COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 5, 2021

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*The proposed amendment to Civil Rule 7.1 unanimously approved by the Standing Committee by email vote on January 13, 2021 is included at pages 517-19.

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JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 5, 2021

AGENDA

1. Opening Business

A. Welcome and Opening Remarks

B. **ACTION:** The Committee will be asked to approve the minutes of the June 23, 2020 Committee meeting

C. Status of Rules and Forms Amendments

- Report on amendments effective December 1, 2020
- Report on amendments approved by the Judicial Conference at its September 2020 session and transmitted to the Supreme Court on October 20, 2020 (potential effective date of December 1, 2021)
- Report on proposed amendments out for public comment, including schedule of upcoming public hearings (potential effective dates of December 1, 2022 and December 1, 2024)

2. Joint Committee Business

A. Consideration of Possible Emergency Rules in Response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

- Pursuant to § 15002 of the CARES Act, the Advisory Committees on Appellate, Bankruptcy, Criminal, and Civil Procedure are considering rules to address measures for emergency situations

B. Other Matters Involving Joint Subcommittees

- Report from the E-filing Deadline Joint Subcommittee on progress of consideration of suggestion to change electronic filing deadlines
- Report on the work of the joint Civil-Appellate subcommittee considering the issue of appeal finality after consolidation and *Hall v. Hall*, 138 S. Ct. 1118 (2018)

3. Report of the Advisory Committee on Appellate Rules

- Information Items
    - Proposed amendments published for public comment
    - Various amendments occasioned by the CARES Act review
    - Comprehensive review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)
    - Consideration of various suggestions related to *in forma pauperis* issues
    - Relation forward of notices of appeal

4. Report of the Advisory Committee on Bankruptcy Rules

A. **ACTION:** The Committee will be asked to retroactively approve the following Official Forms:

- Official Form 309A-I (Notice of Bankruptcy Case)

B. **ACTION:** The Committee will be asked to recommend the following be published for public comment:

- Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)
- Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal)
- Official Form 417A (Notice of Appeal and Statement of Election)

C. Information Items

- Changes to the instructions (Instructions for Mortgage Proof of Claim Attachment) for Official Form 410A (Proof of Claim, Attachment A)
- Bankruptcy Rules Restyling

5. Report of the Advisory Committee on Civil Rules

A. **ACTION:** The Committee will be asked to recommend the following for final approval:

- Rule 7.1 (Disclosure Statement)

B. **ACTION:** The Committee will be asked to recommend the following be published for public comment:

- Rule 15(a)(1) (Amendments Before Trial – Amending as a Matter of Course) – proposed amendment would change the word "within" to "no later than" in specifying time period for amending pleadings

- Rule 72(b)(1) (Dispositive Motions and Prisoner Petitions – Findings and Recommendations) – proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b)

C. Information Items

- Report on the work of the Subcommittee on Multidistrict Litigation

- Continued consideration of a clarifying amendment to Rule 12(a) regarding situations where a statute sets time to serve responsive pleadings

- Report on new items considered and retained on the committee's agenda
  - Suggestion to amend Rules 26(b)(5)(A) and 45(e)(2) to revise how parties provide information about materials withheld from discovery due to claims of privilege
  - Suggestion for a new rule on sealing court records
  - Suggestion to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind)

- Report on items considered and removed from the committee's agenda
  - Suggestion to amend Rule 17(d) to require that a public officer who sues or is sued in an official capacity be designated by official title only, deleting the present alternative of designation by name
  - Suggestion regarding Rule 45 and nationwide subpoena service statutes

6. Report of the Advisory Committee on Criminal Rules

- Information Items

  - Report on the work of the Rule 6 Subcommittee

  - Report on items considered and removed from the committee's agenda

7. Report of the Advisory Committee on Evidence Rules

- Information Items
  - Possible amendment to Rule 702 (Testimony by Expert Witnesses)
  - Possible amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements)
  - Possible amendment to Rule 615 (Excluding Witnesses)
  - *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

8. Other Committee Business

A. **ACTION:** On or before January 12, 2021 the Committee is asked to provide recommendations to the Executive Committee, through the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (1st Circuit), regarding the prioritization of the *Strategic Plan for the Federal Judiciary's* strategies and goals over the next two years

B. Update on the Judiciary's Response to the COVID-19 Pandemic

C. Legislative Update

D. Next Meeting – June 22, 2021

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Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D	District of Columbia	Member: 2020 Chair: 2020	---- 2023
Jesse M. Furman	D	New York (Southern)	2016	2022
Daniel C. Girard	ESQ	California	2015	2021
Robert J. Giuffra, Jr.	ESQ	New York	2017	2023
Frank Mays Hull	C	Eleventh Circuit	2016	2022
William J. Kayatta, Jr.	C	First Circuit	2018	2021
Peter D. Keisler	ESQ	Washington, DC	2016	2022
William K. Kelley	ACAD	Indiana	2015	2021
Carolyn B. Kuhl	JUST	California	2017	2023
Patricia Ann Millett	C	DC Circuit	2020	2022
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2019	2022
Jeffrey A. Rosen*	DOJ	Washington, DC	----	Open
Kosta Stojilkovic	ESQ	Washington, DC	2019	2022
Jennifer G. Zipps	D	Arizona	2019	2022
Catherine T. Struve Reporter	ACAD	Pennsylvania	2019	2023

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. Rebecca B. Connelly *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. James C. Dever III *(Criminal)* Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1

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TAB 1A

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Item 1A will be an oral report.

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TAB 1B

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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 1C

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Effective December 1, 2020

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2020)
- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Amendment (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds 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	Subdivision (c) amended 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 rule to proposed amendment to Appellate Rule 26.1.	AP 26.1
BK 8013, 8015, and 8021	Eliminated or qualified the term "proof of service" when documents are served through the court's electronic-filing system, conforming the rule to the 2019 amendments to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, amended to require that the parties confer about the matters for examination before or promptly after the notice or subpoena is served. The subpoena must notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Subdivision (b) amended to 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 phrase "crimes, wrongs, or other acts" replaced with the original "other crimes, wrongs, or acts."	

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2020)

REA History:

- Approved by Judicial Conference (Sept 2020)
- 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.	

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.

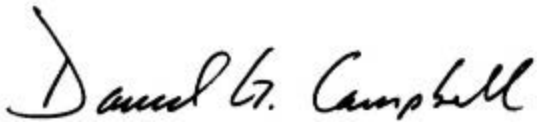
The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day, such as when the clerk's office closes in the 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,



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TAB 2

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

MEMORANDUM

TO: Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve, Reporter
Committee on Rules of Practice and Procedure

Daniel Capra, Reporter
Advisory Committee on Evidence Rules

RE: CARES Act Project Regarding Emergency Rules

DATE: December 1, 2020

This memo summarizes the work of the advisory committees in considering possible rules to govern emergencies. It provides an overview of the coordinated work of the advisory committees to develop, where possible, a uniform rule for extreme situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure.

The COVID-19 pandemic gave rise to urgent challenges in the courts. In the federal courts, the most pressing problems have arisen in criminal cases, as in-person proceedings became hazardous or impracticable and pressures mounted from case needs and Speedy Trial Act requirements. A principal difficulty was that the Criminal Rules were quite limited in their authorization of video conferences and telephone conferences.

With the Judiciary's substantial input, Congress responded by enacting the Coronavirus Aid, Relief, and Economic Security Act, or "CARES Act,"[1] which among other things addresses the use of video conferences and telephone conferences in criminal cases during the period of the current national emergency relating to COVID-19.

In addition to addressing these criminal-procedure issues for purposes of the current emergency, Section 15002 of the CARES Act also assigns a broader project to the Judicial Conference and the Supreme Court for consideration within the Rules Enabling Act framework:

> 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.).

CARES Act § 15002(b)(6).

As this provision indicates, the scope of the project is not limited to pandemics, but extends to other possible types of emergencies that might affect the courts. The advisory committees have invested hundreds of hours of work on this project. In an effort to be fully responsive to Congress's direction, the goal is to move forward at a somewhat faster pace than is usual for rulemaking. The initial goal was to develop proposed drafts to be discussed and tentatively approved at the fall 2020 advisory committee meetings. That goal has been accomplished. The next step is to develop publication-ready versions to be presented at the advisory committees' spring 2021 meetings. That will permit any resulting proposals to be published for public comment in the summer of 2021, if the relevant advisory committee and the Standing Committee decide that proposed amendments warrant publication. Such proposals will then be on track to take effect in December 2023 (if they are approved at each stage of the Enabling Act process and if Congress takes no contrary action).

This memo provides an overview of the collective work of the advisory committees to date. Each advisory committee is also filing a report to the Standing Committee on issues particular to that committee.[2] Here, we set the stage by reviewing the initial determinations that shaped the advisory committees' deliberations. We highlight ways in which the project has achieved significant uniformity in approach across the committees' separate drafts. We then turn to ways in which the proposals diverge, in order to point out areas where the Standing Committee's guidance would be particularly helpful. Next, we briefly offer some reflections on a question raised by an advisory committee member concerning the roles of the different judicial actors under the proposed emergency rules frameworks.

[1] Pub. L. No. 116-136, March 27, 2020, 134 Stat 281.

[2] Those Advisory Committee reports are attached to this Report as Attachment B.

Finally, we treat a question raised late in the process, regarding whether the rules should treat the possibility that those authorized to declare a rules emergency might be unable to do so.

Initial Determinations

Early on in the project, five decisions were made that shaped the scope of the joint efforts of the advisory committees:

1. An emergency rule is not needed for all of the Rules.

The Evidence Rules Committee concluded that an emergency rule should not be added to the Evidence Rules, because those rules are flexible enough to accommodate an emergency. The Evidence Rules grant significant discretion to the trial court --- most notably in Rule 611(a) --- to handle any issue about the form or presentation of evidence that might be affected by an emergency. Nor is there anything in the Evidence Rules that requires testimony to be given only while physically present in court. Moreover, the Evidence Rules are written to allow electronic information to be introduced in lieu of tangible evidence. The Committee concluded that adding an emergency rule where it was unneeded could do more harm than good.

It is important to note that the Civil Rules Committee has left open the possibility that no emergency rule would be added to the Civil Rules. The Civil Rules are flexible as well; they appear to have worked well through the pandemic, and the Committee remains open to the possibility that, given that only a handful of rules (mainly service requirements under Rule 4) might be subject to revision during an emergency, it might be preferable simply to amend those rules.

Finally, the Appellate Rules Committee has also left open the possibility that no emergency rule is necessary. This is because Appellate Rule 2 allows a court of appeals to suspend almost any rule in a particular case. So the need for an emergency rule to suspend rules more generally may not be critical. Relatedly, the Appellate Rules Committee has determined that in light of existing Rule 2, any emergency rule need not be as detailed as those that have been developed for the Bankruptcy, Civil, and Criminal Rules.

2. The declaration of a rules emergency should not be tied to a Presidential declaration.

The CARES Act directs the Judicial Conference to consider emergency measures that may be taken by the Federal courts "when the President declares a national emergency under the National Emergencies Act." But the Advisory Committees have been in full agreement throughout this process that emergency rules designed for the courts should not be contingent on such presidential declarations, and that the authority to declare a "rules emergency" should be lodged in the judicial branch. The Committees reasoned that a national emergency declared by the President would not always equate to a rules

emergency. A rules emergency is one that renders one or more courts unable to operate under the existing rules. National emergencies that lead to presidential declarations will not always affect courts to such a degree. Thus it is possible, even likely, that a Presidential declaration of emergency will not warrant suspending any of the national rules of procedure. And the converse is true as well: an emergency that impairs the functioning of some or even all courts may not warrant a declaration under the National Emergencies Act. Finally, the Committees concluded that the best decisionmaker for determining whether existing rules of procedure should be suspended is the judicial branch itself.

3. Any emergency rule should cover only those emergencies that are so lengthy and serious as to substantially impair the court's ability to function under the existing rules.

From the outset, the Committees decided that the type of emergency to be covered by emergency rules would have to be one that is substantial and lengthy. For example, a pipe bursting in the courthouse would not trigger an emergency rule. Although such an event can certainly be disruptive, it would not require suspension of existing rules, because courts can, and have, applied existing rules successfully to get through such short-term emergencies.

4. Replacement rules should be put in place for rules that are suspended.

The goal for the Bankruptcy, Civil, and Criminal Rules Committees was not simply to determine which rules would be subject to suspension during a rules emergency. It was also to provide what the substitute rule would be. Providing a substitute rule promotes predictability and uniformity, which are especially important in an emergency. (We note the Appellate Rules Committee's contrasting approach below.)

5. Existing rules with sufficient flexibility should not be subject to suspension.

The Committees agreed that if a rule is already flexible enough to accommodate an emergency, that rule should not be subject to suspension by an emergency rule. Examples include rules that allow exceptions for "good cause" or contain language such as "in the interests of justice." A specific example is Civil Rule 43(a), which provides that testimony must be given in open court, but that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."[3] No such rules are included in

[3] This exception provided in Rule 43 has been invoked by courts allowing remote testimony during the pandemic. See *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967 (D. Minn. 2020) (ordering remote testimony in light of Covid concerns of witnesses and counsel; relying on the good cause exception to Civil Rule 43 and stating that "the Court's discretion on this question is supplemented by its wide latitude in determining the manner in which evidence is to be presented under the Federal Rules of Evidence" and also citing Evidence Rule 611(a)). *See also Argonaut Insurance Company v. Manetta Enterprises, Inc.*, 2020 WL 3104033 (E.D.N.Y.) (relying on Rule 43 and Evidence Rule 611(a) to order virtual testimony over the defendant's objection, due to the pandemic); *Rodriguez v. Gusman*, 974 F.3d 108 (2d Cir.2020) (the plaintiff was "removed" to the Dominican Republic after filing this action for inadequate medical care in prison; the

the suspension list for any of the emergency rules. Designating such rules as subject to suspension would seemingly be an admission that a rule with, say, a "good cause" exception would not be up to the challenge of an emergency. But if a rules emergency is not enough to be "good cause" --- then what is? It was important to keep such flexible rules off the suspension list, because including them might actually limit their flexibility to cover problems less drastic than a rules emergency.

Uniformity

The Committees spent considerable effort in trying to make the emergency rules uniform, to the extent reasonably possible --- in the same way that other cross-Committee projects (such as the e-government rules in 2003) have done. Given that there are four separate rules, and given that each Advisory Committee was of course seeking the rule that would best promote the policies of its own set of rules, the degree of uniformity that has been achieved is impressive.

A true picture of the uniformity efforts is not shown in the final product that is included in the agenda book. There were many, many variances that have been resolved through constructive dialogue among the Reporters and Chairs of the Advisory Committees and subcommittees. Every Committee at one point or another had some language in its draft rule that varied from another Committee. All the Committees were flexible and reasonable in coming to some accommodation --- while appropriately drawing the line if uniformity would come at the expense of undermining the goals and policies of a particular set of rules.

One aspect of uniformity, which might seem counterintuitive, is that the definition of a rules emergency is framed by the particular rules set. Thus: "Appellate Rules Emergency", "Bankruptcy Rules Emergency" and so forth. While on its face this seems disuniform, it in fact helps to explain why the rule provisions might differ from Committee to Committee. This is especially so given the differing importance of the rules that would be suspended in a rules emergency. The Civil Rule would alter some provisions of Civil Rules 4 and 6. The Bankruptcy Rule would authorize the extension or tolling of some time periods. In contrast, the Criminal Rules Committee was required to consider such sensitive issues as when to permit the acceptance of guilty pleas and sentencing by video conference and telephone, and how to ensure the defendant's right to consult with counsel when physical access may not be possible. It thus stands to reason that a "Civil Rules Emergency" and a "Criminal Rules Emergency" are not necessarily the same thing. From that it follows that the procedural requirements and limitations attendant to an emergency might differ from rules set to rules set. The intent was to signal these differences by defining the rules emergency as tied to the specific rules set.

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court finds ample authority in the present civil rules to depose him there, to have him testify at trial from there under Rule 43, and to be subjected to court-ordered physical examination there under Rule 35).

While there are obviously many examples of uniform treatment in the emergency rules, there are three notable instances that deserve highlighting. First, the term "rules emergency" is used in each rules set, to highlight the fact that not every "emergency" will trigger the emergency rule. The emergency must be one which would substantially impair the court's ability to comply with the existing rules and perform its functions. Second, the basic definition of a rules emergency is uniform in the four sets of rules. A rules emergency is found when

> "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

Third and finally, the rules have been reviewed in a side-by-side analysis by the Style consultants with a view to implementing style guidelines and eliminating differences that are purely stylistic. This uniform restyling was, and remains, an intense process and we are very grateful to Joe Kimble, Bryan Garner, and Joe Spaniol for their excellent work.[4]

Points of Divergence

While there is a good deal of uniformity, there are a number of differences among the rules. Each of the advisory committees will be reporting on these differences, and on the policy choices that the specific advisory committee has made. This section simply sets out the major differences,[5] and to some extent articulates a committee's rationale for these differences, but it provides no comment on the merits. That is for the Standing Committee to discuss and decide.

1. The "no feasible alternative" requirement in the Criminal Rules definition of "Rules Emergency"

In addition to the uniform basic definition of "rules emergency" set forth above, the Criminal Rule adds the requirement that "no feasible alternative measure would limit the impairment within a reasonable time." The other Committees found no reason to impose

[4] Civil Rule 87(b) differs slightly in structure from its counterparts in the Bankruptcy and Criminal Rules. We believe that the difference is in drafting approach --- both approaches are fine, just different. Those differences have been reduced in the latest drafts. We will continue our work with the style consultants and the Reporters to reach uniformity on questions that are purely stylistic.

[5] One difference, not discussed here, concerns the "soft landing" provisions (in the Civil, Criminal, and Bankruptcy drafts) that address the treatment of proceedings that straddle periods before and after the termination of a rules emergency declaration. The Civil Rules Committee has not yet decided for sure whether it needs a soft landing provision (given the limited nature of its emergency provisions), and the Bankruptcy soft landing provisions are properly set forth in the substitute rules themselves(which relate to tolling or extension of time periods). The variances between the Civil and Criminal soft landing provisions do not strike us as a topic on which the Standing Committee needs to focus at this time.

this extra requirement, given the very strict standards set forth in the basic definition of a rules emergency. The argument has been made that the additional language can be placed justifiably in the Criminal Rules alone, given the importance of the Criminal Rules that would be subject to modification, including rules designed to protect constitutional rights. Simply put, the stakes are much higher in the Criminal Rules.

2. Who has the authority to declare a rules emergency?

The Judicial Conference has the sole authority to declare a Civil Rules or a Criminal Rules Emergency. The Appellate Rule grants such authority to "the court" as well, and provides that the Chief Judge of the circuit can exercise that authority unless the court orders otherwise. The Bankruptcy Rules grant the authority to the Judicial Conference and also to the Chief Judge of a Circuit and to the Chief Judge of a Bankruptcy Court.[6]

The basic disagreement here is over whether the Judicial Conference will be sufficiently responsive to rules emergencies that might be localized. The Civil and Criminal Rules Committees concluded that the Judicial Conference, working through its Executive Committee and with input from relevant judicial officers both within and outside its ranks, would be sufficiently well-informed, flexible, and efficient to timely declare a rules emergency, even if the need is localized.

