction would help. Perhaps providing for district courts to certify that the notice of appeal is clearly premature before they proceed further with the case would provide notice of the need to file a later notice of appeal would help. *Cf. Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996) (referring approvingly to a "practice, embraced by several Circuits, [that] enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings," by certifying an appeal as frivolous).

The subcommittee is also planning to gather additional information from the Clerks.

The subcommittee has not yet discussed Professor Lammon's much narrower suggestion—submitted not as a separate suggestion but as a comment to the proposed amendment to Rule 3—to amend Rule 4(a)(4)(b) to no longer require a new or amended notice of appeal to challenge the disposition of a Rule 4(a)(4) motion. That can be addressed, if appropriate, once the Committee decides how to proceed on the broader proposal.

TAB 5I

TOLEDO LAW
THE UNIVERSITY OF TOLEDO

Bryan Lammon
Professor of Law
University of Toledo College of Law

February 9, 2020

The Honorable Michael A. Chagares
United States Court of Appeals
U.S. Post Office and Courthouse
Two Federal Square, Room 357
Newark, NJ 07102-3513

Professor Edward Hartnett
Richard J. Hughes Professor of Law
Seton Hall University School of Law
One Newark Center
Newark, NJ 07102

Subject: Proposed amendment to Federal Rule of Appellate Procedure 4(a)(2).

Dear Judge Chagares & Professor Hartnett:

I write to ask that the Advisory Committee on Appellate Rules consider amending Federal Rule of Appellate Procedure 4(a)(2).

Rule 4(a)(2) is supposed to give effect to notices of appeal filed before the district court enters a judgment or otherwise appealable order. But the courts of appeals are divided over when exactly Rule 4(a)(2) does so. They have also split on whether Rule 4(a)(2) supersedes the common law cumulative-finality doctrine that the rule (at least partially) codified. And courts do not just disagree with each other; several circuits have issued conflicting decisions on these matters. The Committee looked into these issues in 2010 and 2011 but ultimately decided to take no action. The intervening years have not made things any better.

I accordingly ask the Committee to look into this issue again. I recently published an article addressing these issues in depth: *Cumulative Finality*, 52 Ga. L. Rev. 767 (2018), a copy of which is attached. I use this letter to summarize my analysis in that article and propose a possible rule change. I first briefly discuss the history of cumulative finality up through the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). Second, I describe the split among and within the circuits on the meaning of Rule 4(a)(2). Finally, I offer potential language for a rule amendment that would

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resolve the current cumulative-finality mess.

1. How We Got Here

Litigants normally must wait until the end of district court proceedings before filing a notice of appeal. But sometimes they file too early, before the district court has entered a judgment or other appealable decision. Problems can then arise if these litigants do not then file a second notice (or amend their first). No proper notice has been filed. And litigants that do not file a proper notice forfeit their right to appellate review.

To address this problem, courts and rulemakers developed the cumulative-finality doctrine, which allows subsequent events to save a premature notice of appeal.

Cumulative finality first emerged as a coherent doctrine in the 1960s and 70s. The courts of appeals developed the doctrine to save a variety of prematurely filed notices of appeal. *See* Lammon, *Cumulative Finality*, *supra*, at 781–87. Courts held, for example, that notices filed after a district court announced its decision were saved by the district court's subsequent entry of a judgment. *See, e.g.*, *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1975). They held that notices filed after dismissal of a complaint (but not dismissal of the entire action) were saved by the later dismissal of the action. *See, e.g.*, *Firchau v. Diamond National Corp.*, 345 F.2d 269 (9th Cir. 1965). Courts also held that notices filed after the district court resolved some (but not all) of the claims in a multi-claim action were saved by a subsequent judgment that resolved the remaining claims. *See, e.g.*, *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977); *Jetco Electronics Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). And a few decisions from this time allowed subsequent events to save a notice of appeal filed after an order that did not even resolve a claim. *See, e.g.*, *Curtis Gallery & Library, Inc. v. United States*, 388 F.2d 358 (9th Cir. 1967) (holding that a notice of appeal filed after summary judgment on only liability was saved by a subsequent judgment that determined the amount of damages).

Rule 4(a)(2) was added to the Federal Rules of Appellate Procedure in 1979. As amended, the rule now provides that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." The Notes state that the rule was meant "to avoid the loss of the right to appeal by filing the notice of appeal prematurely." The Notes also indicate that the Committee intended to codify an existing practice in the courts of appeals and cited to some the caselaw in this area.

But neither the Notes nor the rule itself specified what precisely was being codified or how the rule affected the then-existing common law cumulative-finality doctrine. And the post-Rule 4(a)(2) caselaw does not offer many hints. Despite the new rule, the courts of appeals continued to develop cumulative finality as a largely judge-made doctrine. *See* Lammon, *Cumulative Finality*, *supra*,

at 788–93.

Then came the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). *FirsTier* held that Rule 4(a)(2) saved a notice of appeal filed after a district court had announced from the bench its decision to dismiss the case but before it formally entered the final judgment of dismissal on the docket. The Court echoed the Committee Notes on the rule's purpose and origins: Rule 4(a)(2) exists to prevent the loss of appellate rights when a late notice does not prejudice the appellee, and the rule codified an existing practice in the courts of appeals. But the Court added that Rule 4(a)(2) would not save every premature notice of appeal. The rule instead "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would* be appealable if immediately followed by the entry of judgment."

2. The Current Split

FirsTier sowed the seeds for confusion in the courts of appeals; writing for the Tenth Circuit in *In re Woolsey*, 696 F.3d 1266, 1271 (10th Cir. 2012), then-Judge Gorsuch characterized *FirsTier*'s discussion of Rule 4(a)(2)'s limits as "cryptic and arguably tangential," and he noted that the opinion is "open to many different understandings." After *FirsTier*, the courts of appeals developed three approaches to cumulative finality. *See* Lammon, *Cumulative Finality*, *supra*, at 795–802. Some cases held that appeals only from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. *See, e.g.*, *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004). Other cases held that Rule 4(a)(2) will also save notices filed after decisions that could have been certified for an intermediate appeal under Rule 54(b). *See, e.g.*, *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161–62 (D.C. Cir. 2005) (Roberts, J.). Still other cases held that nearly any district court decision, no matter how interlocutory, can be saved by a subsequent judgment. *See, e.g.*, *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999).

The courts have also disagreed about the interaction between Rule 4(a)(2) and the common law doctrine that preceded it. Some courts hold that Rule 4(a)(2) is now the only source of law on cumulative finality. *See, e.g.*, *Outlaw*, 412 F.3d at 160. Others have concluded that the common law doctrine survived Rule 4(a)(2) and continues to exist alongside it. *See, e.g.*, *Lazy Oil*, 166 F.3d at 587.

The split is not just between the circuits; several circuits have issued internally inconsistent decisions on these matters. *See* Lammon, *Cumulative Finality*, *supra*, at 802–14. The Eighth Circuit, for example, has one decision holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had ordered sanctions but before it determined the amount of those sanctions. *Hill v. St. Louis Uniersity*, 123 F.3d 1114, 1120–21 (8th Cir. 1997). But seven years later, the Eighth Circuit claimed to be unaware of any Eighth Circuit decision adopting the cumulative finality doctrine and held that neither the common law

cumulative finality doctrine nor Rule 4(a)(2) saved a notice of appeal filed when a counterclaim remained outstanding. *Miller*, 369 F.3d at 1035.

Until recently, the Federal Circuit has generally taken the narrowest approach to cumulative finality, holding in two unpublished cases that notices filed only after decisions resolving all outstanding issues can be saved by the entry of a final judgment. *See Stoney Point Prods., Inc. v. Underwood*, 15 F. App'x 828, 830–31 (Fed. Cir. 2001) (holding that an appeal from "a judgment disposing of only some asserted claims" was not saved by a subsequent final judgment); Meade Instruments Corp. v. Reddwarf Starware, LLC, No. 99-1517, 2000 WL 987268, at *3 (Fed. Cir. June 23, 2000) (same). That court has, however, taken a broader approach in an appeal from the Board of Contract Appeals. *See Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1348–49 (Fed. Cir. 2002). And just recently, the Federal Circuit allowed counsel to cure a premature notice by abandoning an unresolved counterclaim during oral argument. *See Amgen Inc. v. Amneal Pharmaceuticals LLC*, 945 F.3d 1368 (Fed. Cir. 2020). But the recent decision did not reference any of the Federal Circuit's decisions in this context (or any other court's decisions), nor did it mention Rule 4(a)(2). *See* Bryan Lammon, "The Federal Circuit & Cumulative Finality," Final Decisions (Jan. 31, 2020), https://finaldecisions.org/the-federal-circuit-cumulative-finality.