The Criminal Rules Committee also stressed two other factors in its decision to locate the declaration authority solely in the Judicial Conference. First, allowing only the Judicial Conference to declare emergencies would promote consistency in determining what situations would be sufficient to warrant emergency declarations. Second, the Committee thought the Judicial Conference would be more reluctant to declare a Criminal Rules emergency than local courts, which might, for example, wish to waive rules requiring in-person proceedings in order to process their cases more expeditiously.

3. The open-ended Appellate Rule

The Appellate Rule sets almost no limit on the range of Appellate Rules that are subject to suspension in a rules emergency.[7] Nor does it state what the substitute rule (if any) will be when a rule is suspended. It does not specify what provisions need to be included in an emergency rules declaration. It imposes no set time limits on a rules emergency declaration. These and other limitations are found in the other three emergency rules. As discussed above, the open-ended nature of the Appellate Rule has been justified on the ground that the Appellate Rules proposal originates from a different starting point

[6] Including multiple designators in Bankruptcy means that there is a disuniformity, because the declaration authority must be laid out in subdivision (b) rather than (a). The language in (a) does not work when a number of different actors are in play.

[7] It excludes from the suspension authority certain deadlines described in Appellate Rule 26(b) – namely, provisions that are also reflected in a statute and that limit the time for taking an appeal, seeking permission to appeal, or seeking review or enforcement of an agency order.

than the other rules. The Appellate Rules already allow the court to suspend almost any rule in a particular case --- with no provision on what the substitute rule would be, and no designation of any procedural requirements. Because the Appellate Rules proceed from the premise that everything is subject to change in a case, the argument is that it is not much different to authorize a change across a class of cases, at least in a rules emergency. But there is no question that the approach for the Appellate Rules is in some tension with that for the other rules.

4. Reference to "locations" in the Bankruptcy Rule

The Bankruptcy Emergency Rule provides that an emergency may be declared for one or more designated "locations" in a district --- and that reference to locations is carried through the rule. The Civil and Criminal Rules refer only to "courts" and not "locations." The Bankruptcy Rules Committee was addressing the possibility that a Bankruptcy Court in one location in a district might be incapacitated, whereas another location might be operating. So the idea would be that a rules emergency could be declared in one location but not another within the district. The Criminal Rules Committee's response was that if one location was disrupted, the solution would not be to use emergency rules, but rather to switch everything over to the other location. This difference in position on "location" can be explained, once again, by the difference in what is at stake in the Criminal Rules.

5. Limitations on rules subject to alteration in a rules emergency.

The Bankruptcy, Civil and Criminal Rules all require the declaration of a rules emergency to specify any limitations on alteration of the rules that are listed (in later subdivisions) as subject to being changed in a rules emergency. On this provision, the approach of the Civil Rule differs from the other two. The Civil Rule requires the Judicial Conference to declare which of the specified Civil Rules will actually be altered due to the emergency. Without such an affirmative specification, nothing happens. The Bankruptcy and Criminal Rules proceed from the proposition that when a Rules Emergency is declared, all the rules designated are altered as stated in the emergency rule --- unless the Conference makes an exception for specific rules. Basically the difference is in where you start --- does the glass start empty or full?

In reality, this difference is not as dramatic as it might appear, given the very few Civil Rules that are in fact subject to alteration in an emergency. Moreover, three of the four emergency civil rules begin with the full text of the corresponding provisions in Rule 4, and add alternative means of making service that are modest. It seems unlikely that an emergency declaration would authorize only one or two of these provisions. The fourth emergency civil rule, on the other hand, relaxes the absolute prohibition in Rule 6(b)(2) against extending the time for post-judgment motions. The emergency circumstances that might justify invoking this emergency rule could be quite different. Asking the Judicial Conference to evaluate a claimed emergency to distinguish these potential problems seems appropriate. Finally, the Criminal Rules do provide extra care for some provisions subject

to change in an emergency, because some rules can go into effect only upon a supplementary finding by the Chief District Judge.

That said, there is a difference in the approach that warrants the Standing Committee's consideration. If the rules were promulgated in their current form, the Judicial Conference would be tasked with declaring the Civil Rules that are changed while declaring the Bankruptcy and Criminal Rules that are *not* changed. This may be unnecessarily complex.

6. Termination of Emergency Rules Order: Mandatory or Discretionary?

Each set of Rules, including Appellate, provides for termination of an emergency order when the rules emergency conditions no longer exist. But there is dispute about whether the declaring body must or may enter the order. The Appellate, Bankruptcy and Criminal Rules provide that a declaring body "must" enter a termination order.[8] The Civil Rule provides for discretion.

On the merits, there is something to be said for providing for discretion in entering a termination order. Using the term "must" appears to impose a legal obligation on the Judicial Conference (or other actors) to act. That obligation might well arise in difficult circumstances, especially when it comes to determining whether conditions actually justify a termination. One could imagine instances where the Judicial Conference in good faith believes that emergency circumstances remain, but others do not. Does someone have a cause of action in these circumstances? Giving the Conference discretion here seems wise.

More importantly, the obligation to terminate is likely to arise in a situation in which there is not much time until the declaration itself runs out. (Recall that at least in Bankruptcy, Civil, and Criminal, the declaration is limited to 90 days). Any condition serious enough to be a rules emergency is going to last for an extended period of time. The question of termination, then, is very likely to arise near the built-in termination date. It seems problematic to require the Judicial Conference (or other actor) to terminate a declaration on, say, day 85, as opposed to simply letting the clock run out.

Finally, a rule imposing a termination date may sit uneasily with an accompanying rule that provides that the Judicial Conference "may" modify an emergency declaration with a subsequent order. The line between a termination and a modification is not bright, especially when the question is whether an emergency continues in one court and not

[8] These rules do so in different ways. The Criminal version provides that the Judicial Conference "must terminate a declaration … before its stated termination date when it determines that a rules emergency affecting [the relevant] courts no longer exists." The Bankruptcy version says that a Chief Judge who made a declaration "must" terminate it upon finding the emergency to be over, and that the Judicial Conference "may" do so as well. The Appellate version focuses not on the declaration but on the suspension, stating that "[t]he court must end the suspension when the rules emergency no longer exists" and that the Judicial Conference "may" do so as well.

another, or when the modification leaves only one or two rules suspended. Thus, it may be best to use "may" for both termination and modification.

Roles Under the Proposed Frameworks

During the Appellate Rules Committee meeting, a member asked whether there might be limits on the appropriate role that can be given (by an emergency rule) to an actor other than the judge (or panel of judges) that is deciding a particular case. As to the Appellate draft itself, that question puts the focus on the role of the Judicial Conference. In case that question may give rise to curiosity, more broadly, about the role of the various decisionmakers contemplated under the four drafts, we sketch here some thoughts on those roles.[9]

Preliminarily, we note that the Appellate draft also seats suspension authority in the court of appeals and in the Chief Judge of the circuit, but makes the Chief Judge's authority defeasible by the court of appeals. So the Appellate draft can be seen as according ultimate authority to the Judicial Conference and the relevant court of appeals. Decisions taken by the latter might be seen as akin to standing orders – which have been regarded as an appropriate way of dealing with emergency situations – or perhaps as akin to local rules promulgated by a court of appeals without prior notice and comment (see 28 U.S.C. § 2071(e)). But while suspension orders entered by a court of appeals pursuant to proposed Appellate Rule 2(b) could be viewed as not contravening the Appellate Rules (because such orders would be authorized by the Appellate Rules), some might wonder whether affording such a free-ranging authority to suspend almost any provisions of the Appellate Rules accords with the limitations of the Enabling Act process. A further concern is that when an Appellate rule is suspended, there is no provision in the emergency rule for a substitute (as is the case with the other rules). If an emergency declaration sets forth substitute rules, it looks a lot like rulemaking. These questions dovetail with Point 3 in our discussion, above, on "Points of Divergence."

Turning to the role of the Judicial Conference: The proposals envision the Judicial Conference declaring rules emergencies; suspending particular Appellate Rules; reviewing Appellate or Bankruptcy rules emergency declarations made by other judicial actors; reviewing Appellate Rules suspensions by a court of appeals; specifying which Civil emergency rules would apply; specifying any limits on the predetermined list of suspensions in the Bankruptcy and Criminal Rules; and modifying or terminating emergency declarations. For purposes of this analysis, we leave aside modification and termination of emergency declarations, as those are logical corollaries of the authority to declare a rules emergency. For simplicity, we also leave aside the authority to review the Appellate or Bankruptcy rules emergency declarations made by other judicial actors under the Appellate or Bankruptcy rule; that Judicial Conference role is contingent on features of

[9] We are very grateful to Rules Law Clerk Kevin Crenny for his invaluable help in researching these questions.

the Appellate and Bankruptcy rules that we flag (in point 2 under "Points of Divergence") as ripe for substantive consideration by the Standing Committee. For similar reasons, we leave aside the Judicial Conference's proposed authority to suspend almost any provision of the Appellate Rules in an Appellate Rules emergency, as we are likewise awaiting the Standing Committee's policy views on that distinctive feature of the Appellate draft (see point 3 under 'Points of Divergence').

We thus focus on the Judicial Conference's role in declaring a rules emergency, specifying which Civil emergency rules will apply, and specifying any limits on which Bankruptcy and Criminal emergency rules will apply. Though nothing in the Judicial Conference's enabling statute[10] is directly on point, it seems to us that a rule promulgated under the Rules Enabling Act can properly place the Judicial Conference in the role of declaring a rules emergency. As an analogy, take the portion of the time-counting rules that relies on holidays declared by states.[11] No one has ever claimed (to our knowledge) that this constitutes an illegitimate delegation of rulemaking authority to state governments.[12] In such circumstances, a declaration that triggers a rule that is already provided for is not itself rulemaking.

The draft rules do contemplate a further exercise in judgment on the part of the Judicial Conference – namely, selecting (from the rules' menus) which of the potential emergency provisions will or will not apply. It is hard, though, to see how a challenge to that aspect of the Judicial Conference's role would take shape; in that role, the Judicial Conference can be seen as potentially limiting, but not expanding, the reach of the emergency provisions.[13]

The Bankruptcy draft's choice to accord the emergency-declaring function to the Chief Circuit Judge and the Chief Bankruptcy Judge seems justifiable on the same theory as that, noted above, concerning the Judicial Conference's emergency-declaring role.[14]

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[10] See 28 U.S.C. § 331.

[11] See, e.g., Appellate Rule 26(a)(6)(C) ("for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office"). Analogously, a number of Federal Rules incorporate state law on matters such as serving process, see Civil Rule 4(e)(1), and executing on a money judgment, see Civil Rule 69(a)(1).

[12] And, in fact, a number of existing Rules accord effect to actions taken by the Judicial Conference. Four sets of rules prescribe that "local rule[s] . . . must conform to any uniform numbering system prescribed by the Judicial Conference." Other rules refer to forms or fees set by the Judicial Conference, or to the maintenance of dockets consistent with the "manner prescribed by the Director of the Administrative Office of the United States Courts" as approved by the Judicial Conference.

[13] This is most obvious in the case of the Criminal and Bankruptcy drafts, which set a presumptive menu of emergency provisions and permit the Judicial Conference to subtract from it.

[14] A similar theory justifies the role of the Chief District Judge with respect to certain procedures under the emergency Criminal rule. Under the Criminal draft, certain uses of videoconferencing depend on findings

Likewise, these Chief Judges' authority to state any subtractions from the menu of emergency Bankruptcy rules seems justifiable on the same theory that we sketched, above, as to the Judicial Conference.

The Bankruptcy draft gives an additional role to the Chief Bankruptcy Judge – namely, to select the time periods that are to be extended. To the extent that readers are curious whether this additional role is an appropriate one for the Chief Bankruptcy Judge, reassurance may be found in 28 U.S.C. § 154(b), which provides that "[t]he chief judge of the bankruptcy court shall ensure that the rules of the bankruptcy court and of the district court are observed and that the business of the bankruptcy court is handled effectively and expeditiously." Selecting which time periods to extend (or not) does seem to relate to the statutory mandate to ensure that the business of the bankruptcy court is handled expeditiously.

Drafting for the Possibility that the Judicial Conference May Be Unable to Declare a Rules Emergency

During the discussion of the emergency rule at the Fall Criminal Rules Committee meeting, a suggestion was made that the rule should address the possibility that the Judicial Conference might be so affected by the emergency that it would be unable to declare a rules emergency. For example, it is possible that communications could be so disrupted that it would not be possible to have normal communications among members of the Judicial Conference. Or those members might be incapacitated. The question is whether the emergency rules should provide for the possibility of the Judicial Conference being unable to act. For example, the Criminal Rule might add a provision that "if the emergency renders the Judicial Conference unable to act, the Chief Judge of a District Court is authorized to declare a rules emergency. Once the Judicial Conference is able to act, it may ratify, modify, or terminate any declaration by a Chief Judge."[15]

Because this issue arose only at the meeting, and only after all the other Committees had met, no provision has been approved by any of the Advisory Committees. If the Standing Committee has a view about the necessity of such provision, it would be most helpful to the Advisory Committees going forward.

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by the Chief District Judge. The Chief District Judge's role in making those findings seems analogous to the Judicial Conference's role in making the emergency declaration.

[15] The possible need to delegate the authority downstream is an issue in the Civil and Criminal Rules, where the Judicial Conference is the only body with the authority to declare a rules emergency. Both Appellate and Bankruptcy rest such authority in others as well. Both those sets of rules empower the chief judge of a circuit to declare a rules emergency (the Appellate draft's authorization to the chief judge is defeasible by the court of appeals). There is already a statute that provides for downstream delegations if a chief judge of a circuit is unable to act. See 28 U.S.C. § 45(d) (("If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the circuit judge in active service, present in the circuit and able and qualified to act, who is next in precedence."). See also 28 U.S.C. § 136(e) (delegation if chief district judge is unable to perform duties).

There may be reason to question the need for a provision that delegates authority if the Judicial Conference is unable to act. First, it must be remembered that the Judicial Conference itself has authorized its Executive Committee to act on the Conference's behalf if there are emergency circumstances.[16] So the question is not whether the Judicial Conference as a whole is unable to act, but whether the Executive Committee is unable to act. It seems highly unlikely that the Executive Committee would be disabled for an extended period of time from making an emergency declaration. It is of course possible that a catastrophe could be so grave as to incapacitate virtually everyone for a lengthy period of time. But if that came to pass, presumably we would have much more to worry about than a rules emergency. Moreover, drafting a provision that hinged on the incapacity of the Executive Committee would be challenging (e.g.: Who would decide whether the Executive Committee was unable to act? What would happen if decisionmakers around the country reached differing views on that question?). For these reasons, there is something to be said for not addressing the drastic and (we hope) unlikely event of the Executive Committee of the Judicial Conference becoming unable to declare a rules emergency.

[16] *See* Report of the Proceedings of the Judicial Conference of the United States, September 21, 1987, at 57 (reflecting approval by the Judicial Conference of the principle that "[t]he Executive Committee will be the senior executive arm of the Conference (subject at all times, however, to the authority of the Chief Justice and the Conference itself), and is authorized and directed to act on behalf of the Conference as to any matter requiring emergency action").

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ATTACHMENT A
Draft Emergency Rules

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Emergency Rules Side-by-Side Comparison

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
Rule 2. Suspension of Rules (a) **In a Particular Case.** 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).	**Rule 9038. Bankruptcy Rules Emergency**[1] (a) CONDITIONS FOR AN EMERGENCY. A Bankruptcy Rules emergency may be declared when extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.	**Rule 87. Procedure in Emergency.** (a) CIVIL RULES EMERGENCY. The Judicial Conference of the United States may declare a Civil Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.	**Rule 62. Criminal Rules Emergency** **(a) Conditions for an Emergency**. The Judicial Conference of the United States may declare a Criminal Rules emergency only when it determines that: (1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and (2) no feasible alternative measures would eliminate the impairment within a reasonable time.
(b) In an Appellate Rules Emergency. **(1) *Conditions for an Emergency.*** The court may declare an Appellate Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these Rules. Unless the court orders otherwise, the chief	(b) DECLARING AN EMERGENCY. (1) *By Whom.* An emergency may be declared by: (A) the Judicial Conference of the United States, for all federal courts or for one or more courts; (B) the chief circuit judge, for one or more courts within the circuit; or	(b) DECLARING AN EMERGENCY. (1) *Content*. Each declaration of an emergency: (A) must designate the court or courts affected; (B) may authorize only one or more of the emergency rules in Rule 87(c) to take the place of the same rule [for the period set by Rule 87(b)(3), (4), and (5)];	**(b) Declaring an Emergency**. **(1) *Content.*** The declaration must identify: (A) the court or courts affected; (B) any restrictions on the authority granted in (c) and (d) to modify the rules; and

[1] Changes suggested by the style consultants have been incorporated into the draft but have not yet been approved by the Advisory Committee.

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
circuit Judge may act on its behalf under this Rule. **(2) *Content of a Declaration; Early Termination.*** When a Rules emergency is declared, the court may suspend in that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). The court must end the suspension when the rules emergency no longer exists. **(3) *Action by the Judicial Conference.*** The Judicial Conference of the United States may exercise these same powers in one or more circuits, and may review and revise any determination by a court under this rule.	(C) the chief bankruptcy judge, for one or more locations in the district. (2) *Content*. The declaration must identify: (A) the courts or locations affected; (B) any restrictions on the authority granted in (c) to modify the rules; and (C) a date, no later than 90 days from the date of the declaration, when it will terminate. (3) *Additional Declarations.* The Judicial Conference, the chief circuit judge, or the chief bankruptcy judge may issue additional declarations if emergency conditions change or persist. (4) *Early Termination.* A chief judge who declared an emergency must terminate a declaration before its stated termination date in one or more courts or locations if the judge finds that an emergency no longer affects those courts or locations. The Judicial Conference may exercise the same power to terminate, and may review and revise any determination by a chief judge under this rule.	(C) must be limited to a stated period of no more than 90 days; and (D) may be modified or terminated before the end of the stated period. (2) *Additional Declarations*. Additional declarations may be made under Rule 87(a).	(C) a date, no later than 90 days from the date of the declaration, when it will terminate. **(2) *Additional Declarations.*** The Judicial Conference may issue additional declarations under (a) and (b)(1) if emergency conditions change or persist. ***(3) Early termination.*** The Judicial Conference must terminate a declaration for one or more courts before its stated termination date if it determines that a rules emergency no longer affects those courts.