The Fifth Circuit's caselaw is in what's probably the worst state. Even before *FirsTier*, the Fifth Circuit had issued a series of inconsistent decisions on how cumulative finality operates. *Compare Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165–66 (5th Cir. 1984) (holding that a subsequent decision on the amount of attorneys' fees saved a notice of appeal filed after the district court had determined liability, damages, and entitlement to attorney's fees), *and Tower v. Moss*, 625 F.2d 1161, 1164–65 (5th Cir. 1980) (holding that the subsequent dismissal of the sole outstanding claim saved a notice of appeal filed from an earlier order dismissing only some of the claims), *with United States v. Taylor*, 632 F.2d 530, 531 (5th Cir. 1980) (holding that the subsequent dismissal of a plaintiff's claims did not save the defendant's notice of appeal filed after the dismissal of its counterclaims). The Fifth Circuit's post-*FirsTier* decisions are a mess. That court first appeared to hold that Rule 4(a)(2) would save notices filed after decisions that could be certified for an intermediate appeal under Rule 54(b). *See Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 378–79 (5th Cir. 1996); *Riley v. Wooten*, 999 F.2d 802, 804–05 (5th Cir. 1993). But in *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998), the Fifth Circuit held that *FirsTier* required the narrowest interpretation of Rule 4(a)(2)—only notices filed from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. (*Cooper* addressed the scope of then-Rule 4(b), now Rule 4(b)(2), which is the criminal analogue of Rule 4(a)(2). *Id.* at 962. The *Cooper* court noted, however, that Rule 4(b) should be interpreted like the nearly identical Rule 4(a)(2). *Id.* at 962 n.1.) But *Cooper*'s limiting of Rule 4(a)(2) has not stuck, as some subsequent Fifth Circuit decisions reject it. *See Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 n.1 (5th Cir. 2008) (holding that a premature notice of appeal filed after a partial

grant of summary judgment was saved by the later disposition of all outstanding issues); *Boudreaux v. Swift Transportation Co.*, 402 F.3d 536, 539 n.1 (5th Cir. 2005) (holding that a premature notice of appeal filed after the district court had granted summary judgment in favor of one defendant but before dismissing the claims against a second defendant was saved by the subsequent final judgment). *See also Swope v. Columbian Chemicals Co.*, 281 F.3d 185, 191–92 (5th Cir. 2002).

The Fifth, Eighth, and Federal Circuits are not alone. The First, Third, Ninth, and Tenth Circuits all have issued cumulative-finality decisions that are at least in tension (if not direct conflict) with prior panel decisions. *See* Lammon *Cumulative Finality*, *supra*, notes 226–231 & 239–51 and accompanying text.

3. A Better Cumulative-Finality Rule

Given the various approaches to cumulative finality, some litigants are losing their opportunities for appellate review by filing a notice of appeal too early. I find that troubling. The error here is a technical one. It is not as though a notice of appeal was not filed; it was just filed too early. And the proper time for filing a notice of appeal is not always clear, particularly to those who are not well versed in the intricacies of federal appellate procedure. Parties accordingly sometimes file too early.

Technicalities can be important, especially when dealing with procedure. But the punishment for a procedural misstep should fit the crime. The misstep here—filing a premature notice of appeal—generally does little (if any) harm. Similarly harmless is allowing subsequent events to save these notices. Early notices—unlike late ones—do not implicate any reasonable reliance interests on the finality of a judgment. Early notices create no risk of piecemeal appeals, as the district court must enter a judgment or appealable order before anyone can perfect the appeal. And no one should be surprised when a litigant who filed a premature notice of appeal wants to later obtain appellate review of the district court's decisions.

Granted, a more generous approach to saving premature notices of appeal could encourage litigants to file more premature notices. And when parties file a premature notice of appeal, there is some risk of bogging down litigation while the courts and parties determine the effect of the notice.

But a clearer rule could mitigate these problems. Premature notices that disrupt litigation already occur, due largely to uncertainty about what to do with them. A clearer cumulative finality rule—no matter its content—might largely solve this problem. And of the possible rules, the broadest approach is the most pragmatic. Indeed, courts rarely (if ever) conclude that giving effect to a premature notice causes any prejudice. What little harm a broader approach to cumulative finality might cause can be mitigated through a clear rule. And courts could develop internal procedures for handling the premature notices—placing the appellate docket in suspension, for example, and allowing the parties to reopen it once the district court has entered a judgment or appealable order.

As for language, I have a proposed starting point.. (The language I propose here is different from that proposed in the article, which is due to the proposed amendments to Rule 3(c).) Again, Rule 4(a)(2) currently reads:

> *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

One possible change would be the following:

> *Filing Before Entry of Judgment.* A notice of appeal filed before the court enters a judgment or appealable order is treated as filed on the date of and after the entry of that judgment or order.

The proposed language treats all premature notices the same; it no longer asks what kind of decision or order a notice was filed after. The language makes that notice effective at the entry of the judgment or order that would normally have been appealable. And given that notices of appeal are not supposed to define the scope of appellate review (as the proposed amendments to Rule 3(c) make clear), there is no need to address which judgment or order is entered. Upon the entry of a judgment or appealable order, a prior notice of appeal would spring into effect and allow the party to appeal any matters that would be within the scope of appellate review in an appeal from that judgment or order.

This is not the only way in which to amend Rule 4(a)(2) to cure its ills. But I hope it will provide a helpful jumping-off point for the Committee's work.

I appreciate your time and consideration of this issue. Please let me know if there is anything I can do to assist the Committee in its work.

Sincerely,

Bryan Lammon

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Electronic Filing Deadlines (19-AP-E)

Date: September 24, 2020

The joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information.

Tim Reagan at the Federal Judicial Center is analyzing data on what time of day things are filed. However, plans to conduct surveys information and gather information from individual clerks' offices have been delayed due to COVID.

TAB 6B

APPEAL FINALITY AFTER CONSOLIDATION
JOINT CIVIL-APPELLATE SUBCOMMITTEE

The Civil and Appellate Rules Committees have established a joint subcommittee, chaired by Judge Rosenberg, to consider the effects of the decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). The Court ruled that final disposition of all claims among all parties in what began as a separate action constitutes a final judgment for appeal purposes, even when the action has been completely consolidated with another action under Civil Rule 42(a). The Court also suggested, however, that the Rules Enabling Act committees are the place to look for an answer if this approach creates practical problems.

The subcommittee concluded that one source of practical problems would be forfeiture of appeal opportunities resulting from unfamiliarity with what was a new rule for most circuits, or from failure to realize that a series of orders had resolved all claims among all parties in what began as a separate action. The Federal Judicial Center agreed to undertake a study to determine whether such problems could be identified.

Dr. Emery Lee began the FJC study by a docket search of all federal civil actions filed in 2015, 2016, and 2017. Given the time required to move from filing to consolidation and then to final disposition of all parts of an originally separate action, this period included approximately equal numbers of cases terminating before and terminating after *Hall v. Hall* was decided. Cases in MDL proceedings were excluded from the data base both because they are difficult to track after consolidation, and because few are remanded by the MDL court. The remaining cases yielded 5,953 consolidations that included a total of 20,730 originally independent actions. Together, they were 2.5% of all federal civil filings. A random sample of 400 of these cases was selected from a cohort of "lead" consolidated cases, yielding 385 that were suitable for study. In this sample, 28% of the consolidations were for all purposes, and the nature of the consolidation was not indicated for 48%. It seems likely that most of these were for all purposes. If so, three out of four consolidations effectively become a single action.

This sample yielded nine consolidations that resulted in a judgment terminating all parts of an originally separate action without disposing of the entire consolidated proceeding. Some perspective on this number may be gained by reflecting that 48% of the consolidate proceedings were resolved by settlement, and another 19% by voluntary dismissal. Examination of those nine "*Hall v. Hall* moments" showed that no appeal was taken in three, and that no apparent problems arose from the *Hall v. Hall* rule in the remaining six.

The subcommittee explored the FJC results in a conference call. Notes on the call are appended below. The subcommittee decided that the apparent lack of any practical problems in a

sample of 385 consolidations suggests that there is little reason to expand the sample extracted from the 2015-17 data base. Nor does it seem useful to immediately launch a study of two more years, 2018 and 2019, in part because time will be required for cases filed in those years to progress to the kinds of dispositions that might yield further useful information. This kind of empirical work consumes substantial resources. Further study by other means may show good reason for an expanded docket search, but not for now.

The subcommittee explored other possible ways to gather additional information. It chose to begin an informal survey of a few courts of appeals. Several means may be found to identify and resolve *Hall v. Hall* questions in a court of appeals. Staff attorneys may spot questions of jurisdiction or timeliness. Motions panels may encounter them. Merits panels may reach them and decide, perhaps with an opinion not for publication or with a precedential opinion. These inquiries should be relatively easy to pursue.

It also may prove useful to reach out to the bar groups that frequently provide help to the rules committees. That question will be considered further.

The subcommittee also will continue to evaluate the arguments that new rules should be proposed even if empirical study fails to show practical problems. It seems likely that the 48% of consolidation orders that do not designate the purpose of consolidation generally intend consolidation for all purposes. There is no indication that this practice causes problems. Amending Rule 42(a) to encourage or require a more explicit statement of the purposes of "consolidation" does not seem an urgent matter.

The values that inhere in Rule 54(b), on the other hand, may warrant further thought. If indeed most consolidations are ordered for "all purposes," with an intent to conduct all further proceedings as if the originally independent actions had been filed as one, the calculus of finality from that point on seems the same as if they had been filed as one. If it all begins as a single action, Rule 54(b) relies on the district judge as the "dispatcher," charged with evaluating the possible gains and losses of an immediate appeal. An immediate appeal may be useful, even important, for the parties caught up in the orders that can be made final judgments. It can be important as well for other parties. The trial court can benefit from appellate resolution of questions that affect the matters that remain pending before it, even when it seems prudent to stay further proceedings pending appeal. Or it may find that it can carry on with further proceedings without fear that the effort will be laid waste by the decision on appeal. The court of appeals may benefit from the opportunity to decide a common controlling question early, or may instead be burdened by the prospect of separate appeals that present closely related issues on an essentially common record.