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
	(c) TOLLING AND EXTENDING TIME LIMITS. (1) *In an Entire District.* When an emergency is declared and remains in effect for a court, the chief bankruptcy judge may—for all cases and proceedings in the district: (A) order the extension or tolling of a Bankruptcy Rule, local rule, or order that requires or allows a court, a clerk, a party in interest, or the United States trustee, by a specified deadline, to take an action, commence a proceeding, file or send a document, or hold or conclude a hearing, despite any other Bankruptcy Rule, local rule, or order; or (B) order that when a Bankruptcy Rule, local rule, or order requires that action be taken "promptly," "forthwith," "immediately," or "without delay," that it be taken as soon as is practicable or by a date set by the court in a specific case or proceeding. (2) *In a Specific Case or Proceeding.* Any bankruptcy judge in the district may take the action described in (1) in a specific case or proceeding.	(c) EMERGENCY RULES. (1) Emergency Rule 4(e)(2)(B): leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or, if ordered by the court, sending a copy of each to [that place] [the individual's dwelling or usual place of abode] by registered or certified mail or other reliable means that require a signed receipt. (2) Emergency Rule 4(h)(1)(B): by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process or, if ordered by the court, by mailing them by registered or certified mail or other reliable means that require a signed receipt, and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant;	**(c) Authority to Depart from These Rules After a Declaration.** **(1) *Public Access to Proceedings.*** If emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding. **(2) *Signing or Consenting for a Defendant.*** If these rules require a defendant's signature, written consent, or written waiver, and emergency conditions limit a defendant's ability to sign, defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
	(3) *When an Extensions or Tolling Ends*. A time period extended or tolled under (1) or (2) terminates on the later of: (A) the last day of the time period as extended or tolled or 30 days after the rules-emergency declaration terminates, whichever is earlier; or (B) the last day of the time period originally required, imposed, or allowed by the relevant Bankruptcy Rule, local rule, or order that was the subject of the extension or tolling. (4) *Further Extensions or Shortenings*. A presiding judge may lengthen or shorten the duration of an extension or tolling in a specific case or proceeding. The judge may do so only on its own motion or on motion of a party in interest or the United States trustee, and for good cause, after notice and a hearing. (5) *Exception.* A time period imposed by statute may not be extended or tolled.	(3) Emergency Rule 4(j)(2)(a): delivering a copy of the summons and of the complaint to its chief executive officer or, if ordered by the court, sending them to the chief executive officer by registered or certified mail or other reliable means that require a signed receipt; (4) Emergency Rule 6(b)(2): A court may apply Rule 6(b)(1) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The order extending time has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under those rules. ~~(5) Emergency Rule 43(a): At trial, the witnesses' testimony must be taken in open court or by remote means that permit reasonable public access unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.~~ ~~(6) Emergency Rule 77(b): Every trial on the merits must be conducted in open court in person or by remote means that permit reasonable public access and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in~~	**(3) *Bench Trial*.** If a defendant waives a jury trial in writing, the court may conduct a bench trial without government consent if, after providing an opportunity for the parties to be heard, the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights. **(4) *Alternate Jurors*.** The court may impanel more than 6 alternate jurors. **(5) *Correcting or Reducing a Sentence*.** Despite Rule 45(b)(2), if emergency conditions provide good cause for extending the time to take action under Rule 35, it may be extended as reasonably necessary.

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
		~~chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.~~	
		(d) EFFECT OF TERMINATION. A proceeding not authorized by a rule but authorized and commenced under an emergency rule may be completed under the emergency rule when compliance with the rule would be infeasible or work an injustice.	**(d) Authority to Use Videoconferencing and Teleconferencing After a Declaration.** **(1)** ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule does not modify the court's authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 43(b)(2). But if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings. **(2) V*ideoconferencing for Certain Proceedings at Which the Defendant Has a Right to Be Present.*** Except for felony trials and as otherwise provided under (d)(1) and (3), for a proceeding at which a defendant has a right to be present, the court may use videoconferencing if:

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
			(A) the chief judge of the district finds that emergency conditions in the district substantially impair a court's ability to hold an in-person proceeding within a reasonable time; (B) the court finds that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding; and (C) the defendant consents after consulting with counsel. **(3)** ***Videoconferencing for Felony Pleas and Sentencings.*** For a felony proceeding under Rule 11 or 32, the court may use videoconferencing only if, in addition to the requirements in (2)(A) and (B): (A) the chief judge of the district finds that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in the district; (B) the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing; and

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
			(C) the court finds that any further delay in that particular case would cause serious harm to the interests of justice. **(4) *Teleconferencing*.** [If the requirements for videoconferencing have been met] under this rule [or Rule 5, 10, 40, or 43(b)(2)], the court may conduct the proceeding by teleconferencing if: (A) the court finds that: (i) videoconferencing cannot be provided for the proceeding within a reasonable time; and (ii) the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding; and (B) the defendant consents after consulting with counsel.
			(e) Effect of a Termination. Terminating a declaration for a court ends its authority under (c) and (d) to depart from these rules. But if a particular proceeding is already underway and complying with these rules for the rest of the proceeding

APPELLATE	BANKRUPTCY	CIVIL	CRIMINAL
			would be infeasible or work an injustice, it may be completed as if the declaration had not terminated.

Rule 2. Suspension of Rules

(a) **In a Particular Case.** 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) In an Appellate Rules Emergency.

(1). *Conditions for an Emergency.* The court may declare an Appellate Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these Rules. Unless the court orders otherwise, the chief circuit Judge may act on its behalf under this Rule.

(2) *Content of a Declaration; Early Termination.* When a Rules emergency is declared, the court may suspend in that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). The court must end the suspension when the rules emergency no longer exists.

(3) *Action by the Judicial Conference.* The Judicial Conference of the United States may exercise these same powers in one or more circuits, and may review and revise any determination by a court under this rule.

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Rule 9038. Bankruptcy Rules Emergency[1]

(a) CONDITIONS FOR AN EMERGENCY. A Bankruptcy Rules emergency may be declared when extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARING AN EMERGENCY.

(1) *By Whom.* An emergency may be declared by:

(A) the Judicial Conference of the United States, for all federal courts or for one or more courts;

(B) the chief circuit judge, for one or more courts within the circuit; or

(C) the chief bankruptcy judge, for one or more locations in the district.

(2) *Content*. The declaration must identify:

(A) the courts or locations affected;

(B) any restrictions on the authority granted in (c) to modify the rules; and

(C) a date, no later than 90 days from the date of the declaration, when it will terminate.

(3) *Additional Declarations.* The Judicial Conference, the chief circuit judge, or the chief bankruptcy judge may issue additional declarations if emergency conditions change or persist.

(4) *Early Termination.* A chief judge who declared an emergency must terminate a declaration before its stated termination date in one or more courts or locations if the judge finds that an emergency no longer affects those courts or locations. The Judicial

[1] Changes suggested by the style consultants have been incorporated into the draft but have not yet been approved by the Advisory Committee.

Conference may exercise the same power to terminate, and may review and revise any determination by a chief judge under this rule.

(c) TOLLING AND EXTENDING TIME LIMITS.

(1) *In an Entire District.* When an emergency is declared and remains in effect for a court, the chief bankruptcy judge may—for all cases and proceedings in the district:

(A) order the extension or tolling of a Bankruptcy Rule, local rule, or order that requires or allows a court, a clerk, a party in interest, or the United States trustee, by a specified deadline, to take an action, commence a proceeding, file or send a document, or hold or conclude a hearing, despite any other Bankruptcy Rule, local rule, or order; or

(B) order that when a Bankruptcy Rule, local rule, or order requires that action be taken "promptly," "forthwith," "immediately," or "without delay," that it be taken as soon as is practicable or by a date set by the court in a specific case or proceeding.

(2) *In a Specific Case or Proceeding.* Any bankruptcy judge in the district may take the action described in (1) in a specific case or proceeding.

(3) *When an Extensions or Tolling Ends*. A time period extended or tolled under (1) or (2) terminates on the later of:

(A) the last day of the time period as extended or tolled or 30 days after the rules-emergency declaration terminates, whichever is earlier; or

(B) the last day of the time period originally required, imposed, or allowed by the relevant Bankruptcy Rule, local rule, or order that was the subject of the extension or tolling.

(4) *Further Extensions or Shortenings*. A presiding judge may lengthen or shorten the duration of an extension or tolling in a specific case or proceeding. The judge may do so only on its own motion or on motion of a party in interest or the United States trustee, and for good cause, after notice and a hearing.

(5) *Exception.* A time period imposed by statute may not be extended or tolled.

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Draft Civil Rule 87

Rule 87. Procedure in Emergency

(a) CIVIL RULES EMERGENCY. The Judicial Conference of the United States may declare a Civil Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARING AN EMERGENCY.

(1) *Content.* Each declaration of an emergency:

(A) must designate the court or courts affected;

(B) may authorize only one or more of the emergency rules in Rule 87(c) to take the place of the same rule [for the period set by Rule 87(b)(3), (4), and (5)];

(C) must be limited to a stated period of no more than 90 days; and

(D) may be modified or terminated before the end of the stated period.

(2) *Additional Declarations.* Additional declarations may be made under Rule 87(a).

(c) EMERGENCY RULES.

(1) Emergency Rule 4(e)(2)(B): leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or, if ordered by the court, sending a copy of each to [that place] [the individual's dwelling or usual place of abode] by registered or certified mail or other reliable means that require a signed receipt.

(2) Emergency Rule 4(h)(1)(B): by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process or, if ordered by the court, by mailing them by registered or certified mail or other reliable means that require a

signed receipt, and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant;

(3) Emergency Rule 4(j)(2)(a): delivering a copy of the summons and of the complaint to its chief executive officer or, if ordered by the court, sending them to the chief executive officer by registered or certified mail or other reliable means that require a signed receipt;

(4) Emergency Rule 6(b)(2): A court may apply Rule 6(b)(1) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The order extending time has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under those rules.

~~(5) Emergency Rule 43(a): At trial, the witnesses' testimony must be taken in open court or by remote means that permit reasonable public access unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.~~

~~(6) Emergency Rule 77(b): Every trial on the merits must be conducted in open court in person or by remote means that permit reasonable public access and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.~~

(d) EFFECT OF TERMINATION. A proceeding not authorized by a rule but authorized and commenced under an emergency rule may be completed under the emergency rule when compliance with the rule would be infeasible or work an injustice.

Draft Criminal Rule 62

FEDERAL RULES OF CRIMINAL PROCEDURE
DRAFT NEW RULE 62

Rule 62. Criminal Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Criminal Rules emergency only when it determines that:

(1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and

(2) no feasible alternative measures would eliminate the impairment within a reasonable time.

(b) Declaring an Emergency.

(1) ***Content.*** The declaration must identify:

(A) the court or courts affected;

(B) any restrictions on the authority granted in (c) and (d) to modify the rules; and

(C) a date, no later than 90 days from the date of the declaration, when it will terminate.

(2) ***Additional Declarations.*** The Judicial Conference may issue additional declarations under (a) and (b)(1) if emergency conditions change or persist.

(3) Early termination. The Judicial Conference must terminate a declaration for one or more courts before its stated termination date if it determines that a rules emergency no longer affects those courts.

(c) Authority to Depart from These Rules After a Declaration.

(1) ***Public Access to Proceedings.*** If emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding.

(2) ***Signing or Consenting for a Defendant.*** If these rules require a defendant's signature, written consent, or written

waiver, and emergency conditions limit a defendant's ability to sign, defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.

(3) ***Bench Trial.*** If a defendant waives a jury trial in writing, the court may conduct a bench trial without government consent if, after providing an opportunity for the parties to be heard, the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights.

(4) ***Alternate Jurors.*** The court may impanel more than 6 alternate jurors.

(5) ***Correcting or Reducing a Sentence.*** Despite Rule 45(b)(2), if emergency conditions provide good cause for extending the time to take action under Rule 35, it may be extended as reasonably necessary.

(d) Authority to Use Videoconferencing and Teleconferencing After a Declaration.

(1) ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule does not modify the court's authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 43(b)(2). But if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings.

(2) ***Videoconferencing for Certain Proceedings at Which the Defendant Has a Right to Be Present.*** Except for felony trials and as otherwise provided under (d)(1) and (3), for a proceeding at which a defendant has a right to be present, the court may use videoconferencing if:

(A) the chief judge of the district finds that emergency conditions in the district

substantially impair a court's ability to hold an in-person proceeding within a reasonable time;

(B) the court finds that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding; and

(C) the defendant consents after consulting with counsel.

(3) ***Videoconferencing for Felony Pleas and Sentencings.*** For a felony proceeding under Rule 11 or 32, the court may use videoconferencing only if, in addition to the requirements in (2)(A) and (B):

(A) the chief judge of the district finds that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in the district;

(B) the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing; and

(C) the court finds that any further delay in that particular case would cause serious harm to the interests of justice.

(4) ***Teleconferencing*****.** [If the requirements for videoconferencing have been met] under this rule [or Rule 5, 10, 40, or 43(b)(2)], the court may conduct the proceeding by teleconferencing if:

(A) the court finds that:

(i) videoconferencing cannot be provided for the proceeding within a reasonable time; and

(ii) the defendant will have an adequate opportunity to consult confidentially

with counsel before and during the proceeding; and

(B) the defendant consents after consulting with counsel.

(e) Effect of a Termination. Terminating a declaration for a court ends its authority under (c) and (d) to depart from these rules. But if a particular proceeding is already underway and complying with these rules for the rest of the proceeding would be infeasible or work an injustice, it may be completed as if the declaration had not terminated.

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ATTACHMENT B
Reports of the Advisory Rules Committees

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

JOHN D. BATES
CHAIR

REBECCA A. WOMELDORF
SECRETARY

RAYMOND M. KETHLEDGE
CHAIR
ADVISORY COMMITTEE
ON CRIMINAL RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Draft Rule 62 (Criminal Rules Emergency)

DATE: December 14, 2020

I. Introduction

The Advisory Committee on Criminal Rules met by videoconference November 2, 2020. This report presents the Committee's draft emergency rule—Rule 62—focusing on features not shared by the rules developed by the other Advisory Committees. Our other information items are discussed in a separate report included later in the agenda book.

At its November meeting, the Committee approved the text of Rule 62, with the understanding that it is a work in progress. As described in greater detail in the minutes, members also made suggestions for issues to be considered further and provided comments on the draft committee note. The draft note is included as Appendix 1 to this memorandum.

The draft reflects input from the bench and bar. The Committee's emergency rules subcommittee, chaired by Judge James Dever, solicited comments and suggestions from all chief judges and held a day-long miniconference. The conference participants were judges, prosecutors, federal defenders, and private defense attorneys, many from districts where emergencies such as hurricanes had interfered with the courts' functions and districts undergoing especially severe challenges during the current pandemic.[1] To date, most of the Committee's efforts have

[1] The participants in the miniconference were:

necessarily focused on the rule's text. The Committee will turn next to revising the note and also consider whether to recommend any emergency provisions for the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings.

Several principles guided our Committee's work. First, we recognized that the Criminal Rules are the product of careful design and deliberation, to protect constitutional and statutory rights and other interests. They should not be set aside lightly.[2] Second, the rules have been resilient and stood the test of time, through different emergencies presenting different circumstances. A new rule for emergencies must recognize the adaptability already present in the rules and must address the range of circumstances that might arise during emergencies. Third, the Committee considered the question of a new emergency rule on a clean slate, without an assumption that provisions of the CARES Act should be incorporated into the emergency rule. Finally, we employed the Committee's traditional bottom-up process, developing a proposed rule in consultation with people involved in these issues on the ground.

II. Subdivisions (a) and (b): Defining and Declaring a "Rules Emergency"

Subdivisions (a) and (b) of Rule 62 define the conditions that may constitute a Criminal Rules emergency and how such an emergency may be declared. These subdivisions are intended to restrict narrowly the authority to vary from the rules, which, as noted above, have been carefully designed to protect constitutional and statutory rights, as well as other interests.

A. Who Can Declare a Criminal Rules Emergency

The Committee concluded that the Judicial Conference should have the sole authority to declare a rules emergency.[3] Although some rules emergencies might be limited in geographic effect, allowing judges at the circuit or district level to declare rules emergencies is likely to

Judge Anthony Battaglia, S.D. Cal.
Judge David Campbell, D. Ariz.
Chief Judge Lee Rosenthal, S.D. Tex.
Judge Sarah Vance, E.D. La.
Brian Moran, U.S. Attorney, W.D. Wash.
Louis Franklin U.S. Attorney, M.D. Ala.
Donna Elm, D. Ariz.
Russell M. Aoki, coordinating discovery attorney with national practice
Christina Farley Jackson, Deputy Federal Defender, ND Ill.
Hector Gonzalez, S.D.N.Y.
Douglas Mullkoff, E.D. Mich.
David Patton, Exec. Dir., Federal Defenders of New York, S.D.N.Y. and E.D.N.Y.
Carlos Williams, Exec. Dir., Southern Federal Defender Program, S.D. Ala.

[2] Indeed one member dissented from the conclusion that the Committee should draft an emergency rule on the grounds that it would, inevitably, tend to normalize exceptions to the critical safeguards provided by the Criminal Rules.

[3] The member who dissented from drafting an emergency rule also opposed placing the authority to declare a rules emergency within the judicial branch. One other member dissented on this point, expressing concern that the Judicial Conference might not be sufficiently attuned to the needs of criminal cases and defense practitioners, but not stating a view on her preferred alternative.

produce disparate responses to similar circumstances. The Emergency Rule Subcommittee received numerous requests by individual judges for changes that would set aside, on relatively slender grounds, procedures that safeguard constitutional protections. The Committee believes, therefore, that some circuits or districts might be less reluctant than the Judicial Conference to declare a rules emergency or to depart from particular provisions in the rules. In criminal proceedings, at least, the stakes are too high to invite individual districts or circuits to adopt significant changes during an emergency without some gatekeeping and coordination by the Judicial Conference. The Conference is also in the best position to provide clear and decisive guidance on these matters. Lodging this authority solely in the Judicial Conference is also consistent with its central role in the Rules Enabling Act process.

The Committee rejected concerns that the Judicial Conference would be unable to make necessary findings quickly in an emergency. The Conference's members include the chief judge and a district judge from each circuit, who provide an immediate source of local information, and who can quickly gather more information from sources within the affected courts.

B. The Conditions for a Rules Emergency

Subdivision (a) provides that the Judicial Conference can declare a rules emergency only after making two key findings.

First, the Judicial Conference must find that there are "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court" that "substantially impair the court's ability to perform its functions in compliance with these rules." This finding—which is also included in the draft rules of the Civil and Bankruptcy Rules Committees—is meant to limit judicial emergencies to truly extraordinary circumstances. This finding also requires a direct impact on the federal courts: the emergency circumstances must substantially impair the ability of one or more courts to perform their functions in compliance with the Criminal Rules. This definition is flexible, and encompasses not only a national emergency like the COVID-19 pandemic, but also more local or regional emergencies resulting from disasters like hurricanes, flooding, or wildfires. The definition would cover emergencies like an attack on the electronic grid, which could disable the CM/ECF system.

Second, the Judicial Conference must find that "no feasible alternative measures would eliminate the impairment within a reasonable time." If courts can comply with the rules by means of other feasible measures, then a departure from the rules is not truly necessary. For example, during the devastation of hurricanes Katrina and Maria, courts in the affected districts continued to function in compliance with the rules by using 28 U.S.C. § 141 to move their proceedings to other districts. This second finding therefore is not subsumed by the first one. Moreover, the Committee concluded that the Judicial Conference is well-suited to evaluate the availability of alternatives like invoking § 141, or assigning judges from other districts under 28 U.S.C. § 292(b) and (d), or delaying proceedings if the conditions giving rise to the impairment may dissipate within a reasonable time.

The Committee's insistence on this second finding also reflects the gravity of the interests at issue. In contrast to rules that, say, extend deadlines for bankruptcy filings or provide alternative means for filing civil pleadings, Rule 62 would allow some of the most solemn proceedings in

federal court to be conducted remotely, rather than in-person. Subdivision (d) in particular would allow a court to sentence a defendant to prison remotely—through an iPad, or in some circumstances even by phone—rather than in the courtroom, with family and victims present, and the judge and defendant addressing each other in-person, face-to-face. In-court proceedings also allow the judge to see subtle indications of duress, intoxication, or some other factor affecting whether a plea is knowing and voluntary. We should forgo these protections only as a last resort.