The subcommittee will continue its work, recognizing that valuable information and insights may be gained, but also believing that there is no pressing need for prompt decisions. The subject is worthy, but not urgent.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: September 26, 2020

Re: Suggestion Regarding FRAP 43; Official Capacity Actions (19-AP-G)

Sai has submitted a suggestion that Civil Rule 17 be amended to require, rather than merely permit, the use of an official title in official capacity actions, and that Appellate Rule 43 be amended accordingly.

At the last meeting, this matter was tabled pending the gathering information about how Circuit Clerks currently handle the naming of official capacity actions.

One other consideration to mention: The current Rules *permit* the use of official titles. If parties and counsel are not taking advantage of this opportunity, it might be because they don't know about it or are unthinkingly stuck in old patterns of behavior—even though the option has been in the Rules for nearly six decades. Alternatively, it might be because they have some reason to not take advantage of the opportunity. So long as there are some in the latter category, the question becomes whether the advantages of using official titles justifies overriding the considered choice of litigants to use names rather than titles.

Circuit Practice When a Party is Sued in Official Capacity	
Circuit	Practice
First	Parties are entered by their individual names.
Second	Parties are entered as they appear on the district court caption. For the most part, the district courts use the individual's name, and the Second Circuit follows suit.
Third	Parties sued in their official capacity are named in the caption by their official title and not by their individual name. If sued individually, they are added individually in addition to under the official's title.
Fourth	Parties are entered as they appear on the district court caption. For the most part, the district courts use the individual's name, and the Second Circuit follows suit.
Fifth	Parties are normally listed their name and official title and if the office holder changes they substitute names.
Sixth	Parties are entered as they appear on the district court docket. If they leave office, we substitute the successor. We appreciate the districts that enter the office, not the individual.
Seventh	Parties are almost always entered with the individual's name (which makes it a bit challenging when appeals sit around too long . . . as the Secretary of DHS has changed 3 times in a couple years, or Wardens change once or twice a year.)
Eighth	Parties are entered as they appear on the district court caption. For the most part, the district courts use the individual's name, and the Eighth Circuit follows suit.
Ninth	Parties are entered as they appear on the district court caption. For the most part, the district courts use the individual's name, and the Ninth Circuit follows suit.
Tenth	Parties are entered as they appear on the district court docket. If they leave office, we substitute the successor. They also appreciate the districts that enter the office, not the individual.
Eleventh	Parties are generally entered by title unless the individual is sued in both official and individual capacities.
DC	Parties are entered as the appear on the district court caption. The DC District Court enters by the individual's name.

TAB 7B

From: Sai [redacted]
Sent: Wednesday, May 20, 2020 6:38 AM
To: RulesCommittee Secretary
Subject: Proposal for dismissal of meritless cases under FRCvP & FRAP; FRAP adoption of FRCP 11; and vexatious-attorney sanctions

Dear Appellate and Civil Rules Committees —

A. Dismissal of meritless cases

28 USC 1915(e)(2) subjects poor litigants to the sanction of dismissal if *either* (a) the claim of poverty is untrue, *or* (b) the action is meritless.

It is unconstitutional to apply a different substantive due process standard to poor people than to non-poor people. Indeed, non-poor vexatious litigants can easily cause far more harm; extract coercive settlements that are not justified by the law; etc.

I therefore propose a straightforward fix: apply this to everyone.
I.e. under both the civil & appellate rules, *all* cases should be subject to 1915(e)(2)-style scrutiny, and IFP or pro se status explicitly disallowed as a category by which courts may apply internal review. *

It is only fair to subject all cases to the same review for frivolousness — or at least, all cases in whatever nature-of-suit areas the court wishes to scrutinize. Whether someone has paid or not has very little (if anything) to do with whether their claims have merit; it only speaks to their wealth. $400 is nothing to wealthy individuals or corporations, and litigation by intimidation is a serious problem. Courts should not allow a meritless suit to proceed — thereby imposing very significant costs on others, who often will not be able to recoup those costs even if their defense is both obvious and successful — merely because it came with a filing fee payment.

This is obviously within the courts' authority without a statutory change, e.g. in the nature of a sanction, sua sponte MSJ, or fundamental authority to regulate its own docket.

* Note: this does permit "nature of suit" to be a category used — just not a party's pro se / IFP status itself.

I request that the FJC conduct a survey of meritless litigation and propose which NOS categories have the highest proportions and/or severities thereof, which should be the NOSs for which court attorneys should be assigned to pre-screen cases for potential early dismissal.

I expect that this will likely include the ever-popular 500-series "prisoner petitions" and 440 "other civil rights" NOS categories. I suggest that NOS 820 (copyright) should also be included, as a Federal judiciary parallel to anti-SLAPP laws (whose very existence demonstrates that meritless copyright litigation is a problem).

Proposed FRCP 11(e) [see below re FRAP]

(e) Meritless cases.

1. Notwithstanding:
(a) any filing fee, or any portion thereof, that may have been paid;
(b) the status of service, if any; or
(c) a party's failure to appear, plead, or otherwise defend —

2. if the court determines that the action:
(a) is frivolous or malicious,
(b) fails to state a claim on which relief may be granted, or

(c) seeks monetary relief against a defendant who is immune from such relief;

3. the court shall, at any time, pursuant to FRCP 11(c)(3) or 56(f):
(a) dismiss the case, with or without prejudice,
(b) order that summons not be issued until the matter is resolved,
(c) issue a show-cause order,
(d) declare the plaintiff or attorney a vexatious litigant, or
(e) issue any other appropriate order.

4. A court may have a rule, policy, or procedure subjecting filings to review for frivolousness, if and only if:
(a) a party's pro se or IFP status is not a factor for whether review is conducted (although the standard "nature of suit" code may be used), and
(b) the rule, policy, or procedure is published, as required by 28 U.S. Code §§ 332(d)(1), 2071(b, d), or 2077(a).

B. FRAP adoption of FRCP 11

Currently, the appellate rules lack a rule requiring that representations to the court be truthful, reasonable, non-vexatious, well-founded, etc. To the best of my knowledge, it is (formally
speaking) currently backed only by bar rules regarding candor to the tribunal.

FRCP 11 is extremely well developed, understood by both the bar and bench, and well-tailored. To my understanding, most appellate courts already use it in a sort of informal, implicit way. This should be formalized.

This can and should be solved easily: by the wholesale adoption of FRCP 11 into FRAP, by reference.

Because
a) this is also the ideal place to insert the above meritless-case rule,
b) I believe it is best to avoid duplication across the Rules except when some difference needs to be stated (see e.g. FRBP 7025), and
c) the language of FRCP 11 already applies just fine to appellate proceedings, I have not provided a separate proposed FRAP to parallel the proposed FRCP 11(e) above.

Instead, I propose to solve both problems at once, in the simplest possible way, namely:

Proposed FRAP 25.1

F. R. Civ. P. Rule 11 applies in all proceedings under these Rules.

C. Vexatious attorney declarations

In some categories of meritless litigation — copyright, medical malpractice, proposed class action, etc. — the common factor is not a persistently vexatious litigant, but rather the attorney (or firm).

Therefore, in the proposed FRCP 11(e)(3)(d) above, I have included the clause "or attorney", in order to prompt judges to consider whether the attorney is the person actually responsible for promoting meritless litigation — and if so, to consider vexatious-litigant penalties.

This is already present to some degree in FRCP 11(c)(1) (which provides for sanctions against an attorney or firm and not the party).

However, the nature of a vexatious-litigant sanction — typically, an order forbidding case initiation unless case-by-case leave is first granted after initial screening — may well be more appropriate or effective than monetary penalties, especially for legal "trolling"
schemes.

See e.g. the multi-district saga of Prenda Law as an extreme example.

Pre-filing review could have dramatically reduced the harm to a vast number of hapless defendants, for whom the cost of settlement was priced just below the cost of defense, and being in court at all would mean already having effectively lost.

Pre-screening of meritless cases is precisely the tool for this, and it should be applied regardless of fee payment. If an attorney demonstrates a propensity to repeatedly file meritless cases, a "no filing without permission" vexatious-litigant order is precisely the right solution for an immediate way to staunch the damage to innocents (in parallel with the longer-term solution of referral to the bar for suspension proceedings).

If the Committees feel differently about this part of my proposal, "or attorney" — or (e)(3)(d) entirely — can easily be struck out, so as to not impede the adoption of the above.

As always, I request to be notified by email of any developments arising from my proposals, and allowed the opportunity to present (and observe), via videoconference or teleconference, in any hearing that discusses them.

Sincerely,
Sai
President, Fiat Fiendum, Inc., a 501(c)(3)

PS Non-gendered pronouns please. I'm a US citizen.

TAB 7C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: September 26, 2020

Re: Suggestion to Incorporate Civil Rule 11 (20-AP-B; 20-CV-G)

Sai has submitted a suggestion that Civil Rule 11 be amended to require prefiling review of all complaints, matching the prefiling review of IFP cases under 28 U.S.C. § 1915(e), and that a new Rule 25.1 be added to the Appellate Rules to incorporate Civil Rule 11.

Federal Rules of Appellate Procedure 38 provides:

> Frivolous Appeal—Damages and Costs
>
> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 407 (1990) (exploring the interaction between Civil Rule 11, applicable in the district courts, and Appellate Rule 38, applicable in the courts of appeals).

Back in the mid-1980s there was some suggestion of revising Appellate Rule 38 along the lines of then-existing Civil Rule 11, with its then-mandatory sanctions. *See* Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845 (1984); Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 Am. U. L. Rev. 603, 625 (1985). (Robert Martineau was the Circuit Executive in the Eighth Circuit from 1972 to 1974.) More recently, it was reported that "Rule 38 is much less frequently invoked or litigated than Rule 11, its analog governing frivolous suits at the trial-court level." Meehan Rasch, *Not Taking Frivolity Lightly: Circuit Variance in Determining*

Frivolous Appeals Under Federal Rule of Appellate Procedure 38, 62 Ark. L. Rev. 249, 266 (2009).