C. The Contents of the Declaration

Subparagraph (b)(1)(B) works in tandem with (a)(1) and (2) to allow the Judicial Conference to limit departures from the Criminal Rules to the minimum necessary to meet the specific conditions of a particular emergency. Even when, under (a)(2), the Judicial Conference has found the absence of any "feasible alternative" to invoking the emergency rule, the Judicial Conference may determine under (b)(1)(B) that affected courts need only some, rather than all, of the authority described in Rule 62(c) and (d). There would be no reason to authorize the video and telephone proceedings covered by subdivision (d), for example, when an attack on the electronic grid has not caused any interference with in-person access to the courts.

Paragraph (b)(2) deals with the possibility that emergency conditions might persist longer than 90 days or change while a declaration is in effect. If emergency conditions persist beyond 90 days or begin to affect other courts, paragraph (b)(2) allows the Judicial Conference to make "additional declarations under (a) and (b)(1)." The reference to those subsections is vitally important, because it makes clear the standards for any "additional declarations" are the same as for the initial one. There is, in other words, no lesser standard for renewal of a declaration.

Paragraph (b)(3) provides for the termination of a rules emergency before the date originally set in a declaration if the Conference finds that the rules emergency affecting a court or courts no longer exists. Although this provision was initially drafted as permissive—the "must terminate" was initially a "may"—the Committee was persuaded that the authority to depart from general procedures set forth by the Criminal Rules should last no longer than the actual emergency upon which the declaration was based. This was again the result of the Committee's strong view that the emergency provisions are a necessary evil, to be employed only as long as necessary.

III. Subdivision (c): Defining the Emergency Authority to Depart from the Rules

Subdivisions (c) and (d) define an affected court's authority to depart from the rules. The provisions governing the authority to use video and teleconferencing are quite lengthy, so they are in their own subdivision, namely (d). In addition, unlike subdivisions (a) and (b)—which use the term "court" to refer to a district affected by emergency conditions—subdivisions (c) and (d) use that term to refer to the judge in an individual case. We think the term's meaning in all these provisions is clear from context, even though Criminal Rule 1(b)(2) defines "court" as "a federal judge performing functions authorized by law." The Committee will give additional attention to this issue, consulting with Professor Capra as needed.

With a few exceptions, subdivisions (c) and (d) grant authority to employ emergency procedures, but do not require individual judges to employ that authority—allowing them to determine, for example, whether to conduct certain proceedings by video or teleconference when

allowed to do so under Rule 62(d). The relevant circumstances for each judge may differ, even among judges in different divisions of a single district. This discretion helps to keep deviations from the rules to a minimum, allowing judges who are able to comply with the rules to do so.

Paragraph (c)(1) addresses the courts' obligation to provide alternative access to their proceedings when emergency conditions have precluded the public from attending them in person. It provides: "If emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding." The phrase "public proceeding" encompasses proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments.

A court must provide alternative access not only when emergency conditions preclude anyone from attending a public proceeding in person, but also when conditions would allow participants but not the public to attend, as when capacity is severely restricted to prevent contagion. The rule does not address how alternative access must be provided, recognizing that the means for doing so will inevitably change over time.

The Committee will continue to consider four comments about this provision, which arose at the Committee's fall meeting. First, some members thought that the word "preclude" was too strong, favoring something more like impairment of access. A second comment was that, in the view of some members, the alternative access should be contemporaneous with the proceeding itself. A third was to include, perhaps in the note, different ways to provide alternative access. To respond to the latter two comments, the reporters drafted the bracketed language in the draft note, which reads:

> Alternative access should be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space could be provided. In a proceeding conducted by videoconference, a court could provide public access to the audio transmission if access to the video transmission is not feasible.

A fourth comment was whether to refer specifically to victims in the text or the note, since they have a statutory right to attend proceedings and to address the court at sentencing. After the subcommittee has had a chance to consider all these comments, it will prepare a recommendation for the Committee.

Paragraph (c)(2) specifies that defense counsel or the judge may sign for the defendant, when "emergency conditions limit a defendant's ability to sign." Members and miniconference participants described the difficulty in obtaining the defendant's physical signature when, for example, COVID-19 health restrictions closed detention facilities, preventing counsel from meeting with defendants in person, and when proceedings that would ordinarily be conducted in open court must be conducted by video or teleconferencing. The subcommittee learned that practices in various courts, some embodied in local rules, were permitting substitute signatures.

Whenever the rules "require a defendant's signature, written consent, or written waiver," the draft authorizes defense counsel to sign with the defendant's consent. To create a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record; or (2) defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature.

The court may sign for a pro se defendant if the defendant consents on the record. But the draft does not authorize the court to sign for a counseled defendant, even if the defendant provides consent on the record. The rules requiring the defendant's signature (or his written consent or waiver) protect important rights, and a defendant might feel pressured to sign if approached directly by the judge.

That said, this provision generated considerable discussion during the fall meeting. The Committee will continue to consider these issues, along with some drafting issues.[4]

Paragraph (c)(3) creates an emergency exception to Rule 23(a)(2), which requires the government's consent before the court may conduct a bench trial. The Committee recognizes that the public's interest in a jury trial continues even in an emergency, and this provision should be invoked only when no means to hold a jury trial is feasible. Thus, the rule provides authority to hold a bench trial without the consent of the government only when three conditions are met.

First, as already required by Rule 23(a)(1), the defendant's waiver of the right to a jury trial must be in writing. Second, under paragraph (c)(3), the court must first allow the parties to be heard on the issue. Third, and perhaps most important, the court may conduct a bench trial only if it finds that doing so "is necessary to avoid a violation of the defendant's constitutional rights."

As the meeting minutes reflect, a majority of the Committee was not persuaded by various arguments against including (c)(3) in Rule 62. One argument was that the Supreme Court might think that (c)(3) was presuming to answer a question left open in *Singer v. United States*, 380 U.S. 24 (1965). There, the Court held that a defendant has no constitutional right to waive trial by jury, rejecting the argument that "to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process." *Id*. at 36.[5] But the Court said it was

[4] One member suggested that the rule should be revised to explicitly authorize substituted signatures on written consent and written waivers, and another suggested the need to distinguish more clearly emergency situations from many other reasons that make it difficult to obtain a defendant's signature.

[5] The Court stated:

> A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes

not deciding "whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Id.* at 37. The Court likewise had no occasion to address situations where the delay in conducting jury trials (as a result of emergency conditions, for example) would result in a violation of the defendant's speedy trial rights.

Some members thought that (c)(3) would in reality apply to a null set of cases—where the defendant wants a bench trial, the government refuses to consent to one, and further delay will violate the defendant's constitutional rights. But some members have heard that, in some districts, prosecutors will not consent to bench trials before certain judges who the government views as unreasonably pro-defendant. The Committee will continue to consider this issue.

Paragraph (c)(4) allows the court to empanel more than six alternate jurors, providing flexibility that might be particularly useful for a long trial conducted under circumstances, such as a pandemic, that might increase the chances original jurors would be unable to complete the trial. The draft leaves to the discretion of the trial court the question whether to empanel more alternates, and if so, how many.

During the drafting process, members suggested that the committee note should direct courts to increase the number of peremptory strikes when the number of alternate jurors exceeds six—proportional to the increases included in Rule 24(c)(4)(A), (B), and (C). But the Committee did not include this directive in the draft rule or note. Rule 24(c)(4) provides only the minimum number of peremptory challenges that courts must provide for alternate jurors; it does not prohibit court from providing additional peremptory challenges if more than six alternates are impaneled. And just as the number of additional alternates should be left to the court's discretion in a particular case, so too should the number of peremptory strikes. The draft note thus states as follows: "[I]f more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 23(c)(4)."

Paragraph (c)(5) addresses extensions of time for correcting or reducing sentences. Rule 45(b) presently gives the court general authority to extend the time for filings other than correcting or reducing sentences, allowing the court to extend deadlines on its own or when the parties show "good cause" to do so. The Committee concluded there was no need to state the obvious point that, in making a determination of good cause, courts should consider emergency situations. This point was included in the draft committee note, which states: "The rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown."

> a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. This recognition of the Government's interest as a litigant has an analogy in Rule 24(b) of the federal rules, which permits the Government to challenge jurors peremptorily.

Id.

Rule 45(b)(2) does bar extensions for motions to correct or reduce a sentence under Rule 35. The Committee concluded that the courts should have limited authority to extend those deadlines as well "if emergency conditions provide good cause for extending the time." As the draft note explains: "The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance." Paragraph (c)(5) permits these extensions to be only as long as "reasonably necessary."

The Department of Justice has proposed adding the following language in the note for this provision: "Nothing in this provision is intended to expand the authority to correct a sentence, which is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence." The Committee will consider that proposal along with other aspects of this provision.

IV. Subdivision (d): Videoconferencing and Teleconferencing

Subdivision (d) provides authority to use virtual conferencing technology when emergency conditions limit the physical presence of participants or observers at criminal proceedings. Proposed subdivision (d) is designed to accommodate any emergency that limits physical presence at criminal proceedings but leaves electronic communication intact. The Committee concluded that, given the critical interests served by holding proceedings in-court, any authority to substitute virtual for physical presence must extend no further than necessary.

Although the CARES Act provided the emergency authority under which courts now use video and teleconferencing during the COVID-19 pandemic, the Committee examined all these issues de novo. Moreover, unlike the CARES Act, which was drafted quickly in the early days of the pandemic, the Committee's draft rule incorporates lessons learned over the past eight months of experience with virtual proceedings. The Committee considered input from its members, reports on court operations from various sources, local orders, suggestions solicited from chief judges around the country by Judge Dever, and the valuable insights of practitioners who attended the miniconference in late July. As a result, the proposed rule differs from the CARES Act in several respects, each carefully and deliberately considered by two working groups, twice by the entire subcommittee, and finally by the full Committee at its November meeting. Many of those differences are reviewed in this memo. A chart comparing the conferencing provisions of the CARES Act with those in subdivision (d) of the draft rule is included as Appendix 2 to this memorandum.

A. Structure and Scope of Subdivision (d)

Like the CARES Act, subdivision (d) is arranged by type of proceeding. Proceedings with the fewest restrictions on the use of conferencing technology appear first, followed by proceedings with more stringent prerequisites, again like the CARES Act. The draft rule separates proceedings into three groups, each with a different set of requirements. (This differs from the CARES Act, which provides separate requirements for only two groups of proceedings—the first consisting of an enumerated list of pre- and post-trial proceedings, and the other limited to plea and sentencing proceedings under Rules 11 and 32.)

The first section of the new rule addresses proceedings that courts may conduct by videoconference with the defendant's consent under existing rules: initial appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2). The second section regulates proceedings that are defined not by an enumerated list, but instead by the more inclusive specification that the proceeding be one at which the defendant has a right to be present (other than proceedings addressed in the first and third sections, and trial). The third and final section addresses pleas and sentencings, where use of conferencing is most restricted, as under the CARES Act.

The Committee had three reasons for using the defendant's right to be present to define the second category of proceedings. First, the primary concern raised by conferencing technology was its impact on the defendant's right to be physically present. There was no need to address the use of conferencing technology at proceedings, such as scheduling conferences, where the defendant had no right to be present in the first place. Second, this definition should provide guidance on the use of conferencing technology during certain proceedings that were not included in the enumerated list in the CARES Act, such as suppression hearings. Third, any attempt to enumerate the proceedings in which a defendant has a right to be present would have been complicated, because the constitutional analysis of that right might depend upon the circumstances of a particular proceeding. Thus, it made more sense to define this middle category by referencing the right to presence itself. The draft committee note includes the following explanation:

> Subdivision (d) does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings.

The rule does not address another issue: the use of conferencing technology when a defendant is removed from a proceeding for misconduct. *See* Rule 43(c)(1)(C) (providing a defendant waives the right to be present by persisting in disruptive behavior after a warning of removal). The draft note includes the following explanation: "The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct."

Finally, rather than adding limited authority for teleconferencing to each of the first three sections, the new rule addresses a court's authority to use teleconferencing at the end, in paragraph (d)(4).

B. Ensuring Confidential Communication Between Lawyer and Client

When describing their experiences during this pandemic, miniconference participants and Committee members all focused on a persistent problem: the inability of counsel to consult with their clients. When emergency conditions preclude in-person proceedings, counsel will have neither the usual physical proximity to the defendant during the proceeding, nor ordinary access to the defendant before and after the proceeding.

To address this problem, the draft requires that, in *each case* where the court conducts proceedings by videoconference or teleconference under (d), the judge must find that the defendant will have an adequate opportunity to consult with counsel confidentially before and during the proceeding. The draft note explains that the "requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients," and it states that "it was essential to include this prerequisite for conferencing . . . in order to safeguard the defendant's right to counsel."

During the pandemic, courts have attempted to address the need for client-counsel communication *during* virtual proceedings in a number of ways, including allowing the defendant to halt a proceeding to confer with counsel, providing a private phone line or other electronic connection with counsel, using electronic "breakout rooms" during a videoconference, "muting the incoming sound at the courtroom control panel such that only the inmate, defense counsel, and interpreter can be heard,"[6] and even permitting counsel to text or message with a client who has access to a device with that capability.[7] The rule also recognizes that consultation prior to a proceeding is as essential as consultation during one. The need for confidential consultation might also require more generous scheduling options for counsel to communicate with incarcerated clients via phone or video.[8]

The rule does not address how courts should meet this requirement, recognizing the technology will change, and what options are reasonably available to a court in a given case will vary. The draft note explains, "The rule does not specify any particular means of providing an adequate opportunity for private communication."

C. General Prerequisites for Substituting Conferencing for Physical Presence

A court may not use videoconferencing under the CARES Act without an "application of the Attorney General or the designee of the Attorney General, or . . . motion of the judge or justice." Pub. L. 116-136 § 15002(b)(1), (2). The Committee saw no need to condition the court's authority in this way. Thus, the new rule provides simply that the "court may" use videoconferencing (or teleconferencing under paragraph (d)(4)), and lists specific requirements for doing so.

[6] Fourth Revised Video-Conferencing Plan, 4-5 (S.D. Miss. July 31, 2020), https://www.mssd.uscourts.gov/sites/mssd/files/Fourth%20Revised%20Video%20Conferencing%20Plan%20REV%207-31-2020.pdf

[7] Interim Safety Protocols for In-Person Court Proceedings, Order No. 29, 3 (S.D. Cal. June 10, 2020), https://www.casd.uscourts.gov/_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2029.pdf ("Judges will accommodate counsels' need to confer with their clients while court is in session and considering social distancing requirements by, for example, permitting counsel and clients to text, rather than verbally confer or pass notes back and forth while court is in session.").

[8] *See, e.g.*, S.D. Miss. Plan, *supra* n.6.

D. Terminology

The draft rule abandons the term "video teleconferencing," which is used in the existing rules and the CARES Act, in favor of the simpler and less confusing term "videoconferencing." The draft likewise uses the term "teleconferencing" instead of "telephone conferencing," which is used in the CARES Act. The draft note includes the following explanation: "The term 'videoconferencing' is used throughout, rather than the term 'video teleconferencing' (which appears elsewhere in the rules) to more clearly distinguish conferencing with visual images from 'teleconferencing' with audio only."

E. Section-by-Section Summary

1. *Videoconferencing for proceedings under Rules 5, 10, 40 and 43(b)(2)*

Paragraph (d)(1) addresses proceedings for which videoconferencing is already authorized under the rules with the defendant's consent. The Committee chose to address these proceedings for two reasons. First, the absence (in an earlier draft) of a clear statement at the beginning of subdivision (d) about virtual proceedings under Rules 5, 10, 40, and 43(b)(2) generated confusion among members about if and how the new rule applied to these proceedings. Second, the Committee concluded that emergency conditions could differ in important ways from the ordinary conditions under which videoconferencing is already authorized—notably, with respect to the defendant's ability to consult with counsel.

Paragraph (d)(1) thus clarifies that the new rule does not change the court's existing authority to use videoconferencing for these proceedings, with one exception. When emergency conditions significantly impair the defendant's opportunity to consult confidentially with counsel, the court must ensure that the defendant will have that opportunity before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

2. *Certain proceedings at which the defendant has a right to be present*

Subsection (d)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present," other than trial and the proceedings under (d)(1) and (3). The draft note adds that this right to presence might be based on the Constitution, statute, or rule, and lists a few examples: revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). As noted above, whether a defendant has the right to be present at a particular proceeding might not be obvious. The amendment leaves it to courts to decide whether the defendant has a right to be present at certain proceedings if and when such issues arise.

During a rules emergency, an affected court may use videoconferencing for these proceedings only if the three criteria are met. First, subsection (d)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge has found that emergency conditions "substantially impair a court's ability to hold" proceedings in person within a reasonable time. Unlike the CARES Act, the rule does not specify who may act if the chief judge is unavailable, because 28 U.S.C. § 136(e) already addresses that issue. Section 136(e) provides

that, when "a chief judge is temporarily unable to perform his duties as such, they shall be performed by the district judge in active service, present in the district and able and qualified to act, who is next in precedence." The draft note explains: "[S]ubparagraph (d)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time."

The draft note explains that mandating some finding of need for virtual proceedings recognizes the important policy concerns that animate the existing limitations on virtual proceedings in Rule 43, even with the defendant's consent. The draft note adds: "[T]his district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person."

The other two prerequisites for the use of videoconferencing at a proceeding where the defendant has a right to be present are: (1) a finding by the court regarding an adequate opportunity for confidential consultation discussed earlier, *see* (d)(2)(B); and (2) as under the CARES Act, the defendant's consent after consulting with counsel. The draft note explains:

> If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding. . . . Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.

The reference to trials in (d)(2), warrants some explanation. The CARES Act does not mention trials at all. Once the Committee decided the rule should regulate videoconferencing in proceedings at which the defendant has a right to be present, however, it became necessary to except trials from the scope of (d)(2).

The Committee rejected a suggestion to include a separate provision prohibiting a court from conducting a felony trial without the physical presence of the defendant. Aside from the added complication of accounting for removal for misconduct, the Committee was concerned that such a subsection might suggest, by implication, that the rule endorsed the virtual presence of other trial participants or the remote testimony of witnesses at trial. The note explains further:

> The Committee declined to provide authority in the rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear by videoconference during an emergency declaration. And the new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or when trial participants other than the defendant may appear by videoconferencing.

3. *Pleas and Sentencings*

Paragraph (d)(3). Like the CARES Act, paragraph (d)(3) provides more restrictions on the use of videoconferencing at pleas and sentencings than on its use at other proceedings. The draft note explains the Committee's rationale for the added restrictions:

> The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of the defendant's physical presence at plea and sentence is reflected in the existing rules. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (d)(2).

The first prerequisite is in subparagraph (d)(3)(A) of the draft rule, which requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e) if the chief judge is not available) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district. The draft note explains:

> This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (d)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (d)(3) and (4) are satisfied.

Second, under subparagraph (d)(3)(B) of the draft rule, the defendant must affirmatively request—in writing—videoconferencing for a plea or sentencing proceeding. The defendant's consent, even after consultation with counsel, is not enough. As the draft note states, "The substitution of 'request' for 'consent' was deliberate, as an additional protection against undue pressure to waive physical presence." Like the CARES Act, videoconferencing for pleas and sentencings requires *both* a district-wide finding by the chief judge (or the chief judge's alternate) and a case-specific finding by the judge on the case.

Finally, subparagraph (d)(3)(C) requires that before a court may conduct a plea or sentencing by videoconference, the court on the case must find "that any further delay in that particular case would cause serious harm to the interests of justice." The draft note includes several examples:

> Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would

> allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

This requirement is quite similar to the finding required by the CARES Act, which requires that "the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice." Anecdotal accounts suggest that under this language district courts are generally limiting the use of videoconferencing in pleas or sentences to the types of cases suggested in the draft note.

4. *Teleconferencing*

Paragraph (d)(4). There are four prerequisites for the use of teleconferencing under subsection (d)(4) of the draft rule. The draft note explains the primary reason for requiring these added findings for teleconferencing: "Because videoconferencing allows participants to see as well as hear each other, it is a better option than an audio-only conference." That understates matters.

The first prerequisite is that all of the conditions for the use of *videoconferencing* for the proceeding in question must be met. Thus, for example, before using teleconferencing for a sentencing under Rule 32, the court must comply with (d)(3), including finding under (d)(3)(C) "that any further delay in that particular case would cause serious harm to the interests of justice." And teleconferencing for a first appearance would require compliance with (d)(1)(B) and Rule 5(g).

Next, subparagraph (d)(4)(A) requires the judge to determine that videoconferencing cannot be provided for the proceeding within a reasonable time. There was a suggestion at the Committee meeting to substitute a finding that videoconferencing not be reasonably available, and the Committee will consider that change.

Subparagraph (d)(4)(B) requires the judge to find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding. The Committee recognized that, even when confidential consultation would have been possible with videoconferencing, additional accommodations might be necessary to assure confidential consultation for a telephone conference. Hence the need for the judge to make that finding. For example, when the video fails and the only telephone line available to the defendant for speaking privately with counsel is the line used for teleconferencing, the court must take additional steps to provide the opportunity for confidential consultation.

Finally, after consultation with counsel, the defendant must consent to teleconferencing. A prior written request for videoconferencing does not suffice as consent for teleconferencing. Several members wondered why the consent for teleconferencing did not have to be in writing, as with videoconferencing, whereas others wondered why any additional consent was necessary at all. The note explains that the differences between video and teleconferencing—especially the inability to see the person speaking—might lead a defendant who requested videoconferencing to reject teleconferencing. The reporters have drafted a possible addition to the note (not yet reviewed by the Committee), that would further explain: "Based on experience with the COVID-19

pandemic, courts may often, if not primarily, resort to teleconferencing when videoconferencing fails in the midst of a proceeding, at a time when securing written consent to continue by telephone, even under (c)(2), would be problematic."

V. Subdivision (e): Effect of a Termination

In general, under draft Rule 62, when an emergency declaration terminates, authority to depart from the other Criminal Rules terminates as well. But subdivision (e) provides a narrow exception for certain proceedings commenced under a declaration of emergency but not yet completed when the declaration terminates. If the court finds that it cannot complete such a proceeding in compliance with the rules, or that compliance with the rules would work an injustice, the court may complete the proceeding using procedures authorized by the emergency rule. For example, if a hearing begins by videoconference and the emergency declaration ends before the final day of the hearing, out-of-town participants might not be able to travel to court for the final day of the hearing. Subdivision (e) recognizes the need for some flexibility during the transition period, while also recognizing the importance of returning promptly to compliance with the rules.

At the November meeting, a member raised the question whether there could be circumstances in which continuation of emergency procedures, after the emergency itself has ended, might constitute a constitutional violation. The reporters noted that the rule allows the continuation of the emergency procedures only if the court has found that an immediate resumption of the normal procedures would be "infeasible or work an injustice." The Committee will consider that question further.

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Committee Note

Subdivision (a). This rule defines the conditions for a criminal rules emergency that may be the basis for a declaration authorizing a court to depart from one or more of these rules, and who may declare that a rules emergency exists. The Federal Rules of Criminal Procedure have been promulgated under the Rules Enabling Act and carefully designed to protect constitutional and statutory rights and other interests. Compliance with rules cannot be cast aside because of cost or convenience, or without consideration of alternatives that would permit compliance with the rules to continue. Any authority to depart from the rules must be strictly limited. Subdivision (a) narrowly restricts the type of [emergencies/situations] that would permit such authority.

First, paragraph (a)(1) requires circumstances that are extraordinary and that relate to public health or safety or affect physical or electronic access to a court. These requirements are intended to prohibit the use of this emergency rule to respond to other challenges, such as those arising from staffing or budget issues. Second, those extraordinary circumstances must substantially impair the ability of a court to perform its functions in compliance with these rules.

Second, paragraph (a)(2) requires that even if the extraordinary circumstances defined in (a)(1) are found to exist, there is no criminal rules emergency if feasible alternative measures would allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in compliance with the Rules was substantially impaired for substantial period of time. But there would have been no criminal rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the Rules by moving proceedings to other districts under 28 U.S.C. § 141. Another example might be a situation in which the judges in a district were unable to carry out their duties as a result of an emergency, but courthouses remained safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the Rules, but temporarily assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

Subdivision (a) also recognizes that emergency circumstances may affect only one or a small number of courts – familiar examples include hurricanes, floods, explosions, or terroristic threats – or may have widespread impact, such as a pandemic or a regional disruption of electronic communications. The rule provides a uniform procedure that is sufficiently flexible to accommodate different types of emergency conditions with local, regional, or nationwide impact.

Subdivision (a) also specifies that the power to declare a rules emergency rests solely with the Judicial Conference of the United States, the governing body of the judicial branch. To find that a rules emergency exists, the Judicial Conference will need information about the impact of extraordinary circumstances on the ability of affected courts to comply with the rules, as well as the existence of reasonable alternatives to continue court functions in compliance with the rules. The judicial council of a circuit, for example, may be able to provide helpful information it has received from judges within the circuit regarding local conditions and available resources. District court clerks, Federal Defender offices, and the Department of Justice may provide relevant knowledge as well.

Paragraph (b)(1). Subparagraph (b)(1)(A) requires that each declaration of a rules emergency identify the court or courts affected by the rules emergency as defined in (a). Some

emergencies may affect all courts, some will be local or regional. The declaration must be no broader than the rules emergency. That is, every court identified in a declaration must be one in which extraordinary circumstances that relate to public health or safety or that affect physical or electronic access to the court are substantially impairing its ability to perform its functions in compliance with these rules, and in which compliance with the rules cannot be achieved within a reasonable time by alternative measures. A court may not exercise authority under (c) and (d) unless the Judicial Conference includes the court in its declaration, and then only in a manner consistent with that declaration, including any limits imposed under (b)(1)(B).

Under (b)(1)(B), the Judicial Conference's declaration of a rules emergency may restrict the range of rule departures to only some of those authorized by subdivisions (c) and (d). For example, if the emergency arises from a disruption in electronic communications, there may be no reason to authorize video teleconferencing for proceedings in which the rules require in-person appearance. But (b)(1)(B) does not allow a declaration to expand departures from the rules beyond those authorized by subdivisions (c) and (d).

Under (b)(1)(C), each declaration must state when it will terminate, which may not exceed 90 days from the date of the declaration. This sunset clause is included to ensure that these extraordinary deviations from the rules last no longer than [absolutely] necessary.

Subparagraph (b)(2) recognizes that the conditions that justified the declaration of a criminal rules emergency may continue beyond the term of the declaration. The conditions may also change, shifting in nature or affecting more districts. An example might be a flood that leads to a contagious disease outbreak. Rather than provide for extensions, renewals, or modifications of an initial declaration, subparagraph (b)(2) gives the Judicial Conference the authority to respond to such changes by issuing additional declarations. Each additional declaration must meet the requirements of subdivision (a), and must include the contents required by (b)(1). As with an initial declaration, the Committee expects that in the event of a potential criminal rules emergency the Judicial Conference will be in close communication with the affected courts.

Subparagraph (b)(3). If emergency conditions end before the termination date of the declaration for some or all courts included in that declaration, (b)(3) provides that the Judicial Conference must terminate the declaration for the courts no longer affected. This provision ensures that any authority to depart from the rules lasts no longer than necessary.

Subdivisions (c) and (d) describe the authority to depart from the rules after a declaration.

Paragraph (c)(1) addresses the courts' obligation to provide alternative access when emergency conditions have precluded in-person attendance by the public at public proceedings. The phrase "public proceeding" was intended to capture proceedings that the Rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings."

The duty arises only when the preclusion of in-person access by the public [or victim] is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions preclude anyone

from attending a public proceeding in person, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

[Alternative access should be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space could be provided. In a proceeding conducted by videoconference, a court could provide public access to the audio transmission if access to the video transmission is not feasible.]

Paragraph (c)(2) recognizes that emergency conditions may disrupt compliance with rules that require the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (c)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of defense consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that the rules requiring the defendant's signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.

Paragraph (c)(3) creates an emergency exception to Rule 23(a)(2), which requires the consent of the government before the court may conduct a bench trial. The amendment provides authority to hold a bench trial without the consent of the government, if the defendant waives the right to trial by jury in writing, and, after providing an opportunity for the parties to be heard, the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights. The Committee recognizes that the public's interest in a jury trial continues even in an emergency, and this provision should be invoked only when no alternative venue or other mechanism to hold a jury trial is feasible.

Paragraph (c)(4) allows the court to impanel more than six alternate jurors, creating an emergency exception to the limit imposed by Rule 24(c)(4). This flexibility may be particularly useful for a long trial conducted under emergency conditions, such as a pandemic, that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment leaves to the discretion of the district court the questions whether to impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

Paragraph (c)(5) provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance. Nothing in this provision is intended to expand the authority to correct a sentence, which is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence. The rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown.

Subdivision (d) provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a rules emergency. The term "videoconferencing" is used throughout, rather than the term "video teleconferencing" (which appears elsewhere in the rules) to more clearly distinguish conferencing with visual images from "teleconferencing" with audio only. The first three subsections describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last subsection describes a court's authority to use teleconferencing when videoconferencing is not available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (d).

Subdivision (d) does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

Paragraph (d)(1) addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This subdivision was included to eliminate any confusion about the interaction between existing videoconferencing authority and new Rule 62(d). It clarifies that the new rule does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Later subsections apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

The requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients. The Committee believed it was essential to include this prerequisite for conferencing under Rules 5, 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs

(d)(2), (3), and (4), in order to safeguard the defendant's right to counsel. The rule does not specify any particular means of providing an adequate opportunity for private communication.

Paragraph (d)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present" under the Constitution, statute, or rule, excluding felony trials and proceedings addressed in either (d)(1) or (d)(3). Such proceedings include, for example, revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met.

First, subparagraph (d)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

Second, subparagraph (d)(2)(B) conditions videoconferencing upon the court's finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.

Third, subparagraph (d)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.

The Committee declined to provide authority in the rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear by videoconference during an emergency declaration. And the new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or when trial participants other than the defendant may appear by videoconferencing.

Paragraph (d)(3) addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in the existing rules. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence

include three circumstances in addition to those required for the use of videoconferencing under (d)(2).

Subparagraph (d)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e) if the chief judge is not available) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (d)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (d)(3) and (4) are satisfied.

Subparagraph (d)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of "request" for "consent" was deliberate, as an additional protection against undue pressure to waive physical presence.

Subparagraph (d)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

Paragraph (d)(4) details conditions for the use of teleconferencing to conduct proceedings for which videoconferencing is authorized. Because videoconferencing allows participants to see as well as hear each other, it is a better option than an audio-only conference. To ensure that teleconferencing is used only when videoconferencing is not feasible, (d)(4) sets out four prerequisites.

The first is that all of the conditions for the use of videoconferencing for the proceeding must be met. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (d)(2)(A) and (d)(3)(A), (B), and (C). No teleconferencing of a sentence is permitted unless those videoconferencing requirements have been met. Likewise, for a first appearance, teleconferencing requires compliance with (d)(1)(B) and Rule 5(f).

Second, subparagraph (d)(4)(A) requires the court to find that videoconferencing cannot be provided for the proceeding within a reasonable time.

Third, (d)(4)(B) provides that the court must find the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding, as opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing.

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (d)(4)(C) provides that the defendant must consent to teleconferencing after

consultation with counsel, even if the defendant previously requested or consented to videoconferencing.

Subdivision (e). In general, when a declaration of emergency terminates, all authority to depart from the other Federal Rules of Criminal Procedure that govern proceedings will cease. Subdivision (e) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If the court finds, in an individual case, that a proceeding commenced before a declaration terminates cannot be completed in compliance with the rules or that compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by the emergency rule. Subdivision (e) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

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Appendix 2 – Comparison of draft Rule 62(d) with CARES Act – December 13, 2020

Topic	**CARES ACT**	**DRAFT Rule 62(d): Authority During Emergency Declarations**
Overall authorization	JCUS finding that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. §1601 et seq.) with respect to COVID–19 will materially affect the functioning of either the federal courts generally or a particular district court	A court may employ the conferencing authority in 62(d)[(2), (3), and (4)] only when the JCUS has issued a declaration of a rules emergency for that court under 62(a) and (b), and that declaration does not exclude the authority in question.
Terminology	Video teleconferencing/ telephone conferencing	Videoconferencing (VC)/ teleconferencing (TC)
Juvenile defendants, hearings under 18 USC 3142 or 1348	Included in VC/TC authorization	Not addressed – Rule 62 includes provisions that depart from existing rules that may be needed when emergency conditions impair compliance with existing *Rules.* It does not address other statutes.
Proceedings at which defendant has no rt to be present	Not included	not included
Communication between defendant and counsel	Not addressed	Adds a prerequisite for VC and TC: court must find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding
Consent by defendant	Consent of the defendant, after consultation with counsel, required for all use of VC and TC under the Act	Same, "consent" after consultation with counsel for proceedings other than felony plea or sentence. For felony plea or sentence, VC allowed only if defendant, after consulting with counsel, *requests in writing* that the proceeding be conducted by videoconferencing. TC allowed only for any proceeding only when the defendant consents to TC, even if D already gave requisite consent to VC for that proceeding
Prerequisites for VC in proceedings under Rules 5, 10, 40, and 43(b)(2)	Upon application of the Attorney General or designee, or on motion of the judge or justice, chief judge (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) may authorize VC for district.	Requires no application or motion, district-wide finding, or other modification of existing authority to use videoconferencing for a proceeding under Rules 5, 10, 20, or 43(b)(2), *except that* "if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to consult confidentially with counsel before and during those proceedings."

Prerequisites for VC for proceedings under Rules 5.1, 7(b), 32.1.	Same as above (application of AG or motion of judge plus authorization by chief judge or alternate)	No motion or application required. "[T]he court may" leaves it to judge's discretion. In a proceeding at which a defendant has a right to be present, the court may use videoconferencing if the chief judge of the district (or CJ's alternate) finds that emergency conditions in the district substantially impair a court's ability to hold an in-person proceeding within a reasonable time
Other proceedings at which a defendant has a rt to be present	Not addressed	See above – would include any proceeding at which the defendant had a right to be present, including proceedings not addressed in CARES Act (e.g., suppression hearings).
Prerequisites for VC for proceedings under Rules 11 and 32	Upon application of the Attorney General or designee, or on motion of the judge or justice, if: Chief judge (or CJ's alternate) specifically finds that felony pleas under Rule 11 and felony sentencings under Rule 32 cannot be conducted in person without seriously jeopardizing public health and safety, and The district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice	No motion or application required. "[T]he court may" leaves it to judge's discretion if: Chief judge of the district (or CJ's alternate) finds that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district; Defendant, after consulting with counsel, requests in writing that the proceeding be conducted by VC; Court finds any further delay in that particular case would cause serious harm to the interests of justice.
Trial	Not mentioned	Exempted from provisions addressing proceedings at which the defendant has a right to be present
Teleconferencing instead of videoconferencing.	Chief judge (or CJ's alternate) may authorize telephone conferencing, district-wide, for the ten categories of proceedings enumerated in the Act if "video teleconferencing is not reasonably available." A plea or sentencing proceeding can be conducted by phone if case-specific findings for video teleconferencing are made and "video teleconferencing is not reasonably available."	Does not permit a chief judge (or alternate) to authorize proceedings by TC district wide merely by finding VC is "not reasonably available." Instead, use of TC authorized for a proceeding only if (1) all prerequisites for use of VC for that proceeding are met, (2) court finds that VC cannot be provided for the proceeding within a reasonable time, (3) court finds that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding, and (4) the defendant consents to TC after consulting with counsel.

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

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CHAIR
ADVISORY COMMITTEE
ON BANKRUPTCY RULES

MEMORANDUM

TO: Committee on Rules of Practice and Procedure

FROM: Advisory Committee on Bankruptcy Rules

RE: Proposed Bankruptcy Rule 9038 (Bankruptcy Rules Emergency)

DATE: December 7, 2020

In response to section 15002 of the CARES Act and guidance provided by Judge Campbell, Judge Dow appointed a subcommittee to consider the need for and content of a possible Bankruptcy Rule to apply in the case of serious emergencies affecting the bankruptcy courts. The Subcommittee met five times between April 2020 and the Advisory Committee's fall meeting. It began its work by considering examples of emergency provisions contained in the CARES Act (pertaining to criminal cases), proposed to Congress by the Bankruptcy Administration Committee (to allow extensions of Bankruptcy Code time periods during the Covid-19 emergency), and ordered by bankruptcy courts during the current emergency. Subcommittee members then surveyed the Bankruptcy Rules to identify rules that might be impacted by an emergency situation.

The Subcommittee concluded that it should consider an emergency rule that would allow time periods in the Bankruptcy Rules to be extended on a district-wide basis when there is a declared emergency that adversely affects the operation of the bankruptcy courts. While Bankruptcy Rule 9006(b)(1) provides considerable flexibility to extend time periods in the rules, the Subcommittee thought that a new emergency rule is needed for several reasons. First, there are certain time periods that cannot be extended according to Rule 9006(b)(2). Second, it appears that Rule 9006(b)(1) may not permit the extension of requirements in the rules for prompt action—requiring an act to be done "promptly," "forthwith," "immediately," or "without delay"—since those rules do not impose "a specified period" for action. Finally, there is a question whether Rule 9006(b)(1) allows extensions on a district-wide rather than case-by-case basis. A new rule for declared emergencies could expressly authorize district-wide extensions and provide the conditions under which such extensions could be granted. The Subcommittee considered several drafts of such a rule.

The Subcommittee concluded that an emergency rule would need to address the following topics:

- how the emergency situation is defined;
- who is authorized to invoke the emergency provisions;
- whether the authorization is case-specific or applies district-wide;
- what departures from the existing rules are permitted;
- whether party consent is required;
- what findings must be made; and
- how long the emergency authorization remains in effect.

The reporters conferred frequently with the other advisory committee reporters and kept the Subcommittee informed about the other committees' drafts in order to benefit from their thinking and to achieve as much uniformity among the various emergency rules as possible. At the fall meeting of the Advisory Committee, the Subcommittee presented a draft of an emergency rule for the Advisory Committee's consideration and feedback. The Subcommittee noted issues presented by the provisions and discussed the extent to which the draft's provisions were consistent with or diverged from the drafts of the other advisory committees.