Unless the members of the Committee believe that Rule 38 sanctions are not being imposed frequently enough, or that Rule 38 is inadequate to serve its purposes, I suggest removing this item from the Committee's agenda.

TAB 7D

EMERGI • CARE
MEDICAL CENTER
4800 Apopka-Vineland Road
Orlando, FL 32819
407 876-5555

Dr. Usha Jain, Board certified in Emergency Medicine, Anti-aging, and Pediatrics

Date June 23, 2020

Rebecca A. Womelsdorf, Secretary
Committee on Rules of Practice and Procedure
United States Judicial Conference
One Columbus Circle, NE
Washington, D.C. 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov
Re: Comment on Emergency Rulemaking and URGENT Efforts to prevent the spread of deadly COVID-19 and related deaths

Respected Ms. Womelsdorf:

As a concerned board-certified emergency medicine physician, I respectfully request that you, as a member of the rulemaking committee, facilitate an administrative change allowing self-representing people to file electronically in the Federal Court so that self-representing people have equal access to filing and receive the real-time orders of the court. This is especially relevant during the current tragic times of global pandemic and the spread of COVID-19.

The risk of exposure and spread of the deadly virus is increased when people are required to visit the post office to mail the paper filings as they must stand in line with those who may be infected in order to calculate and purchase postage or they must touch unsanitized self-service machines that are touched by many others each hour. Hand delivery to the court also increases exposure to other members of the public unknown to them as well as employees.

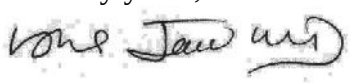
The appellate Federal Court (11th Circuit) and state court both allow filing electronically for self-representing citizens. Because electronic filing has ZERO risks for spreading COVID-19 and thus could help prevent the spread of the deadly disease, I urge you to allow the Federal Court, by an administrative order, to provide the electronic filing option to self-representing citizens.

There are GUIDELINES set forth by the CDC, FL Surgeon General, President Trump and Florida Governor DeSantis, and many other leaders and experts to prevent the spread of coronavirus. These guidelines have included closing government offices when possible and having many employees work remotely and electronically.

Electronic filing for self-representing citizens would also help those with medical conditions, physical limitations, and handicapped status. It would "level the playing field" for those who choose not to hire an attorney.

I humbly request that you evaluate and use logical reasoning for equal opportunity to prose litigants. This would increase judicial efficiency, lessen hardship due to medical disability and now to protect the safety of lives of prose litigants, especially those over 70 with comorbid conditions and high risk of mortality.

Gratefully yours,



Dr. Usha Jain

Compelling Reasons for the Changes in our Democracy

Inherent Prejudice to Prose Litigants due to Risk of Safety of Lives, Hardship due to Medical Disability, Real-Time Lag in receiving the Orders, and Unequal Opportunity to Access the Court.

In Federal Court in Orlando, electronic filing is only for attorneys and the only option for *prose* is via postal mail or hand delivery for filing motions and receiving orders. This inequality has inherent prejudice to citizens who are representing themselves in the court (pro se). Following are the compelling concerns:

A. Risk of the safety of lives from exposure from COVID-19

Not allowing prose litigants to file electronically conflicts with the GUIDELINES set forth by the CDC, FL Surgeon General, President Trump, and Governor DeSantis to prevent the spread of coronavirus as well reckless disregard to lives of the citizens from exposure to COVID-19.

1. Mailing exposes risk for coronavirus as one has to stand in the line with the general public to get an estimate of postage for the weight of papers which varies with every filing;

2. Plaintiffs have to leave in fear from exposure of coronavirus;

3. Delivery to the courthouse has a similar higher risk

The above risks are higher if a prose litigant is in a high-risk group due to their age and medical conditions like diabetes, high blood pressure, kidney, and heart condition.

B. Prejudice due to Medically disable prose litigants and Undue Hardship:

1. This prejudice toward medically disabled litigants is against the guidelines to accommodate disabled citizens, as the disabled person still has to drive and walk either to the post office or courthouse. In our democracy, citizens should be aided in their path for justice and accommodations should be made for those with physical and/or health issues so that they may obtain the same justice as those without such issues.

2. If the accommodation of electronic filing can be granted at the discretion of the judge, it seems reasonable that this is an appropriate accommodation for those with a medical disability.

C. Prejudice and risk of Technical Default due to not Receiving the Orders Timely

Prose litigants are subject to the risk of lost mail, clerical error, misdeliveries, etc. Prose litigants receive the order in the mail which may take several days and may not come in the mail. Once again, this is not equal access. Prose litigants are penalized for not having access to electronic delivery of the court order. Those represented by counsel are given this electronic access and are NOT subject to that risk.

D. Unequal Justice and Violation of First Amendment Rights

The prose citizens should be allowed equal access to electronic filing. Granting access only to attorneys is unwise since it is attorneys who are least in need of such service; rather, the prose litigants who might have mobility or cost issues would need such access the most. This is a violation of the 1st Amendment rights of the citizens.

Also, for the service of the Order, in electronic filing, the document automatically comes to your email address and would be seen right away vs waiting for the mail for several days risking the physical loss of the mail as it changes hands frequently.

Attorneys get more time to file; they are permitted to file by midnight vs prose citizens who have to reach to the court by 4 pm to avoid default. Mail also has uncertainty and the extra burden of cost (legal carriers or mailing by certified mail).

Because lawyers and courts are so intertwined, there seems to be a bias that legal professionals are needed for access to the court. This is neither democracy nor our law but maybe a bias. The prose citizens should be allowed equal access to the court system by electronic filing.

The prose citizens should be given equal access to the current electronic filing procedures afforded to others, and this is especially critical during a time of national pandemic and threat of exposure to deadly COVID-19 virus. The infrastructure for electronic filing exists, the prose citizens who own technology required to utilize the system in place for electronic filing should be able to use the court system currently being used by counsel for the benefit of other citizens as well as by some other citizens approved by a judge.

Finally, lack of equal access opens the door for manipulation of technical default for prose citizens. If some judges have predetermined opinion regarding prose litigants, they can refuse electronic access to prose and the case can be easily be manipulated for technical default for prose citizens. Other judges grant access to prose litigants, further deteriorating equal access for some. Some have been denied equal access even after showing undue medical hardship and among COVID-19 risks during a stay-at-home order.

The following are the statements by other people in favor of electronic filing:
From: Buck Maker
To: Rules Committee Secretary

Subject: emergency rules
Date: Monday, May 11, 2020 8:17:35 AM

Rather than use the pandemic to make access to courts more restricted than it is now, you might make it more open by allowing all plaintiffs to file electronically, without favor of lawyers, or fear of the pro se, especially, who are routinely, treated like “trash” in the notorious words of your former Justice Posner.
Sent from Mail for Windows 10

From: David Michaels
To: Rules Committee Secretary
Subject: Proposed Rule Amendment
Date: Thursday, May 07, 2020, 12:32:55 PM

Dear US Courts:

Please pass a rule that requires all district courts to allow any party to a proceeding to electronically file documents in their proceeding, even if they are self-represented parties acting pro se. The WDNY has a local rule that requires prose litigants to file documents either in person or by mail. This creates a disadvantage for a party when there are time constraints or tight filing deadlines. Thank you,

David Michaels, J.D

From: Lemuel Bray
To: Rules Committee Secretary
Subject: Prose CM/ECF privileges
Date: Thursday, May 07, 2020, 12:21:15 PM

Recommend Prose litigants be granted CM/ECF privileges if they meet rules and decorum in filing in a trial period. No frivolous filing accepted and frivolous and impropriety filings a reason for withdrawal of the privilege on the order of a clerk.
Lemuel C Bray

From: Andrew Straw
Sent: Thursday, May 07, 2020 12:38 PM
To: Rules Committee Secretary
Subject: COVID-19 and US Courts Rule Changes

I am interested principally in prose litigants and disabled court participants.
All court filings should be electronic (email or CM/ECF) for all prose filers.
All prose litigants should automatically be enrolled in "one free look."

TAB 7E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: September 26, 2020

Re: Suggestion to Permit Electronic Filing by Pro Se Litigants (20-AP-C; 20-CV-J)

Dr. Usha Jain has submitted a suggestion that pro se litigants be allowed to file electronically, particularly in light of the coronavirus pandemic.

Federal Rules of Appellate Procedure 25(a)(1) provides, in relevant part:

> (B) **Electronic Filing and Signing**.
>
> > (i) **By a Represented Person—Generally Required; Exceptions**. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by a local rule.
> >
> > (ii) **By an Unrepresented Person—When Allowed or Required**. A person not represented by an attorney:
> >
> > - may file electronically only if allowed by court order or by local rule; and
> > - may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

Whether pro se litigants, then, may file electronically is left to local rules and court orders.

If the Committee thinks that it might be time for national uniformity regarding electronic filing by pro se litigants, I would suggest the creation of a subcommittee to explore this suggestion. If, on the other hand, the Committee thinks that local variation remains appropriate, I would suggest removing this item from the Committee's agenda.