The Advisory Committee's Deliberations

Definition of a rules emergency. In the draft presented to the Advisory Committee, the definition in subdivision (a) was identical to the one in the Criminal Rule draft and similar in some respects to the Civil Rule draft. In earlier drafts subdivision (a) expressed two requirements for a rules emergency: extraordinary circumstances and a resulting impairment of the court's ability to function in accordance with the rules. The extraordinary circumstances had to relate either to public health or safety or to access to the court. When the Criminal Rules subcommittee decided to make the definition more restrictive, adding the requirement that "no viable [later changed to "feasible"] alternative measures would eliminate such substantial impairment within a reasonable time," the Subcommittee added that provision to (a), for the sake of uniformity.

At the Advisory Committee meeting, it was noted that the draft of the Civil Rule did not include the no-viable-alternative requirement. After considerable discussion, the Advisory Committee decided not to include the additional requirement in the Bankruptcy Rule. Members thought that the requirement for a rules emergency was sufficiently stringent without it and that in any event the assessment of alternatives might be part of a determination of impairment. It was also noted that the issues involved in making emergency alterations to the Criminal Rules were of a weightier nature than the extensions of time limits addressed by the draft Bankruptcy Rule and that a higher standard for the Criminal Rule might be appropriate.

Declaration of an emergency. The Advisory Committee discussed the fact that the drafts of the various emergency rules were not in agreement about who should be authorized to declare a rules emergency, with the civil and criminal rule drafts giving this authority only to the Judicial Conference and the appellate rule draft authorizing the Judicial Conference and the chief

judge of a circuit. The Advisory Committee considered whether it supported expanding the authorized group by giving the authority to declare an emergency to the chief bankruptcy judge, as well as to the Judicial Conference and the chief circuit judge. Some members thought it was important to provide authority at the bankruptcy court level because of the specialized nature of the Bankruptcy Rules. Others favored this authorization because emergency action could be taken more swiftly and with greater knowledge of local conditions at that level.

A series of votes were taken on this question. Only one member favored allowing just the Judicial Conference to declare a rules emergency. Four members voted to authorize the Judicial Conference and the chief circuit judge, whereas six members voted to include the chief bankruptcy judge in addition to the other two. The Advisory Committee also voted to include as a safeguard a provision authorizing the Judicial Conference to review and revise a declaration made by a chief circuit or chief bankruptcy judge.

Limiting a declaration to a particular location within a district. Authorization for a chief bankruptcy judge to declare a rules emergency extends, of course, only to the judge's district. But that provision raises the question whether a rules emergency must always exist district-wide or whether an emergency might be declared for only part of a district. The Advisory Committee believed that there could be circumstances in which a natural disaster affected only one or more locations within a district, particularly in a district that covers an entire state, and the conditions constituting a bankruptcy rules emergency could be found to exist only there. For example, a hurricane or wildfire might damage a courthouse and the surrounding community to such a degree that hearings and meetings of creditors could not proceed as scheduled and attorneys could not make filings on time. The availability of courthouses in other parts of the state might not address the problem of the inability to comply with Bankruptcy Rules' deadlines, and the Advisory Committee concluded that the emergency rule should allow for extensions of time periods in those circumstances.

Limitations on rules subject to suspension. Like the draft of the criminal rule, the proposed bankruptcy emergency rule provides that the declaration of an emergency may specify "any restrictions on the authority granted in (c) to modify the rules." As explained in the memo by Professors Capra and Struve, this means that any of the rules covered by subdivision (c) are subject to modification during a bankruptcy rules emergency unless the declaration provides otherwise. This approach contrasts with the proposed civil emergency rule, which requires an affirmative designation of the rules covered by a declaration.

The Advisory Committee supported the everything-unless-specified-otherwise approach as being appropriate for the type of rule being proposed. Subdivision (c) allows modification only of time periods, of which there are hundreds in the Bankruptcy Rules. It would be unwieldy to require the emergency declaration to specify all of the rules allowed to be modified. Instead, the default position is that any time period in the rules may be modified unless the declaring authority declares one or more off limits. And even if there is no restriction in the declaration, under subdivision (c) the chief bankruptcy judge (or any bankruptcy judge in a particular case) may choose to authorize the extension or tolling of only certain specified time periods. The full authority granted by the declaration does not have to be exercised.

Termination of emergency rules declaration: mandatory or discretionary? Subdivision (b)(4) of the bankruptcy emergency rule, unlike the other emergency rules, provides for both mandatory and discretionary termination authority. If a chief circuit judge or chief bankruptcy judge declared a bankruptcy rules emergency, he or she must terminate the declaration before its stated end date if the emergency no longer affects the court or courts covered by the declaration. Persuaded, however, by arguments about the need to give the Judicial Conference discretion to terminate, the Advisory Committee approved the last sentence of (b)(4), which says that the Judicial Conference "*may* exercise the same power to terminate" (emphasis added).

Extensions of time periods. Subdivision (c) is the part of the rule unique to bankruptcy. It gives authority to the chief bankruptcy judge to permit extensions of time limits on a district-wide basis, regardless of who made the declaration under subdivision (b). It also allows any bankruptcy judge to extend or toll time limits in a particular case or proceeding. The Advisory Committee thought this approach was appropriate because a local actor will be in the best position to assess conditions and determine the rule departures that are needed.

Subdivision (c)(3), which addresses the termination of extensions and tolling, looks to three possible dates. An extended or tolled time period will terminate either 30 days after the rules-emergency declaration terminates or when the original time period would have expired, whichever is later—unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, that date would be compared to the original termination date (and of course will be the later of the two dates since it is an extension).

Subdivision (c)(4) allows fine tuning in individual cases of extensions of time that have been granted.

Other types of rule provisions considered. The Subcommittee raised with the Advisory Committee rule provisions other than time limits that it had considered but decided should not be included in the emergency rule, and the Advisory Committee agreed. The first was an authorization for remote hearings. Virtually all bankruptcy courts switched to remote means of conducting any hearings that could not be postponed following the declaration of the Covid-19 emergency. Such action could be required in any type of emergency that endangers public health and safety or impairs access to the court. The Subcommittee concluded, however, that Rule 5001(b) (Trials and Hearings; Orders in Chambers) is sufficiently flexible to allow remote hearings in times of emergencies without additional authorization.

Other rules that the Subcommittee identified for consideration were those requiring service or transmission by first class mail. It was suggested that in some types of emergencies, the U.S. postal system might be disrupted, and thus compliance with mailing requirements in the rules might be difficult or impossible. There could be an emergency so severe that all means of communication and delivery are disrupted. But assuming electronic transmission is still available, recent amendments to Bankruptcy Rule 9036 provide at least a partial solution to mail

disruption. They allow electronic notice and service in many instances when the rules otherwise require mailing. Similarly, Rules 5005 and 8011 allow electronic filing.

Other procedures that the Subcommittee considered and decided not to address in an emergency rule were ones governing payment of filing fees online by unrepresented parties and electronic signature requirements. The Subcommittee determined that the existing Bankruptcy Rules on these topics either contain sufficient flexibility to allow adjustments during an emergency or leave the issues to regulation by local rules or orders.

Finally, it should be noted that while the emergency Civil Rule would allow service by first-class mail in emergency situations, Bankruptcy Rule 7004(b) already authorizes such service as a general matter.

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ON CIVIL RULES

MEMORANDUM

TO: Committee on Rules of Practice and Procedure

FROM: Advisory Committee on Civil Rules

RE: Draft Civil Rule 87 (Procedure in Emergency)

DATE: December 7, 2020

This part of the report by the Civil Rules Committee recounts the development of draft Civil Rule 87 as part of the discussion of the differences that remain between this draft and the drafts of other emergency rules. As noted elsewhere, the Committee is uncertain whether to recommend adoption of any Civil Rule addressing emergency circumstances, but will recommend publication of a proposed rule if any other emergency rules are published. It may recommend publication of an alternative approach that would amend a few Civil Rules for all purposes, perhaps entirely bypassing an emergency rule. The inherent flexibility of the Civil Rules seems to have met most special needs arising from the COVID-19 pandemic, but the publication process may provide valuable information about problems that have not yet been recognized.

The CARES Act Subcommittee chaired by Judge Kent Jordan worked through late spring and summer to pare down broad initial drafts in a process that wound up with a modest emergency rules authority. The draft is limited because the inherent discretion and flexibility of the Civil Rules, coupled with existing provisions for relying on remote technology, have served the courts and parties well during the COVID-19 pandemic. This apparent success left the subcommittee uncertain whether any emergency rule is needed. The emergency rules draft includes specific text for a small number of emergency rules that might be adopted by a declaration of a civil rules emergency. At least most of these emergency rules texts could prove to be useful as amendments of

the present general rules texts for all purposes. The Committee recognizes this possibility. Work will continue nonetheless to devise the best possible emergency rules draft. It is likely that this spring the Committee will recommend publication of a general civil rules emergency draft rule, even if it is accompanied by an alternative proposal to adopt all of the emergency rules as amendments of the corresponding general rules. Public comment may show a need for other emergency rules provisions to address obstacles in the rules that have not yet been identified. It is possible that experience as the current pandemic continues will show that the general rules have not been as successfully adapted to emergency circumstances as the Committee now believes. [And adopting a limited emergency rule could serve as a reminder that administering the present rules in the spirit of Rule 1 is the most important response to difficult circumstances, even those that truly qualify as emergencies.]

The text of the current draft Rule 87 and committee note can serve to introduce a brief description of the process that led to this point. The process involved an intense level of coordination and cooperation with the other advisory committees, brilliantly encouraged and executed by Professor Capra. Description of the process will include discussion of such differences as remain among the different emergency rules. More importantly, discussion of the differences includes recognition of the reasons why different emergency rules provisions are appropriate in light of the tradition, structure, and needs confronted by different areas of judicial procedure.

Rule 87. Procedure in Emergency.

(a) CIVIL RULES EMERGENCY. The Judicial Conference of the United States may declare a Civil Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARING AN EMERGENCY.

(1) *Content.* Each declaration of an emergency:

(A) must designate the court or courts affected;

(B) may authorize only one or more of the emergency rules in Rule 87(c) to take the place of the same rule [for the period set by Rule 87(b)(3), (4), and (5)];

(C) must be limited to a stated period of no more than 90 days; and

(D) may be modified or terminated before the end of the stated period.

(2) *Additional Declarations.* Additional declarations may be made under Rule 87(a).

(c) EMERGENCY RULES.

(1) *Emergency Rule 4(e)(2)(B):* leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or, if ordered by the court, sending a copy of each to [that place] [the individual's dwelling or usual place of abode] by registered or certified mail or other reliable means that require a signed receipt.

(2) *Emergency Rule 4(h)(1)(B):* by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process or, if ordered by the court, by mailing them by registered or certified mail or other reliable means that require a signed receipt, and——if the agent is one authorized by statute and the statute so requires——by also mailing a copy of each to the defendant;

(3) *Emergency Rule 4(j)(2)(a):* delivering a copy of the summons and of the complaint to its chief executive officer or, if ordered by the court, sending them to the chief executive officer by registered or certified mail or other reliable means that require a signed receipt;

(4) *Emergency Rule 6(b)(2):* A court may apply Rule 6(b)(1) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The order extending time has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under those rules.

~~(5) *Emergency Rule 43(a):* At trial, the witnesses' testimony must be taken in open court or by remote means that permit reasonable public access unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.~~

~~(6) *Emergency Rule 77(b):* Every trial on the merits must be conducted in open court in person or by remote means that permit reasonable public access and, so far as convenient, in a regular courtroom.~~

~~Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.~~

(d) EFFECT OF TERMINATION. A proceeding not authorized by a rule but authorized and commenced under an emergency rule may be completed under the emergency rule when compliance with the rule would be infeasible or work an injustice.[1]

COMMITTEE NOTE

Subdivision (a). This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions. At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unsurpassable obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local——familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its

[1] This provision seems unnecessary if only Emergency Rules 4, and even 6, are authorized. If we venture into "open court" territory, it may be useful to ensure that it is proper to carry on with a remote trial after it has begun. But this is an added argument for avoiding all of the "open court" issues.

functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility that is embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the extensive flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should exhaust the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this Rule 87, or a declaration of a rules emergency, do not imply any limitation of the courts' ability to respond to emergency circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b). A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration can extend only to one or more of the emergency rules listed in subdivision(c) and must designate the emergency rule or rules included in the declaration. An emergency rule takes the place of the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, and the Judicial Conference may terminate or modify a declaration before the end of the stated period. A declaration may be succeeded by a new declaration made under Rule 87(a).

Subdivision (c). Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rules 4(e)(2)(B), 4(h)(1)(B), and 4(j)(2)(a) begin with the text of the present rule and authorize additional means of service "if ordered by the court." The nature of some emergencies may make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties, taking account of the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice for the district by entering a standing order, or even by local rule if it is practicable to adopt a local rule within the expected duration of the emergency and the prospect that the declaration of emergency may be renewed.

[Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those times under Rule 6(b)(1). Rule 6(b)(1) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well. Special care must be taken to ensure that the parties understand the effect of an extension on the time for filing a notice of appeal. The interface with Appellate Rule 4(a)(4) is addressed by the provision in Emergency Rule 6(b)(2) that an order extending time has the same effect as a timely motion under the enumerated rules. If the order extending time is not followed by an actual motion within the extended time, the time to file a notice of appeal begins when the extended time period ends. That is when the order disposes of the motion to extend time. An actual motion for relief under the designated Rules made within the extended time will have the same effect on appeal time as a timely motion under the nonemergency rules.]

~~The emergency provisions for Rules 43 and 77 must not be taken to imply that remote proceedings do not satisfy an "open court" requirement without authorization of an emergency rule.~~

Subdivision (d). Proceedings may be commenced under an emergency rule but not be completed before the declaration of a judicial emergency terminates. Completing a particular proceeding by reverting to the general provisions of the applicable rule may be possible without any real difficulty or may generate unnecessary

waste. A proceeding may be completed as if the declaration had not terminated when compliance with the applicable rule would be infeasible or work an injustice.

Drafting History: Convergence and Departures

Most of the drafting history remains relevant to illustrate the diligent work pursued by the CARES Act Subcommittee in conjunction with the other subcommittees. Lengthy description, however, would distract from the essential points on which all committees have converged, and exploration of the reasons why the remaining divergences are appropriate in light of the different contexts in which they operate.

What Constitutes an Emergency: Rule 87(a). Early Rule 87 drafts quickly moved from reliance on emergency declarations by executive or legislative authorities to rely on judicial authority. A functional approach emerged, and, following the lead of the Criminal Rules subcommittee, led to this formula, common to all the emergency rules drafts:

> extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

Draft Criminal Rule 62(a) adds an additional element:

> no feasible alternative measures would eliminate the impairment within a reasonable time.

The committees agree that the differences between the Civil Rules and Criminal Rules contexts justify different definitions. For many years, the Civil Rules have been drafted with a deliberate choice to confer very broad discretion to shape the general provisions to the needs of each specific action. Reports on the adaptations made by litigants and the courts in response to the current pandemic suggest that this flexibility has proved adequate to meet nearly all emergency needs. The Criminal Rules, on the other hand, include several less flexible provisions. The need for proceedings in the presence of the court reappears regularly. The specific Criminal Rules identified in the CARES Act are of this sort. The Criminal Rules Committee has worked to identify other Criminal Rules that should be included in an emergency rule that enumerates those rules——and only those rules——that might be subject to departure when a rules emergency is declared.

For the Civil Rules, the "no feasible alternative" provision seems an unnecessary complication. It is intended to stiffen the initial reference to circumstances that "substantially impair" the ability to function in compliance with the rules. For the Civil Rules, "substantially impair," coupled with the sound judgment of the Judicial Conference, seems protection enough. A transient impairment, or one that can be addressed under the rules, is not substantial. And the draft Rule 87 committee note emphasizes that courts should focus on employing the Civil Rules to take advantage of their general flexibility and adaptability in addressing emergency circumstances. Alternative measures within the rules abound. There is no need to risk the unintended implication that courts should explore alternatives that are not "in compliance with these rules." The present structure of Civil Rule 87, moreover, permits only a specific set of emergency rules that define narrow departures from the general rules and depend on court orders. There is no need in the Rule 87 context to stiffen the common controlling language.

One final observation. The draft committee note repeatedly recognizes that a court's ability to function under the rules is affected by the parties' ability to discharge their responsibilities. It would be possible to add this important element to the rule text: "substantially impair the court's and the parties' ability to perform ~~its~~ their functions in compliance with these rules."

Who Declares an Emergency? Rule 87(a). Several alternatives were explored before reaching the proposal that a rules emergency can be declared only by the Judicial Conference. The list included circuit judicial councils, chief circuit judges, chief district judges, or the full bench of circuit or district courts. The Supreme Court was mentioned once, but was promptly discarded for fear of adding yet another responsibility to its already heavy burdens.

The more localized authorities seemed attractive because they know local circumstances better than more remote bodies. They also know their own capacities better, and can tailor emergency responses that better fit their operations.

The subcommittee narrowed the list rather early to include only circuit judicial councils. The balance of circuit and district judges would provide good access to local information, and at the same time promote uniformity in responding to local, regional, or

circuit-wide emergencies. Individual districts could readily ask the circuit council to act, and it was expected that the council could act quickly.

The recommendation to rely on the Judicial Conference alone was based in part on the preference of the Criminal Rules subcommittee. Circuit councils might well adopt disparate responses to national emergencies or regional emergencies that cross circuit lines. One council or another might not be as reluctant as the Judicial Conference to declare a rules emergency, and might be willing to depart from more rules provisions. The Judicial Conference, composed of the chief judge of each circuit and a district judge from each circuit, is able to respond quickly in an emergency. Its members provide an immediate source of local information, and can quickly gather more. The Judicial Conference also plays a pivotal role in the Rules Enabling Act process. In all, it seemed best to rely on the Judicial Conference alone. If it declares a national rules emergency, it can provide for nationally uniform responses when appropriate. At the same time, it can declare a rules emergency for a single district or, at least in theory, part of a district.

The Judicial Conference need not rely on its own resources to know when it should consider declaring a rules emergency. Suggestions that it act can come not only from its own members but from other judges, often by informal means, particularly when the scope of a potential emergency is local or regional.

Relying only on the Judicial Conference may have some impact on the understanding of the appropriate scope of a rules emergency declaration. Although it is well structured to respond quickly in determining whether to declare an emergency, it may not be well structured to define the precise scope of the rules-departing procedures best suited for immediate adoption, and perhaps ongoing adaptation. That range of concerns is addressed in the draft provisions of Rule 87(b) and (c) that prescribe the contents of a declaration of emergency and the rules that can be adopted under a declaration.

The Declaration: Rule 87(b). Draft Rule 87(b) prescribes in narrow ways the authority established by declaring a rules emergency. Some of the limits are formal: The declaration must designate the court or courts affected by the emergency; must be limited to a stated period of no more than 90 days; and may be modified or terminated before the end of the stated period.

The remaining limit on the authority to declare a rules emergency is found in Rule 87(b)(1)(B). This draft is quite narrow, authorizing only a few specific substitutes for a few identified rules. The subcommittee came to this recommendation by a process that continually narrowed the scope of this authority. The process is described with draft Rule 87(c).

Extending a Declaration. Draft Rules 87(b)(1)(D) and (b)(2) address the questions created by the variable and often uncertain duration of rules emergencies. Paragraph (b)(1)(D) allows a declaration to be modified or terminated before the end of the initial stated period. Paragraph (b)(2) allows renewal by additional declarations of the Judicial Conference for periods of no more than 90 days each, ensuring continued attention to the need for emergency measures.