TAB 7F

Dear AOUSC[1] —

I have previously written to you regarding the standards for IFP status, and the improper judicial collection of and demand for information not permitted by 28 U.S.C. § 1915.[2] My understanding of the current status of my proposals is that the Civil Rules Committee recently established a sub-committee to look into it further, and that, based on other such projects, a final outcome (i.e. Supreme Court issuance of a Rules Enabling Act order) is roughly 3–5 years away.

I currently have IFP status in multiple courts.[3] Two of these appointed counsel based on the combination of my poverty and disability. I am also seeking IFP status in other pending cases.[4] I am not a prisoner.

Earlier this week, I asked my partner of 14 years whether he would marry me. He said yes.[5]

This should be an occasion for untarnished celebration. Alas…

You stand directly in the way of my prospective marriage.

As I have explained before, the IFP forms and standards in current United States federal practice, including those promulgated by the AOUSC, have multiple fundamental defects:

1. they lack *any* objective reference criteria by which an applicant can know whether they qualify, and are in fact administered in an arbitrary and capricious manner;
2. they ask for information for which there is no adequate legal definition *in this context*, exposing the affiant to liability for perjury, dismissal, or IFP denial; and
3. they ask for information which the statute does not authorize the courts to demand.

I do not wish to wait many years on the uncertain prospect of a Rules Enabling Act rulemaking before I am able to marry my fiancé; nor do I wish to give up my IFP status or appointed counsel. You are directly responsible for the harm of this dilemma, and I am therefore asking you to fix it promptly, i.e. at least as fast as it would take to litigate for an injunction. I will therefore discuss only the aspects of this issue that directly interfere with my prospective marriage.

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[1] By "AOUSC", I mean to include the Judicial Conference and its general, civil and appellate rules committees.

[2] *See* 19-AP-C/19-CR-A/19-CV-Q. *See also* briefs in *Sai v. USPS*, 135 S. Ct. 1915, No. 14-646 (2015) (BIO req'd, cert. denied):
Cert. pet. https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%20Petition%20for%20certiorari.pdf
Maryland Volunteer Lawyers Service *amicus*
https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%2014-646%20Amicus%20brief%20for%20Sai%20on%20cert%20-%20Maryland%20Volunteer%20Lawyers%20Service.pdf
Western Center on Law and Poverty & the Legal Aid Association of California *amici*
https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%2014-646%20Amicus%20brief%20for%20Sai%20on%20cert%20-%20Western%20Center%20on%20Law%20and%20Poverty%20and%20Legal%20Aid%20Association%20CA.pdf
BIO https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%2014-646%20USPS%20Brief%20in%20opposition%20to%20cert.pdf
Reply https://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%20Petition%20for%20certiorari.pdf

[3] D. D.C. No. 1:14-cv-403, N.D. CA. No. 3:16-cv-1024, & 9th Cir. No. 20-15615

[4] e.g. D. D.C. No. 1:20-1314, 1st Cir. No. 15-2356, D. MA. No. 1:15-cv-13308

[5] The marriage would take place in England, where we currently live together. I am a U.S. citizen. My partner is a Canadian citizen. We have previously resided, as a couple, in multiple U.S. states. Applicable law is, thus, complex.

1. *AOUSC forms and (implied) rules unlawfully require disclosure of a spouse's financial information.*

AO 239 & FRAP Form 4[6] demand that an IFP applicant disclose, usually on public record, a wide-ranging array of information *about their spouse*, namely:

1. Last 12 months' average monthly income, and expected next month's income, from:
    a. Employment
    b. Self-employment
    c. Income from real property
    d. Interest and dividends
    e. Gifts[7]
    f. Alimony[8]
    g. Child support[9]
    h. Retirement (such as social security, pensions, annuities, insurance)
    i. Disability (such as social security, insurance payments)
    j. Unemployment payments
    k. Public-assistance (such as welfare)[10]
    l. Other (specify)[11]
2. Employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.), including
    a. Employer
    b. Address
    c. Dates of employment
    d. Gross monthly pay
3. Cash[12]

---

[6] AO 240 (standard district court IFP short form) does *not* request spousal information, and I therefore do not challenge it on those grounds here.

[7] Gifts are *not* considered "income" by the LSC, 45 C.F.R. § 1611.2(i) ("Total cash receipts do not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to $2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute.")
They are also not considered "income" by the IRS, 26 U.S.C. §§ 368(d)(2)(B), 911 (excluding (b) "foreign earned income"; (c) "housing cost amount". It is not "earned income", § 911(d)(2)(A). It is not taxable income, IRS Pub. 525 (2019) p. 32 § "Gifts and inheritances". Neither are, e.g., "court awards and damages", *id.* p. 30.

[8] Starting in 2019, alimony is not considered "income" by the IRS. Pub. 525 (2019), p. 1, *referencing* Pub. 504.

[9] Child support is not considered "income" by the IRS. *Id.* p. 30.

[10] Considering welfare as "income" for IFP purposes is clearly prohibited by *Adkins v. DuPont*, 335 U.S. 331, 339 (1948): "To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support."

[11] There is no definition whatsoever of "income", for IFP purposes, sufficient to give a party fair notice as to what might count as "other income". As noted above, the existing elements directly contradict the definitions of "income" by the IRS and LSC, so those standards are of no help to the affiant. This is a plain violation of constitutional due process, and is arbitrary and capricious.

[12] This question makes no distinction between separate or joint assets. For the record, I do not know how much cash my

   a. Financial institution
   b. Type of account
   c. Amount your spouse has
4. The assets, and their values, which you own or your spouse owns [(except] clothing and ordinary household furnishings[)].[13]
   a. Home (Value)
   b. Other real estate (Value)
   c. Motor vehicle (Value)
      i. Make and year
      ii. Model
      iii. Registration #
   d. Other assets (Value)
5. Every person, business, or organization owing you or your spouse money, and the amount owed.
   a. Person owing you or your spouse money
   b. Amount owed to your spouse
6. Persons who rely on you or your spouse for support.
   a. Name (or, if under 18, initials only)
   b. Relationship
   c. Age
7. Average monthly expenses
   a. Rent or home-mortgage payment (including lot rented for mobile home)
      i. Are real estate taxes included?
      ii. Is property insurance included?
   b. Utilities (electricity, heating fuel, water, sewer, and telephone)
   c. Home maintenance (repairs and upkeep)
   d. Food
   e. Clothing
   f. Laundry and dry-cleaning
   g. Medical and dental expenses
   h. Transportation (not including motor vehicle payments)
   i. Recreation, entertainment, newspapers, magazines, etc.
   j. Insurance (not deducted from wages or included in mortgage payments)
      i. Homeowner's or renter's:
      ii. Life:
      iii. Health:
      iv. Motor vehicle:
      v. Other:

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fiancé has; I don't *want* to know; and I will not make any effort whatsoever to find out in order to satisfy any court's or public's mere curiosity. As is my right, I utterly decline to act in any way as an informant on my fiancé (/ spouse).
If there is a lawful reason for a court to delve into my fiancé's finances, then it has a clearly established means to do so: by issuing a letter rogatory under the Hague Service Convention (to which the US, UK, and Canada are signatories), in compliance with all applicable Canadian, UK, and US privacy law. I do not believe any such attempt would succeed, as there is no lawful reason to demand such information from him, and such an inquiry would be unjustifiable.

[13] *Ibid.*

k. Taxes (not deducted from wages or included in mortgage payments) (specify):
l. Installment payments
    i. Motor vehicle:
    ii. Credit card (name):
    iii. Department store (name):
    iv. Other:
m. Alimony, maintenance, and support paid to others
n. Regular expenses for operation of business, profession, or farm (attach detailed statement)
o. Other (specify)[14]

Literally *none* of this disclosure of a spouse's information is authorized by law.

To the contrary, it is expressly prohibited by a wide range of privacy laws in the US, UK, and Canada (absent showings of the proportionality and necessity of invasion of the spouse's privacy, such as those required to obtain a subpoena, that are not met here).

Among other laws, it is illegal under the GDPR and the UK Data Protection Act 2018 for me to disclose such information to a third party, let alone to the public, without my partner's consent. As a matter of EU & UK law, an "consent" under coercion is invalid, and which expressly includes the threat of any negative legal repercussion from a failure to "consent". It is, therefore, illegal for me to disclose my spouse's information on an IFP application, and I absolutely refuse to do so.[15]

Even if his consent wasn't impossible as a matter of law, my fiancé is a very private person. He does not wish to be the focus of any public attention or scrutiny, nor to have his information disclosed to the public. I will not violate his trust, and I will actively assert the full extent of any spousal or other privilege, and all applicable law, that is available to me to protect his privacy.

Current AOUSC forms and rules mean that my obedience of laws protecting my spouse's privacy would result in the denial of my IFP status. This is unlawful. A court may not coerce a violation of law, nor condition a benefit on the waiver of a right.

This is, of course, in addition to the fact that there is simply no statutory basis whatsoever for this requirement, and the courts may not make a demand without a sufficient legal basis for doing so.

---

[14] Again, there is *no* definition of what constitutes "expenses", and as above, the AOUSC clearly does not follow IRS or LSC definitions. Therefore, it is a violation of due process to demand an accounting of "other expenses", as there is no adequate notice (indeed, no notice *at all*) as to what is included or excluded by that term.

[15] It is completely immaterial to me whether I have a realistic risk of prosecution, civil or criminal, by the government or my partner. I will not violate laws with which I agree. I am not motivated by fear of prosecution, but rather by very deeply held principles and religious convictions. I absolutely refuse to be coerced into violating such laws or principles, and have a demonstrated history of sticking to my convictions even in the face of severe harm, difficulties to myself, and attempts at coercion. As to matters of principle, I am simply not coercible.
Moreover, I cannot respect any court or government that would actively undermine the just laws of allied nations, or disregard its own just treaties.
Contrast Aérospatiale v. S.D. Iowa, 482 US 522 (1987) (approving US courts' disregard for the Hague Evidence Convention as to corporate objectors, on the basis that the corporation was unlikely to actually be prosecuted for the court's command to violate foreign law).

2. *If my fiancé's assets were considered despite their nonavailability, I would wrongly lose IFP status.*

Although I qualify for IFP status, my intended spouse does not.[16]

If a court were to consider my spouse's financial resources as if they were my own, I would be denied IFP status, and obligated to withdraw it in all my pending cases. This could lead to severe negative repercussions for me: financially, medically, and legally.

My fiancé and I have always kept separate finances, and broadly speaking, we intend to continue doing so after marriage. We intend to sign a prenuptial agreement which would provide for us to have a mixture of separate and jointly held assets (including e.g. joint financial accounts). The prenup would expressly prohibit the use of jointly held assets to fund any litigation, unless both of us are co-parties. Therefore, any assets in such joint accounts would *not* be "actually available" to me, which is the only kind of asset that is reasonably relevant to an IFP application.

In particular, I do not wish to burden my partner with expenses related to my litigation. To my view, protecting my partner from harm is an essential aspect of marriage. Due to my strong belief in, and practice of, robust public-interest litigation, I choose to expose myself to legal liabilities. My choice to risk and endure poverty[17] where it is necessary to vindicate my other interests is *mine*, not my partner's, and I will not have it thrust upon him due to our marriage.

Simultaneously, I have my own liberty interest in being free to live and litigate as I see fit, without his direction or control (which would inevitably be involved if I were forced to use his funds); and to have access to court-appointed counsel (which I doubt he could afford).

Beyond the above, I do not wish to disclose anything further about my arrangements with my partner, nor the reasons for them. How and why we manage our private affairs is nobody's business but ours. The courts have no right to interfere with our mutually-desired private affairs, including financial contracts. To the contrary, they must *enforce* our agreements.

I admit one limited exception: for the purposes of IFP qualification, jointly held assets that are actually and currently available to me for the purposes of funding litigation[18] count towards whether I am or am not poor.[19] However, assets belonging to someone else (including my spouse), which are not liquid, or not lawfully available to me for use towards litigation expenses (e.g. due to the provisions of an LLP or prenup contract), do *not* count. I am the IFP applicant, not my spouse.

Similarly, my marital status is a protected category, and may not be used as a basis for denying me access to a statutory right.[20]

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[16] There is currently *no* publicly known standard for what the judiciary considers as sufficient, necessary, or prohibitive for IFP qualification. Therefore, I am here assuming that "qualification" follows the LSC's standards, as I set forth in 19-AP-C/19-CR-A/19-CV-Q. I will not disclose any more fine-grained detail about my spouse's finances than the mere fact of being above the disqualifying cut-offs.

[17] Obviously, I would rather not be poor, but given my present situation, I am not able to be otherwise.

[18] *Cf.* Legal Services Corporation regulations, 45 C.F.R. § 1611.2(d, i) (only household assets and income that are "currently and actually available to the applicant" may be considered).

[19] These are, and I expect will remain, zero.

[20] I do not object to *strictly voluntary* use that would benefit the applicant, e.g. consideration of spousal support or

Relevant law

1. *Both marriage and poverty trigger strict scrutiny.*

Fundamental rights are subject to strict scrutiny. *Planned Parenthood v. Casey*, 505 U.S. 833, 929 (1992). Marriage is a fundamental right, protected by the due process clause of the 14th Amendment. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (quoting J. Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)) & *Loving v. Virginia*, 388 U. S. 1, 12 (1967)

Most restrictions on marriage are subject to strict scrutiny; in particular, the government's interest in protecting the public fisc "cannot justify" its infringement. *Zablocki v. Redhail*, 434 U.S. 374, 383–89, 389 (1978), *citing Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942), *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974), & *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Discrimination on the basis of wealth is also subject to strict scrutiny. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

2. *The IFP statute does not permit any inquiry into an applicant's spouse.*

28 U.S.C. § 1915(a)(1) is the *sole* statutory basis for inquiry into non-prisoner litigants. It states:

> Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

There is not a single mention of the word "spouse", "household", or any related term in the section. Congress is extremely well versed in making such distinctions, and expressly did so in e.g. laws governing the IRS, Social Security, welfare, and numerous other areas of law. Not here.

The IFP statute's silence as to spouses is a prohibition; *incluso unius est exclusio alterius*.

3. *The IFP statute does not permit any inquiry into a non-prisoner applicant's financial details at all, absent good cause to suspect perjury.*

The awkward phrase in (a)(1), "an affidavit that includes a statement of all assets such prisoner possesses", was inserted by the Prison Litigation Reform Act of 1995, Pub. L. 104-134 title VIII, at § 804(a)(1)(C).[21] There is no textual indication that the Act was intended to alter non-prisoners'

alimony costs as detracting from disposable income.

[21] SEC. 804. PROCEEDINGS IN FORMA PAUPERIS.

(a) FILING FEES.—Section 1915 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "(a) Any" and inserting "(a)(1) Subject to subsection (b), any";

(B) by striking "and costs";

litigation in any way. The *entirety* of that Act is a regulation of litigation *by prisoners*. So is the awkward extra-affidavit clause in (a)(1), which refers to "such prisoner", rather than the interrupted "a person" clause which sets the requirement for IFP affidavits generally.

The pre-PLRA statute, 28 U.S.C. § 1915 (1995), was[22] as follows (in entirety):

> § 1915. Proceedings in forma pauperis
>
> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.
>
> (c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.
>
> (e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.
>
> (June 25, 1948, ch. 646, 62 Stat. 954; May 24, 1949, ch. 139, §98, 63 Stat. 104; Oct. 31, 1951, ch. 655, §51(b), (c), 65 Stat. 727; Sept. 21, 1959, Pub. L. 86–320, 73 Stat. 590; Oct. 10, 1979, Pub. L.

> (C) by striking "makes affidavit" and inserting "submits an affidavit that includes a statement of all assets such prisoner possesses";
> (D) by striking "such costs" and inserting "such fees";
> (E) by striking "he" each place it appears and inserting "the person" ...

[22] https://docs.uscode.justia.com/1995/title28/USCODE-1995-title28/pdf/USCODE-1995-title28-partV-chap123-sec1915.pdf

96–82, §6, 93 Stat. 645.)

The pre-PLRA statute is absolutely clear that the *only* requirements for IFP filing are that the litigant "makes affidavit that [they are] unable to pay such costs or give security therefor", and "state the nature of the action, defense or appeal and affiant's belief that [they are] entitled to redress."

There is not a single mention of any requirement for detailed financial substantiation. Indeed, doing so would go against the essential admissibility of sworn testimony. The sworn affidavit is admissible by itself, and as the *only* thing demanded by the law, it needs no further substantiation.

The purpose of a court demanding further details of an IFP applicant's finances is, in effect, to attempt to impeach the affiant.[23] A court can only do so if there is good cause to believe that the affiant has committed perjury, and even then, likely only if criminal charges are brought; a court may not act as prosecutor. It is entirely improper to, in effect, accuse *every* affiant of perjury and demand that they *prove* what they have sworn to be true, with no statutory basis for such demand.

If a court wishes to impose a standard for what does or does not count as poor, rather than leaving that up to each applicant, then it has a clearly prescribed means for doing so: the Rules Enabling Act. The judiciary can, and should, promulgate clear, specific rules that permit an applicant to determine for themselves whether or not they meet the criteria. It may not impose such criteria in secret, nor on a purely *ad hoc* basis; and it may not demand information that the IFP statute does not permit in order to substitute its own standardless decisions for what the statute explicitly dictates: namely, nothing but the non-prisoner applicant's good-faith, sworn statement.

Both the plain text of the current code, and of the linchpin PLRA amendments, indicate that *only* prisoners need to provide "a statement of all assets such prisoner possesses". Non-prisoners have no duty to provide *any* such statement at all[24], short of a perjury inquiry based on good cause.

4. *AOUSC's non-prisoner IFP forms and practices are* ultra vires*, and cannot withstand scrutiny.*

Courts must give effect to *all* words of a statute: here, "such prisoner" in (1)(a). They must do so under strict scrutiny, since this is a law that discriminates on the basis of poverty. Any additional inquiry into marriage must also survive strict scrutiny, and is utterly without statutory basis.

The statute does not permit what AOUSC-instructed courts are now doing. It is atextual, contrary to the clear language and intent of Congress, and a violation of fundamental Constitutional rights, such as the rights to privacy, marriage, and due process.

By promulgating the non-prisoner IFP rules & forms without a statutory basis for the demands made therein, the AOUSC violated the Rules Enabling Act and the Constitution.

AOUSC cannot in good faith defend them under any principled textual analysis of 28 U.S.C. § 1915, and should promptly admit and correct its error.

[23] Or to determine a target for garnishment. This is the clear purpose of *prisoner* disclosure; *see* (b)(1, 2) & (f)(2).

[24] Let alone non-"assets", like income, expenses, employment history, or debts. And certainly not those of third parties.

Settlement demand

I am under actual, current and imminent threat of harm from the courts' current practices; namely, if I marry my fiancé, I am likely to face the severe sanction of "dismissal at any time", or simply be unable to access the courts in the first place (as has in fact happened before).[25]

This harm is the direct fault of the AOUSC, which promulgated AO 239 and FRAP Form 4 *ultra vires*. These are followed (with minor variation) by all Federal civil courts as *de facto* rules.