Draft Criminal Rule 62(b)(3) takes a more demanding approach. Where Rule 87(b)(1)(D) says that a declaration "may be modified or terminated," Rule 62(b)(2)(B) says that the Judicial Conference "must terminate a declaration for one or more courts before its stated termination date when it determines that a rules emergency affecting those courts no longer exists." Issuing a successive declaration is permissive, as with Rule 87, but Rule 62(b)(2)(A) adds a requirement that "emergency conditions change or persist." These are real differences. It remains uncertain whether the differences between criminal procedure and civil procedure justify the differences. Several considerations weighed against mandating termination of a civil rules emergency declaration. The occasion for termination is likely to arise, if at all, only well into the life of the original declaration, which can run no longer than 90 days. There is a real prospect that circumstances requiring termination may differ from one court to another, substantially increasing the complex determinations that may be required. And at least as to the civil rules, there is nothing so radical about the authorized emergency rules as to fear a few days or weeks, or even a couple of months, of possibly excess duration.

Emergency Rules Rule 87(c). Rule 87(c) authorizes only a small number of departures from the Civil Rules in response to a declaration of a rules emergency. This recommendation rests on the belief that ongoing responses to the procedural challenges arising from the COVID-19 pandemic have demonstrated the capacity of courts and litigants to seize the opportunities created by the wide measures of discretion and flexibility deliberately built into the rules. It will be important to continually monitor potential

roadblocks to ensure that this belief continues to be justified. The process that led to the present recommendation is instructive.

Emergency Rules 4. All three Emergency Rules 4 proposed in draft Rule 87(c)(1), (2), and (3) begin with present rule text. Each authorizes service by additional means if ordered by the court. The additional means, "registered or certified mail or other reliable means that require a signed receipt," are modest, and familiar in present practice when authorized by state law. Adding these provisions to the regular rules is likely to prove desirable for nonemergency circumstances as well as for emergencies.

It would be possible to propose still more detailed provisions. One illustration overlaps problems that exist now, but may be multiplied by an emergency. A calamitous fire, flood, earthquake, or hurricane may render large numbers of people homeless. How should service be made on an individual who has no "dwelling or usual place of abode"? Or what of intended defendants who deliberately disappear to evade service, perhaps with added cover generated by an emergency?

These and like questions occur regularly. They have not generated calls for rules amendments. It seems better to defer them rather than attempt to find answers in the time frame for publishing emergency rule proposals.

Emergency Rule 6(b)(2). Rule 6(b)(2) has no element of flexibility or discretion: "A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." The draft emergency rule responds to the temptation to alleviate an impenetrable obstacle that may prove unfair when emergency circumstances prevent a timely postjudgment motion, and when the emergency may make it apparent to all parties that it is inappropriate to rely on the termination of all opportunities for relief and on the beginning of the time to appeal. The draft attempts to address the potential complication of appeal time under Appellate Rule 4(a)(4), but the discussion in the committee note shows that integration with the Appellate Rules may not be easy.

The same difficulties would be encountered in attempting a general revision to permit extensions of the times for the enumerated post-judgment motions. If a proposal is to be made to amend Rule 6(b)(2) itself, rather than adopt any version of Rule 87, it likely should borrow from the standard set by draft Rule 87(a) for declaring a rules emergency. The authority to extend the time for a post-judgment rule would require "extraordinary

circumstances" that make it impossible (or nearly impossible?) to move within the "time set by Rule 6(b)(1)." The same standard should be set for even making a motion to extend after expiration of the original time, if such motions are to be recognized at all.

Emergency Rules 43(a), 77(b). These emergency rules are shown with overlining to indicate that they are not recommended, but may deserve some further consideration. They are designed to ensure that "open court" proceedings can include remote testimony, argument, and deliberation. But two concerns counsel caution. Experience during the COVID-19 pandemic suggests that the present rules are well designed to meet needs for remote proceedings. And there is a risk that adopting these provisions only for emergencies could all too easily stifle desirable evolution of nonemergency practice. That concern could be addressed by proposing to amend these rules for all purposes without any limitation to emergency circumstances. General rules amendments might have the added benefit of encouraging remote proceedings more generally.

Still, pursuing these issues for general rules amendments would require further thought. Experience with remote trials is only beginning to develop, and cogent concerns remain even for emergency circumstances. Additional safeguards might well be wise for any general rules amendments. For now, it seems better to defer any recommendation, although it might be helpful to raise the question for comment when Rule 87 is published.

Emergency Rule 87(d): Effect of Termination. This rule addresses the prospect that a proceeding commenced under an emergency rule may not be completed when the declaration of a rules emergency terminates. It is drafted as a mirror of Rule 86(a)(2)(B). Rule 86 provides that an amended rule applies to a pending proceeding unless the court determines that applying the rule in a particular action "would be infeasible or work an injustice." Here the same standard is applied when an emergency rule expires.

This draft is tentative. It may not be necessary if the range of emergency rules authorized by Rule 87 remains as narrow as the present draft. Once a court orders service under one of the Emergency Rules 4, the order could easily stand even though service has not been completed when the emergency ends. If some version of Emergency Rule 6(b)(2) is adopted, there might be a greater need to protect a party that has relied on the opportunity to seek, and perhaps win, an extension of the time to make a postjudgment motion that would be prohibited by Rule 6(b)(2) itself. It might be better

to add a specific provision to Emergency Rule 6(b)(2), specifically tailored to the rule, and discard any general "soft landing" provision.

However this problem is resolved for Rule 87, the specific and limited scope of the Rule 87 Emergency Rules provides the reasons for not attempting to struggle with a provision drafted in common with the other sets of emergency rules.

Broader Emergency Rules Provisions. Early drafts authorized essentially wide-open responses once an emergency is declared. The most enthusiastic draft offered alternative versions. One, somewhat narrower, authorized a district court to authorize departure from a rule identified by a declaration of emergency "when (1) necessary to perform the court's functions [in a particular case] and (2) consistent with all obligations [imposed by][under] the Constitution of the United States and applicable statutes." The broader version provided that "the parties should [agree on]{propose to the court} modified procedures that depart from the rule to the extent necessary to respond to the emergency. If the parties cannot agree the court may act under Rule 16 to specify the procedure to be followed."

More restrained versions soon followed. Two basic forms were considered. One would allow the Judicial Conference to declare an emergency with respect to any rule or rules except for those identified in a list of untouchable rules. The illustrative list of excluded rules never came on for extended discussion. Sufficient illustration is provided by rules affecting the right to jury trial——an emergency could not justify relaxing the standard for judgment as a matter of law or for summary judgment, seating a jury of fewer than 6 members, dispensing with jury instructions, or like measures. The other basic form was the obvious counter: it would list the only rules that could be affected by a declaration of emergency.

The difficulty of the task quickly emerged from attempts to develop suitable lists of rules to be excluded from, or included in, a declaration of emergency. Rule 4 provides an example that is duplicated by many other rules. Parts of Rule 4 may well deserve modification to meet emergency circumstances if they are not modified for all purposes. Other parts, including the basic requirement that summons and complaint be served, should not be modified. Any list of exclusions or inclusions would be quite long, and fraught with the prospect of error.

Regular Rules Amendments Alternative

The alternative to recommending a narrow set of emergency rules to be available through a Judicial Conference declaration of a rules emergency is to proceed directly, on the same time table, to propose amendments of the same rules that do not depend on a determination of an emergency by the Judicial Conference or any court. The amendments might simply adopt the proposed emergency rule text for all circumstances. Or somewhat different provisions might be proposed, seeking terms flexible enough to accommodate an emergency without relaxing important safeguards.

The subcommittee has not extensively studied the differences that might be made in proposing to amend the regular rules in ways that parallel the draft emergency rules. There should be time enough, however, to study the possible differences and advance proposals for publication at the same time that a potential general emergency rule might be——or is——proposed for publication.

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

MEMORANDUM

TO: Honorable John Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Emergency Appellate Rule 2

DATE: December 8, 2020

In accordance with the CARES Act, the Advisory Committee established a subcommittee to consider what amendments, if any, would be appropriate to deal with future emergencies. The members of that subcommittee began by reviewing every Federal Rule of Appellate Procedure to evaluate which ones might be appropriate candidates for amendment. The subcommittee ultimately concluded that the best approach for the Appellate Rules was simply an amendment to the existing Federal Rule of Appellate Procedure 2.

Existing Rule 2 provides:

> **Rule 2. Suspension of Rules**
>
> 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).

That is, under current law, a court of appeals is empowered to suspend *any* provision of the Federal Rules of Appellate Procedure in a particular case, except those that govern the time to appeal, the time to seek permission to appeal, and the time to review administrative action. This broad suspension power is nothing new: it has

been a part of the Federal Rules of Appellate Procedure from the very beginning of those Rules.

The subcommittee also reviewed the Federal Rules of Appellate Procedure from the other perspective to see if there are any Appellate Rules that should *not* be liable to suspension in an emergency. It did not find any, 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 that suspension would be unnecessary, not because compliance with them is so important even in an emergency.

The Advisory Committee considered the issue at length and concluded that any narrower approach to suspension in an emergency would be inappropriate in light of existing Rule 2. As edited by the style consultants, the working draft of the proposed amendment reads as follows:

Rule 2. Suspension of Rules

(a) **In a Particular Case.** 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) In an Appellate Rules Emergency.

(1). *Conditions for an Emergency.* The court may declare an Appellate Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these Rules. Unless the court orders otherwise, the chief circuit Judge may act on its behalf under this Rule.

(2) *Content of a Declaration; Early Termination.* When a Rules emergency is declared, the court may suspend in that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). The court must end the suspension when the rules emergency no longer exists.

(3) *Action by the Judicial Conference.* The Judicial Conference of the United States may exercise these same powers in

one or more circuits, and may review and revise any determination by a court under this rule.

There are two ways in which the proposed emergency rule is broader than the existing Rule 2. First, it applies to all cases, not just to a particular case. Second, it permits the suspension of non-statutory time limits to appeal or otherwise seek review.

The first difference may not be as large a change as first appears. After all, existing Rule 2 empowers a court of appeals to suspend virtually any rule in a particular case, and it could be used in *every* case pending during an emergency. The major reason to consider an emergency rule is that using existing Rule 2 in every pending case might be thought by some to stretch the concept of a particular case and start to look like a local rule.

The second difference may also not be as large a change as first appears. The Supreme Court has distinguished between mandatory claims processing rules, such as those in Appellate Rule 4, and jurisdictional time limits, such as those in 28 U.S.C. § 2107. *See, e.g., Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017). But some time limits that appear in the Rules merely repeat those imposed by a statute. The proposed emergency Rule permits suspension only of those time limits imposed by a Federal Rule of Appellate Procedure that are not imposed by statute.

The Advisory Committee on Appellate Rules took seriously the contrast between its approach and that of other Advisory Committees. But it could find no reason to create an emergency power that was narrower in scope than the existing Rule 2. Frankly, it would prefer to have no emergency rule than one more limited in scope than existing Rule 2, because such an emergency rule might be understood by some to reduce the authority to suspend Federal Rules of Appellate Procedure that courts of appeals have been always been empowered to exercise ever since there have been Federal Rules of Appellate Procedure. And the Advisory Committee relies on the existing Rule 2 when framing proposed amendments to the other rules. For example, when debating between alternate formulations of a proposed amendment, the Committee will acknowledge that the debate is about setting a default rule, because Rule 2 permits departure from whichever formulation is chosen.

There are good reasons for the Federal Rules of Appellate Procedure to be more readily subject to suspension than other Rules. The Federal Rules of Appellate Procedure deal with matters such as filing notices of appeal, the record on appeal, stays, motions, briefs, appendixes, oral argument, and rehearing. Unlike the Federal Rules of Civil Procedure, they do not deal with, for example, summoning defendants, witnesses, and jurors, nor with demanding the pretrial production of documents and oral testimony from parties and non-parties. Unlike the Federal Rules of Criminal Procedure, they do not, for example, deal with arrest warrants, arraignments, plea colloquies, and sentencing. The public has little role in the courts of appeals. The most

public aspect of procedure in the courts of appeals is oral argument, and whether to hold oral argument is discretionary. The most controversial amendment to the Federal Rules of Appellate Procedure in memory concerned the length of briefs.

The breadth of the statutory power of the courts of appeals to determine appeals is consonant with a broad power to suspend procedural rules:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106. *See also Schacht v. United States*, 398 U.S. 58, 64 (1970) ("The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.").

The proposed emergency rule also differs from the proposals of some other Advisory Committees by vesting the power to declare an Appellate Rules emergency in the court of appeals itself, rather than restricting that power to the Judicial Conference. This is appropriate for a court of appeals, even if not appropriate for a district court.

A court of appeals routinely acts as a body rather than as individual judges. This is obviously true in that a court of appeals usually sits in panels of three, while a district judge almost always sits alone. But it goes beyond that. A three-judge panel of a court of appeals is bound by prior panel precedent, while a district judge is not bound by prior district precedent. Similarly, a panel of court of appeals can speak for the entire court, and it can bind future panels. No district judge can do that. The en banc process in the court of appeals is designed to produce a court speaking with one voice, and panel opinions are frequently circulated to the full court before being filed and released to the public.

Since their creation in 1891, the courts of appeals have also been given the authority to render final decisions in many cases—final in the sense that there is no right of appeal from the decision. Over the years, Congress has expanded the category of such cases so that today there are no cases (or at least nearly so) in which there is a right of appeal from a decision by a court of appeals. With the Supreme Court hearing fewer than ninety cases a year, and the courts of appeals deciding nearly fifty thousand cases a year, the courts of appeals have the last word in determining virtually every federal case. It is appropriate for such a court to be able to decide for itself that an emergency exists warranting the suspension of its procedural rules.

Finally, vesting the power in the court itself raises no concern about statutory authority, unlike vesting the power in the Judicial Conference. The concern with vesting power in the Judicial Conference is not whether the Federal Rules may incorporate by reference legal provisions properly established by others (such as legal holidays or methods of service established by state law). Instead, the concern is whether the Judicial Conference has the statutory authority to declare emergencies, suspend rules, establish rules, or choose among rules—apart from its important power to make recommendations to Supreme Court. Sovereign states may establish legal holidays and methods of service to be used in their courts. A creature of statute, like the Judicial Conference, must point to some statutory authority for its actions. (It has the statutory authority to "modify or abrogate" a local circuit rule that is inconsistent with federal law, 28 U.S.C. § 331, which arguably supports the power to "review and revise any determination" by a court of appeals under this proposed emergency rule.)

The proposed emergency rule also empowers the chief circuit judge to act on a court's behalf unless the court orders otherwise. The members of the Advisory Committee were confident that any chief judge would consult with other members of the court and seek consensus. No one was worried about a rogue chief judge, but in any event the full court could override the chief judge.

Concern has been raised that the proposed emergency rule does not specify what procedure will govern in place of a suspended rule. The Advisory Committee may wish to consider this concern more fully, but at least two possibilities present themselves. First, in many circumstances, there will be no need to have any substitute provision. For example, courts of appeals in the current pandemic have suspended the requirement of submitting paper copies of many documents. In such circumstances, there is no need for a substitute provision. Instead, the existing requirement of electronic submission alone remains. Second, where this possibility is insufficient and some substitute is needed, the court can "order proceedings as it directs"—as the current Rule 2 already provides. If necessary, this language can be added to the proposed Rule 2(b) as well.

A possible Committee Note is sketched below.

Committee 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 court may declare an Appellate Rules emergency when it determines that 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. When such an emergency is declared, the court may suspend in that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). The court must end the suspension when the rules emergency no longer exists. The Chief Circuit Judge may act on the court's behalf unless the court orders otherwise. The Judicial Conference of the United States may exercise these same powers in one or more circuits, and may review and revise any determination by a court under this rule.

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). Although there might be emergency situations that call for relaxation of these time limits in the rules, the emergency authority 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.

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ADMINISTRATIVE PROVISION—THE JUDICIARY
VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS
SEC. 15002.

(a) DEFINITION.—In this section, the term "covered emergency period" means the period beginning on the date on which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates.

(b) VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS.—

(1) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court), upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, may authorize the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available, for the following events:

(A) Detention hearings under section 3142 of title 18, United States Code.

(B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure.

(C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure.

(D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure.

(E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure.

(F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure.

(G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code.

(H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure.

(I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure.

(J) Proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act"), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

(2) FELONY PLEAS AND SENTENCING.—

(A) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit

that includes the district court) specifically finds, upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice, the plea or sentencing in that case may be conducted by video teleconference, or by telephone conference if video teleconferencing is not reasonably available.

(B) APPLICABILITY TO JUVENILES.—The video teleconferencing and telephone conferencing authority described in subparagraph (A) shall apply with respect to equivalent plea and sentencing, or disposition, proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act").

(3) REVIEW.—

(A) IN GENERAL.—On the date that is 90 days after the date on which an authorization for the use of video teleconferencing or telephone conferencing under paragraph (1) or (2) is issued, if the emergency authority has not been terminated under paragraph (5), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the authorization and determine whether to extend the authorization.

(B) ADDITIONAL REVIEW.—If an authorization is extended under subparagraph (A), the chief judge of the district court (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) to which the authorization applies shall review the extension of authority not less frequently than once every 90 days until the earlier of—

(i) the date on which the chief judge (or other judge or justice) determines the authorization is no longer warranted; or

(ii) the date on which the emergency authority is terminated under paragraph (5).

(4) CONSENT.—Video teleconferencing or telephone conferencing authorized under paragraph (1) or (2) may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.

(5) TERMINATION OF EMERGENCY AUTHORITY.—The authority provided under paragraphs (1), (2), and (3), and any specific authorizations issued under those paragraphs, shall terminate on the earlier of—

(A) the last day of the covered emergency period; or

(B) the date on which the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the

National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) no longer materially affect the functioning of either the Federal courts generally or the district court in question.

(6) NATIONAL EMERGENCIES GENERALLY.—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.).

(7) RULE OF CONSTRUCTION.—Nothing in this subsection shall obviate a defendant's right to counsel under the Sixth Amendment to the Constitution of the United States, any Federal statute, or the Federal Rules of Criminal Procedure.

(c) The amount provided by this section is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Con-trol Act of 1985.

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TAB 3

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TAB 3A

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

MEMORANDUM

TO: Honorable John Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on the Appellate Rules

DATE: December 8, 2020

I. Introduction

The Advisory Committee on the Appellate Rules met on Tuesday, October 20, 2020, via Teams. It discussed several matters but did not take any formal action on proposed amendments to the Rules. It therefore does not seek any action by the Standing Committee at the January 2020 meeting of the Standing Committee. The draft minutes of the October 2020 meeting are attached to this Report.

The Committee anticipates that, at the spring 2021 meeting of the Standing Committee, it will seek final approval of a proposed amendment to Rule 42, dealing with stipulated dismissals, and a proposed amendment to Rule 25, dealing with privacy protections in Railroad Retirement Act cases. (Part II of this report.)

It also anticipates that, at the spring 2021 meeting, it will seek approval for publication of a proposed amendment to Rule 2, dealing with the suspension of rules in an emergency, as well as amendments to Rule 4, Rule 33, Rule 34, and Rule 45, all of which involve minor changes based on experience during the pandemic. It also anticipates that it might seek approval for publication of a comprehensive re-write of Rule 35 and Rule 40, dealing with rehearing. (Part III of this report.)