This harm directly interferes with, and is currently preventing, my intended marriage to my partner of 14 years, and with our private contracts. It is imposing an unconstitutional condition: that I give up one right (access to the courts) in order to assert another (marriage and freedom to contract).

I wish to marry promptly, without risk to my IFP status. AOUSC rules prevent me from doing so.

This harm can be readily remedied by the AOUSC, as follows:

1. Amend AO 239 and FRAP Form 4 to completely strike *all* questions about spouses.[26]
2. Issue explicit guidance to all Federal courts, stating that it is prohibited to make any inquiry as to an IFP applicant's spouse solely because the applicant filed for IFP status.
3. Do both of the above as quickly as is permitted by the Rules Enabling Act.

That is, therefore, precisely what I demand in order to avoid litigation.

As with any settlement discussion, your active cooperation is essential. If I do not hear back from you promptly (and regularly thereafter, to inform me of progress towards completion), I will be forced to assume that you are refusing to settle this amicably or to substantively engage in non-litigation settlement, and therefore forced to sue for declaratory and injunctive relief.

If you have any concerns, alterations to propose, practical barriers that might affect your ability to complete this in a timely manner, or indeed anything else that would affect a speedy and amicable resolution, I am very amenable to discussing and resolving them in a reasonable manner.

Please promptly tell me your point of contact for all further discussion of this matter by having your litigation counsel email me.

I hope that we can resolve this promptly, amicably, and without the need for litigation.

Respectfully,
Sai[27]
[redacted] / +1 [redacted]

[25] *See e.g. In re Sai*, No. 1:18-mc-161 (D. D.C.), No. 19-5039 (D.C. Cir.) (dismissed solely for reasons related to IFP affidavit privacy, directly contrary to prior order of D. D.C. granting seal of IFP affidavit and IFP status, 1:14-cv-403).
[26] Although I believe it is also *ultra vires* for the reasons expressed above, I do not here demand the removal of spouse-related questions about the *applicant's* finances, such as alimony; nor questions as to assets that are jointly owned, if they are actually available to the applicant. Joint ownership includes e.g. assets of an LLP, not just of marriage.
[27] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns and no title. My partner is male. I am partially blind. Please send all communications, in § 508 accessible format, by email.

TAB 7G

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: September 26, 2020

Re: Suggestion to Revise Form 4 (20-AP-D)

Sai has submitted a suggestion calling for quick revision to Form 4, focusing on the Form's demand for financial information about a spouse. This suggestion is directly related to Sai's broader suggestion regarding IFP standards (19-AP-C). Sai states:

> You stand directly in the way of my prospective marriage.
> . . .
>
> I do not wish to wait many years on the uncertain prospect of a Rules Enabling Act rulemaking before I am able to marry my fiancé; nor do I wish to give up my IFP status or appointed counsel. You are directly responsible for the harm of this dilemma, and I am therefore asking you to fix it promptly, i.e. at least as fast as it would take to litigate for an injunction.

I suggest that this suggestion be referred to the IFP subcommittee.

TAB 7H

From: Sai
To: RulesCommittee Secretary
Subject: Comment re proposed FRAP Rule 3 amendments, and suggestion for new rule re statements on possible appeals
Date: Monday, August 24, 2020 12:51:36 PM

Dear FRAP and FRCP Committees —

The proposed amendment to Rule 3 seeks to cure a needlessly complicated rule by still more complication.

The current proposed language in proposed (c)(4) / (c)(5) is excessively legalistic and technical. It does not really solve the problem of making notices of appeal simpler and more robust; rather, it's a new source of confusion and a potential trap for those who rely upon it.

Consider, for instance:

1. What, exactly, counts as "merged"?

This isn't a naïve question; I do know the doctrine, roughly speaking. The problem is that this is hardly a straightforward issue — nor one that the average trial litigator will be expert in. It's an appellate technicality that a procedurally aggressive appellee's appellate-specialist counsel will be sure to challenge.

A litigant who wants to ensure that their notice of appeal is bulletproof can take no solace in the proposed (c)(4). Until the court of appeals makes its ruling, there is no truly *reliable* way to know whether an issue is merged or not — and therefore the proposed (c)(4) also cannot be relied on.

A cautious litigant will simply ignore this clause and opt to be verbose, to protect against having to later argue a possible technical defect — the exact opposite of the Committee's stated intent.

Perhaps the Committees will remember their response to my modest proposal that clerks state what's appealable when, including what counts as a "judgment": a great deal of hand-wringing that the *court itself* might make an error. Surely it's harder to determine what's "merged" into a judgment than the bare question of whether an order is one or not. This proposed rule provides no guidance or determination to make that any better.

If you don't even trust the court itself to decide this correctly — as you said in response to my prior proposal — you really should not be making it implicit in a rule that tells litigants "don't worry about this". They will inevitably commit the error of doing so — only to learn that it's an error after it's far too late to correct, and worse yet, that the erstwhile assurance of your new rule is illusory, with no protective power behind it.

If you are to give such an assurance ethically, you must make it both unmistakable in coverage and binding on the courts of appeals. The proposed rule does neither.

2. What does it even mean for a rule to say something is "not necessary", considering that the essential nature of rules is to only make statements of what is either required or permitted?

This necessarily implies an override of some other rule that says or implies it *is* necessary. So, a cautious (or textualist) reader will ask: where is that other rule, and what else does it require? The answer is, again, not at all obvious, and fodder for hyper-technical circuit splits.

The fix is not to add yet another layer of caveats, exceptions to exceptions, or summary restatements of doctrine.

Rather, it's to change the basic rule to be simpler & more permissive in the first place.

I suggest a radical simplification:

Change the rule so that the appellant just has to say "[I/We] appeal" — and the rule's defaults ensure that they are completely covered.

Any indication of appeal should be taken to encompass everything appealable at that time, unless the notice of appeal explicitly *excludes* some appealable matter from the scope. Rather than having to state what's included (and thereby risk a technical failure), one only has to say something extra if one wants to *waive* an issue. Exempting things *not* appealed, or represented parties not joining the appeal, should be the exception.

If filed before final judgment, then it should encompasses everything subject to interlocutory appeal. If filed afterwards (or contemporaneously), then it's everything except matters that can *only* be interlocutorily appealed.

If filed by CM/ECF, it should be a non-document entry. CM/ECF will note the filer and parties represented as always; it should present a list of everything appealable at the time of entry, with all of them selected by default. Click 'submit' and it files a text-only docket entry that says "X appeals everything appealable except Y — which, for convenience, CM/ECF thinks is the following ECF #s: [list]". If filed by paper, it's an ordinary filing whose entire content is literally "[I/We] appeal." and the usual signature block.

To be more specific, I propose the following replacement language (with proposed committee footnotes inlined):

Rule 3. Appeal as of Right—How Taken

…

(c) Filing the Notice of Appeal.

[delete all of (c)(1), replace with following]

(1) (A, B, & C) Abrogated.

(D) The notice of appeal must indicate that the filer is appealing.

[Note: "[I/We] appeal." is sufficient, and should ordinarily be the entire content of the notice of appeal. CM/ECF should offer a non-document entry for this purpose. By default, everything appealable is appealed, by all parties represented by the filer, to the court of appeals with jurisdiction over the court appealed from.]

(E) The notice of appeal may, but ordinarily will not, designate express exceptions.

(i) The notice may designate parties in the case who are represented by the filer, but are not joining the appeal. In the absence of such an exclusion, all such parties are deemed to be taking the appeal.

[Note: A pro se filer represents whomever of themselves, their spouse, and their minor children are parties.
In a class action, whether or not the class has been certified, the class is included if any appealing party is qualified to be a class representative.
If a represented party is joining the appeal in personal but not official capacity, or vice versa, this must be explicitly stated.]

(ii) The notice may designate judgment(s), appealable order(s), or parts thereof which the appealing parties are not appealing. In the absence of such an exclusion, all appealable matters, including all orders that merge for

purposes of appeal, are deemed to be appealed;

[Note: Unless explicitly excluded, a notice of appeal in civil cases includes the final judgment, regardless of the existence of a separate FRCP 58 document, if it is filed after:
(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
(B) an order described in Rule 4(a)(4)(A).]

(iii) The notice may designate court(s) to which the appeal is taken. In the absence of such a statement, the usual appellate court is the court to which the appeal is taken.

[Note: A court should only be designated in exceptional circumstances, e.g. for direct appeals to the Supreme Court that skip the usual court of appeals; MDLs; or situations where the appeal is to be transferred to a different jurisdiction.]

(F) The clerk, or CM/ECF if all parties receive electronic service, should immediately thereafter make an advisory filing, informing the parties of the defaults under subparagraph (B), i.e.:

[Note: This notice is purely advisory, and has no substantive or procedural effect. The notice should, if possible, be entirely automated by CM/ECF. If any exclusions were designated, this notice should state that the exclusions take precedence over these defaults.]

(i) the parties represented by the person filing the appeal;
(ii) the full list of appealable orders and judgments at the time of the appeal; and
(iii) the usual court of appeal.

(G) If the notice of appeal is filed directly in the court of appeals, it shall be considered as having been properly filed in the originating court, and the clerk shall send a copy to the originating court.

[Note: 28 U.S. Code § 1631 (cure for mistaken filing in court of appeals).]

[delete (c)(2 & 3), and mark them as abrogated (rather than renumbering following paragraphs), so as to not harm the comprehensibility of other sources' references by number. See e.g. abrogated FRAP 11(d).]

[discard proposed (c)(4-6)]

[delete FRAP 12(b) as redundant]

Furthermore, I suggest the following addition, in order to preempt (or at least lessen) a routine source of confusion, paucity of record for review, technicalities, and avoidable litigation:

FRAP 3(c)(1)

(H) Statements on possible appeals.

See FRCP 60.1, which is triggered by the filing of a notice of appeal.

FRCP 60.1 Statements on possible appeals.

The court must:

(a) within 3 days of
(1) a party's request,
(2) the filing of a notice of appeal, or
(3) the filing of any "judgment" under Rule 54;

(b) file a statement addressing, for each prior order not addressed in a prior statement under this rule:
(1) regardless of whether final judgment has issued:
(i) whether it is a "judgment" under Rule 54;
(ii) whether an appeal from it is, or would be, taken in good faith; and

[Note: Element (ii) is based on FRAP 24(a)(3)(A) and (a)(4)(B); see 28 U.S.C. § 1915(a). Nevertheless, it is required under this rule regardless of the IFP status of the parties.]

(iii) whether it is, or will be, merged into the final judgment; and

(2) if final judgment has not yet issued:
(i) whether and when it is appealable, addressing 28 USC §§ 1291 & 1292 at minimum;
(ii) whether it involves
(I) a controlling question of law
(II) as to which there is substantial ground for difference of opinion;
(iii) whether an immediate appeal would materially advance the ultimate termination of the litigation;
(iv) whether it is separable from, and collateral to, rights asserted in the action;
(v) whether it is too important to be denied interlocutory review;
(vi) whether it is final, and if not, what would convince the court to change its decision; and
(vii) whether it is effectively reviewable or curable on appeal from final judgment.

[Note: Elements (ii—vii) are based on 28 U.S. Code § 1292(b) and Cohen v. Beneficial Industrial Loan Corp. In circuits whose precedent sets forth further elements for determining interlocutory appealability, the statement must address those elements as well.

The statement is not binding on the court of appeals, and does not affect the standard of review.]

(c) The court may make a statement under this rule sua sponte, e.g. at the same time as it issues an order.

[Note: This is encouraged. Addressing appealability issues contemporaneously would reduce the number of orders in the scope of ¶ (b); give parties immediate notice of whether an order is appealable without the risk of irritating a judge by making an explicit request; ensure that the record reflects the judge's views at the time the order was issued; and remind judges of the need to make a record sufficient for review.]

I suggest that the Committees read about whitelist vs blacklist based defense in computer security, e.g. as used to prevent SQL injections or determine what programs are safe to run. This is fundamentally the same concept, and the proposed rule commits the usual fundamental error: it picks the wrong default, and then tries to fix it by adding more and more caveats.

If you want to make a simple rule that definitively prevents the risk of underinclusion, the answer is simple: make everything included by default, so that action only needs to be taken to *exclude* something from the default scope.

Sincerely,
Sai

TAB 7I

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: September 26, 2020

Re: Suggestion to Revise Rule 3 (20-AP-E)

Sai has submitted a suggestion criticizing the proposed amendment to Rule 3 as "excessively legalistic and technical." Sai suggests instead an amendment that would require a notice of appeal to state simply "I/We appeal." Unless the notice designated something as not begin appealed, "all appealable matters, including all orders that merge for purposes of appeal, are deemed to be appealed."

Because this suggestion is offered as a critique and replacement for the pending amendment to Rule 3—a proposed amendment that has already been given final approval by the Standing Committee—I suggest that this item be removed from the Committee's agenda. If the pending amendment to Rule 3 goes into effect as scheduled in December of 2021 and proves problematic, a new suggestion can be entertained at that time.

Alternatively, this suggestion could be referred to the Relation Forward subcommittee.

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

ADVISORY COMMITTEE ON APPELLATE RULES

MICHAEL A. CHAGARES
CHAIR

May 26, 2020

Via Email

Honorable Jeffrey R. Howard
Chief Judge, U.S. Court of Appeals for the First Circuit
Warren B. Rudman U.S. Courthouse
55 Pleasant Street, Room 4232
Concord, NH 03301

Re: Decisions Based Upon Unbriefed Grounds

Dear Chief Judge Howard:

I hope this letter finds you well. I am writing to you about a matter presented to the Advisory Committee on Appellate Rules. On behalf of the Committee, I ask that you consider it and respectfully request that you share it with your Court as you deem appropriate.

In late April 2019, I received the attached memorandum from the American Academy of Appellate Lawyers (the "AAAL"). The focus of the memorandum is that appellate courts have been deciding cases on grounds never raised or briefed by the parties. Indeed, at a recent AAAL meeting that I attended, almost all of the hundreds of attorneys present raised their hands when asked if this had occurred in cases that they had handled. The AAAL points out that although many appellate courts do invite supplemental briefing on previously unbriefed issues, not permitting the parties the opportunity to brief issues upon which a decision is based "harms the integrity of the appellate process," runs contrary to due process, and deprives courts of learning why those issues were not developed before the trial or appellate courts. As a result, the AAAL suggested the adoption of a rule requiring courts to give notice and an opportunity for the parties to be heard before an appeal is decided on a ground not briefed or raised by a party.

The Committee carefully considered the AAAL's suggestion, and, while the Committee agreed that the AAAL raised a legitimate concern, the Committee ultimately decided against amending the Federal Rules of Appellate Procedure at this time. Among other issues, the

Committee was concerned about its ability to define with precision the issues or grounds on which notice and additional briefing should be required. Instead, the Committee endorsed my sending this letter to the Chief Judges of all the Courts of Appeals in order to bring this issue to the Courts' attention. The Committee determined, however, that it will revisit this matter in three years.

Thank you for your time and, again, I hope you will consider the concern raised by the AAAL and share it with your Court as you see fit.

Very truly yours,

Michael A. Chagares
United States Circuit Judge

Attachment

American Academy of Appellate Lawyers

TO: THE HONORABLE MICHAEL CHAGARES, CHAIR
FEDERAL ADVISORY COMMITTEE ON APPELLATE RULES

FROM: AMERICAN ACADEMY OF APPELLATE LAWYERS

DATE: APRIL 26, 2019

RE: PROPOSED RULE REGARDING DECISIONS BASED ON UNBRIEFED GROUNDS

The American Academy of Appellate Lawyers proposes that the Federal Rules of Appellate Procedure be amended to address appeals that are decided on legal issues or theories not raised by the parties.[1] The proposed rule provides that, before a court decides an appeal on a ground not raised by parties, the court shall give notice that it is considering a previously unaddressed ground and provide an opportunity to brief it.

The proposed amendment addresses a practice that harms the integrity of the appellate process. To avoid limiting what appellate courts may consider in deciding cases, the proposed amendment merely requires that, before an appeal is decided on a ground the parties framing the appeal have not raised or addressed, the court must give parties notice and an opportunity to be heard on the unbriefed issue or theory.

Proposed Rule 32.2

Rule 32.2
Decisions on Unbriefed Grounds

Before a decision is issued based on a ground not briefed or argued by any party, the court shall provide a notice to the parties that describes the ground, and the court shall give the parties the opportunity to submit supplemental briefing on that ground.

[1] Positions taken in this recommendation state views determined by the Academy's internal process and should not be attributed to individual Fellows, their places of work, or their clients.

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The problem addressed by the proposed rule

An appellate decision based on a ground not raised by the parties may not be a common occurrence, but it happens.[2] The vast majority of members attending the Academy's Fall 2017 meeting indicated they have received decisions based on issues not presented in the briefs.

Many appellate courts invite supplemental briefs when a court's own research indicates potential grounds for decision other than those raised by the parties.3 But the consequences are severe when courts decide appeals based upon grounds the parties did not have an opportunity to brief. Issues and theories considered without notice and briefing may deprive the appellate court of the reasons those matters were not developed at trial or on appeal.

In addition to being necessary for integrity and quality in appellate decision-making, the opportunity to be heard before decisions are made is fundamental to the American adversary system of justice and due process of law. Notice and opportunity to be heard are also critical to the public perception of justice under law.

Established procedure is necessary

Rule-making provides the procedural mechanism to ensure that litigants can be heard before the court renders decisions in their cases based upon grounds the parties did not have an opportunity to develop or contest. Court rules set forth explicit procedures for providing notice to parties before courts determine facts relevant to the legal issues that determine the outcome of their cases. For example, the Federal Rules of Civil Procedure explicitly require notice and a reasonable time to respond before the court may grant summary judgment either *sua sponte* or on grounds not raised by a party.[4] A court is required to give notice to the parties before appointment of a special master,[5] and also must give notice and an opportunity to respond before

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[2] *See* E. King Poor & James E. Goldschmidt, Sua Sponte *Decisions on Appeal*, FOR THE DEFENSE, Oct. 2015, at 62.

[3] *See, e.g. In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012) (Gorsuch, J.) (discussing supplemental briefing by the parties in response to the court's request in light of authority discussing a different statutory basis for the relief sought by the appellant).

[4] Fed. R. Civ. P. 56(f): *Judgment Independent of the Motion.* After giving notice and a reasonable time to respond, the court may:
(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or

[5] Fed. R. Civ. P. 53(b)(1): *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

imposing sanctions for a violation of Federal Rule of Civil Procedure 11.[6]

The Academy's proposed Rule of Appellate Procedure is thus consistent with other rules designed to ensure due process.

[6] Fed. R. Civ. P. 11(c)(1): *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on recommendation.