Other matters under consideration (Part IV of this report) are:

- regularizing the criteria for granting in forma pauperis status and revising Form 4;

- a proposed amendment to Rule 4 to deal with premature notices of appeal;

- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight; and

- in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identify for purposes of appeal.

The Committee also considered other items, removing several from its agenda and tabling one. (Part V of this report.)

II. Proposed Amendments Already Published for Public Comment

A. Rule 42—Voluntary Dismissal

This proposed amendment to Rule 42 was published for public comment in August of 2019. At the June 2020 meeting of the Standing Committee, the Advisory Committee presented it for final approval. At the time, the proposed amendment read as follows:

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.

The Standing Committee was concerned about how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal. It decided to withhold approval until local rules were examined.

The Advisory Committee examined several local rules that are designed to be sure that a defendant has consented to dismissal. These local rules take a variety of approaches, such as requiring a signed statement from the defendant personally or requiring a statement from counsel about the defendant's knowledge and consent.

To guard against the risk that these local rules might be superseded by the proposed amendment, the Advisory Committee approved the following addition:

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

If this addition meets the Standing Committee's concern, the Advisory Committee intends to seek final approval of the following amendment at the spring meeting:

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.

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order. Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

[The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.]

B. Rule 25—Railroad Retirement Act

This proposed amendment to Rule 25 was published for public comment in August 2020. It would extend the privacy protection given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

At the June 2020 meeting of the Standing Committee, a member raised the concern whether other kinds of cases—such as ERISA cases and Hague Convention cases—might warrant similar treatment and asked that outreach be done to relevant stakeholders. The ABA Joint Committee on Employee Benefits has been contacted, but it has not yet commented. (One comment, not specifically addressed to the proposed amendment, has been received from a member of the public).

The Appellate Rules Committee believes that if any amendments to extend privacy protections to other kinds of cases are warranted, such amendments would have to be made to the Civil Rules rather than the Appellate Rules. In most instances, the Appellate Rules simply piggyback on the privacy protections in the Civil Rules. The only reason the Appellate Committee got involved with this proposed amendment is that Railroad Retirement Act cases come directly to the courts of appeals.

The Committee expects to seek final approval of the following amendment in the spring of 2021.

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 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.

III. Proposed Amendments for Possible 2021 Publication

A. Proposed Amendment to Rule 2, Dealing with Suspension of Rules

See the report from this Advisory Committee on the proposed amendment to Rule 2, which is attached to the umbrella report on the CARES Act prepared by Daniel Capra and Catherine Struve.

B. Various Amendments Occasioned by the CARES Act Review

As noted in the report on the proposed amendment to Rule 2, the CARES Act subcommittee reviewed every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies. That review has led the Committee to consider some minor amendments that may be appropriate in light of the experience of the pandemic without regard to a rules emergency.

1. Rule 4(c)—Prisoner Mailbox Rule

The Committee is considering an amendment to the prison mailbox rule to deal with situations where a prison mail system is unavailable.

Rule 4

* * *

(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 Rule 4(c), a parallel change to Rule 25(a) might also be appropriate.

2. Rule 33—Appeal Conferences

The Committee is considering an amendment to Rule 33 to permit 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.

3. Rule 34—Oral Argument

The Committee is considering amendments to Rule 34 to broadly permit the court to set the "manner" of oral argument, thereby accommodating oral argument conducted remotely, in whole or in part, and to limit the rule governing physical exhibits in the courtroom to in-person arguments.

Rule 34

* * *

(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.

* * *

(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.

4. Rule 45—Clerk's Duties

The Committee is considering an amendment to Rule 45 to acknowledge the reality that circumstances may sometimes prevent a clerk or deputy clerk from being "in attendance" at the clerk's office. Prior to restyling, the Rule stated that a clerk or deputy clerk "shall" be in attendance; that was changed to "must." The Committee is considering using the word "will" rather than "must."

It decided against any change to the provision that the court "is always open." The provision echoes a statute with roots going back to 1842, 28 U.S.C. § 452, whose apparent purpose was 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.

Rule 45

* * *

(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. The clerk's office with the clerk or a deputy in attendance ~~must~~ will 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.

C. Comprehensive Review of Rules 35 and 40—Rehearing

For several years, the Committee has been considering a comprehensive revision of Rules 35 and 40. Rule 35 addresses hearing and rehearing en banc, and Rule 40 addresses panel rehearing.

Early on, the Committee considered three basic approaches that could be taken in reconciling the two ways of petitioning for rehearing:

1) align the two Rules with each other;

2) revise both Rule 35 and Rule 40, drawing on Rule 21;

3) revise Rule 35 so that it addresses only initial hearing en banc, and revise Rule 40 so that it addresses both panel rehearing and rehearing en banc.

The Committee viewed the third approach as the most radical but potentially the most valuable. Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Litigants frequently request both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

But there was considerable resistance to this approach, particularly because devoting Rule 35 to only initial hearing en banc would draw more attention to the possibility of initial hearing en banc—a proceeding that is and should remain rare.

For a time, the Committee decided to forego any comprehensive revision and focus instead on spelling out what happens when a petition for rehearing en banc is filed and the panel believes that it can fix the problem. The goal is to make clear that a panel can act while still preserving a party's ability to access the full court. But working on the specifics led the Committee to revisit the possibility of a comprehensive revision.

The Committee has not yet decided to recommend a comprehensive revision. But it has made substantial progress toward creating an integrated draft that will enable it—and others in the Rules Enabling Act process—to decide whether the benefits of such a revision are worth the costs.

The central feature of the working draft is that it abrogates Rule 35 and revises Rule 40 to govern all petitions for rehearing (and the rare initial hearing en banc).

- Rule 40(a) provides that a party may petition for panel rehearing, rehearing en banc, or both.

- Rule 40(b) sets forth the criteria for each kind of rehearing.

- Rule 40(c) brings together in one place uniform provisions governing matters such as the time to file, form, and length. It also provides that any amendment to a decision restarts the clock for seeking rehearing and that a petition for rehearing en banc does not limit a panel's authority to grant relief. These provisions empower a panel to fix a problem identified by a petition for rehearing, while not blocking access to the full court.

- Rule 40(d) deals with initial hearing en banc.

Here is the current working draft:

[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 both forms of rehearing. Panel rehearing is the ordinary means of reconsidering a panel decision, and en banc rehearing is not favored. Oral argument on whether to grant the petition is not permitted.

(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 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 panel 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.

(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.

There are three particular issues still under discussion.

First, current Rule 35(b)(3) allows circuits, by local rule, to require separate petitions for panel rehearing and rehearing en banc. Should this local option continue or should the Rule call for a single petition covering both requests?

Second, when a panel changes its decision in response to a petition for rehearing, should a party be able to stand on its previously filed petition for rehearing en banc rather than file a new petition for rehearing? Requiring a new petition is the clearest way to make a party's position clear. On the other hand, requiring a new petition may be burdensome, particularly for pro se litigants.

Third, should the rule state that a panel that changes its decision in response to a petition for rehearing may order that no further petitions for panel rehearing will be entertained? The advantage of such a provision would be to save resources when the panel is convinced that it has heard enough. The disadvantage would be that the panel can't know what a party would want to say in response to whatever change it made.

The major question whether the benefits of a comprehensive revision are worth the costs will also be discussed further. Notably, two of the strongest proponents of comprehensive revision are practicing lawyers with considerable federal appellate expertise. While they themselves are quite familiar with the interaction of Rules 35 and 40, they are concerned that lawyers without such federal appellate expertise find Rules 35 and 40 quite confusing.

IV. Other Matters Under Consideration

A. IFP Status

The Committee is continuing to consider suggestions to regularize the criteria for granting IFP status and to revise Form 4 of the Federal Rules of Appellate Procedure. This form, unlike the Administrative Office forms used in the district courts, was adopted pursuant to the Rules Enabling Act. Even though the Civil Rules Committee has removed the item from its agenda, the Appellate Rules Committee has not.

In addition to reviewing other extant forms (such as one used in other courts and one published as a suggested federal form), the Committee is seeking information about how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful.

B. Relation Forward of Notices of Appeal

The Committee has begun to consider a new suggestion to deal with a recurring issue: premature notices of appeal. In many situations, existing Rule 4(a)(2)—which provides that a notice of appeal filed after the announcement of a decision but before its entry is treated as if it were filed immediately after its entry—works appropriately to save premature notices of appeal. But there are other premature notices of appeal that are not saved. The Committee considered this problem about a decade ago but did not find an appropriate solution, apparently because of a concern with inviting more premature notices of appeal.

The Committee is not inclined to support the solution that was offered in the suggestion—which would allow any premature notice of appeal to become effective once a judgment or appealable order is filed—because it fears that this would cause more problems than it solves by inviting premature notices of appeal.

At this point, the kinds of cases that appear most sympathetic involve appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. A belated certification works to save a premature notice of appeal. But if the case reaches final judgment without a Rule 54(b) certification ever being entered, a premature notice of appeal can sometimes result in a loss of appellate rights.

The Committee is exploring ways to deal with this issue, perhaps by increasing awareness of the effect of a notice of appeal and whether it divests the district court of jurisdiction. It is not confident that it will succeed this time around, but it will try.

C. Deadline For Electronic Filing (with other Advisory Committees)

The joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information, but that data gathering has been delayed due to COVID-19.

D. Finality in Consolidated Cases after *Hall* (with Civil Committee)

The joint subcommittee dealing with finality in consolidated cases continues to gather information. Any amendment would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), not the Appellate Rules.

The Supreme Court in *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identify for purposes of appeal. If one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation.

A docket study by Emery Lee of the Federal Judicial Center has identified thousands of consolidated cases, not including MDL cases. A sample of four hundred of these consolidated cases revealed nine that produced a final judgment in one originally separate action while the rest of the consolidated proceeding remained pending. He projected that there may be hundreds of such instances every year.

No particular problems were found in the cases from this sample, leaving the joint committee with little sense of urgency. However, problems may exist but be hidden. Lawyers may miss the issue, and only discover it when it is too late. Lawyers who are aware of the issue spend time determining whether a decision in consolidated proceedings finally resolves one of the originally separate actions. Courts may overlook the problem. The one thing that is said in favor of the rule in *Hall* is that it is clear. But while it is clear in simple cases, it is not so clear in cases where there has been a consolidated amended complaint or where additional parties have been added after consolidation.

For now, the joint subcommittee continues its evaluation.

V. Items Removed or Tabled

The Committee has been considering 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. Previously, this matter was tabled pending the gathering of information about how Circuit Clerks currently handle the naming of official capacity actions.

The information gathered revealed that most litigants and courts use an individual's name. In the Civil Rules Committee, the Department of Justice opposed

the suggestion, not only because there was no problem needing fixing, but because the use of titles can be complicated. The Civil Rules Committee removed the item from its agenda, and the Appellate Rules Committee did the same.

The Committee considered 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. The Committee saw no problem that needs to be addressed and removed this item from its agenda.

The Committee considered a suggestion that electronic filing be made more widely available to pro se litigants, especially because of the pandemic. There have been many similar suggestions made to the Civil Rules Committee. Current Appellate Rule 25(a)(2)(B) establishes a presumption against electronic filing by pro se litigants, but a court order or local rule may permit it.

The Committee discussed that in the past, clerks—especially district court clerks—have voiced strong opposition to more broadly permitting electronic filing by pro se litigants, but that the big staffing issue in the pandemic has been sending people into the office to deal with the paper filings. The Committee decided to table the matter, revisiting it once it sees what the Civil Rules Committee does.

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Minutes of the Fall 2020 Meeting of the

Advisory Committee on the Appellate Rules

October 20, 2020

Via Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, October 20, 2020, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Justice Judith L. French, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, and Lisa Wright. Acting Solicitor General Jeffrey B. Wall was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice.

Also present were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison Member, Advisory Committee on the Appellate Rules; Molly Dwyer, 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); Shelly Cox, Administrative Analyst, RCS; Kevin Crenny, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; Brittany Bunting, Administrative Analyst, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Daniel J. Capra, Reporter, Advisory Committee on the Rules of Evidence and Liaison to the CARES Act Subcommittees; 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 Bybee opened the meeting and greeted everyone, particularly Molly Dwyer, the new Clerk Representative. He offered his heartfelt appreciation to Judge Michael Chagares, the immediate past chair of the Committee.

II. Report on Meeting of the Standing Committee

The draft minutes of the June Standing Committee meeting are in the agenda book, along with the report of the Standing Committee to the Judicial Conference.

III. Approval of the Minutes

The draft minutes of the April 3, 2020, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

A. Proposed Amendment to Rule 42—Stipulated Dismissal of Appeal (17-AP-G)

The Reporter stated that the Advisory Committee had submitted for final approval a proposed amendment to Rule 42 that would make it mandatory for a Clerk to dismiss an appeal when the parties so stipulate. The Standing Committee, however, was concerned how this proposed amendment could interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. As reflected in the agenda book (page 107), he suggested the addition of a provision to deal with this concern:

> **(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.

He added that Professor Struve was concerned that this phrasing might be read by naïve readers (particularly defendants themselves) as suggesting that the court of appeals should pressure a defendant to withdraw an appeal. Professor Struve added that no lawyer would read it this way but was concerned about paranoid readings by inmates. She suggested rewriting the provision.

Judge Bybee noted that the proposed addition sends readers to the local rules. Professor Struve responded that her concern was not that any court of appeals would think that it should pressure defendants, but that she is always looking out for ways that members of the public might misread rules.

An academic member suggested using the phrase "confirm whether" instead of "ensure that" and asked whether the addition should be limited to criminal appeals or extend to habeas cases or civil cases generally. Judge Bates suggested that perhaps the addition be broadened to require compliance with all relevant local rules, but also stated that he was not aware of any such local rules other than those dealing with criminal appeals.

Mr. Byron responded that if the Appellate Rules are to encourage or permit local rules, they should do so in a focused way. To date, the relevant local rules are limited; we should not encourage more local rule making, particularly since the point

of the amendment is to require that courts dismiss when the parties stipulate. He said that the addition should not extend to civil cases, including habeas, and noted that securing the parties' consent would be complicated in cases with corporate parties.

The Reporter asked whether the change to "confirm whether" met Professor Struve's concern. She agreed it did.

An attorney member noted that she was not familiar with stipulated dismissals in criminal cases, and that in her experience, such a dismissal was done by motion. The Reporter responded that the concern raised by the Standing Committee was about stipulated dismissals, but that the proposed amendment would reach both.

Judge Bybee moved that the phrase "ensure that" be replaced by the phrase "confirm whether." Mr. Byron found that phrasing awkward: if one imposes a requirement it is usually to do something. Perhaps "confirm that" would be better. Professor Struve suggested "confirm that the defendant is consenting." An attorney member suggested "confirm that the defendant has consented." This last suggestion was met with unanimous approval.

The Committee approved the following addition:

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

B. Proposed Amendment to Rule 25—Railroad Retirement Act (18-AP-E)

The Reporter explained that the proposed amendment to Rule 25 would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

The proposal has been published for public comment. Only one comment has been received; that comment (reproduced on page 109 of the agenda book) is not specifically directed to the proposed amendment. The Standing Committee, however, expressed some concern about whether other kinds of cases—such as ERISA cases and Hague Convention cases—might warrant similar treatment and asked that outreach be done to relevant stakeholders. The Reporter noted that he had reached out to the ABA Joint Committee on Employee Benefits but had not yet heard back. He invited members of the Committee to suggest any additional outreach, particularly regarding Hague Convention cases.

He added that it was somewhat awkward because any amendment to deal with such cases would have to be to the Civil Rules rather than the Appellate Rules. In most instances, the Appellate Rules can simply piggyback on the privacy protections in the Civil Rules. The only reason this Committee got involved with this proposed amendment is that Railroad Retirement Act cases come directly to the courts of appeals.

Judge Bybee stated that this should be worked out with the Civil Rules Committee; our work is done here. Both Judge Bates and Professor Coquillette stated that the Reporter should talk to the reporters for the Civil Rules Committee.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendment to Rule 2—CARES Act

The Reporter presented the subcommittee's report regarding the CARES Act (Agenda Book page 115). He stated that Congress had directed the Judicial Conference to consider amendments under the Rules Enabling Act to address future emergencies. Each of the Advisory Committees has undertaken this task. The Evidence Committee decided that no changes were needed, thereby freeing its reporter, Professor Daniel Capra, to coordinate the efforts of the other Committees.

Thus far, the various subcommittees have taken a range of approaches, with Criminal being the most restrictive, Appellate the least restrictive, and Civil and Bankruptcy in between. There are three major issues: what triggers the emergency provisions, who decides whether to invoke those provisions, and what can be changed in an emergency.

All four subcommittees are using the same basic triggering language—"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." Criminal, however, adds a requirement that there be no feasible alternative.

The four subcommittees differ regarding who is empowered to invoke the emergency provisions. Criminal and Civil restrict the power to the Judicial Conference, with Criminal adding the requirement of particular findings. Bankruptcy adds both the Chief Circuit Judge and the Chief Judge of the Bankruptcy Court. The Appellate subcommittee proposal empowers the Chief Judge of the Circuit and the Judicial Conference, with power in the latter to review and revise any determination of the former.

Other Committees list particular rules that can be changed. The Appellate subcommittee proposal does not, reflecting that existing Rule 2 permits virtually any rule to be suspended in a particular case.

Professor Capra elaborated on some of the differences between the various subcommittees, noting that many are stylistic, but that Appellate is the outlier in being so open-ended.

Mr. Byron stated that it is appropriate for Appellate to be more open-ended and that we should advocate for that approach. Professor Capra stated that there is much to be said for uniformity, and that the various subcommittees are using the same basic definition of an emergency but have considerable disuniformity.

An academic member raised a question of statutory authority. 28 U.S.C. § 2071 gives each court rule making authority, and 28 U.S.C. § 2072 gives the Supreme Court general rule making authority. 28 U.S.C. § 331 gives the Judicial Conference the authority to modify or abrogate local rules that are inconsistent with federal law. But where does the Judicial Conference or the Chief Judge get the authority to promulgate a rule? In response to a question from Judge Bybee about whether a similar problem affects the existing Rule 2, an academic member stated that a panel hearing a case has authority to act, and existing Rule 2 provides that it is not hemmed in by other existing rules. He suggested that the authority should be channeled through local rules, which in turn could authorize the Chief Judge to act, and the Judicial Conference be empowered to make recommendations.

Judge Bates observed that other committees are proposing language that would substitute for the existing rules that are suspended. The proposed amendment to Rule 2 gives leeway to suspend, but it doesn't say what replaces the suspended rule. This may be a concern when the proposed rules go to the Judicial Conference, the Supreme Court, and Congress.

The Reporter suggested that the CARES Act itself might provide the necessary statutory authorization. A judge member agreed with Judge Bates; there is a difference between suspending the rules and issuing rules. The court should have power, not the chief judge.

Professor Coquillette drew on his institutional memory to recall that when Congress wants the rules committees to do something, it is willing to clarify their authority. It's not a practical problem; Congress wants the committees to act. On the other hand, using local rules is much more problematic. It is far easier for Congress to oversee the Rules Enabling Act rulemaking process than to oversee local rules.

Professor Capra added that the authority issue is not a problem if the Judicial Conference is simply making findings that trigger alternatives that are built into the rules.

An academic member noted that the CARES Act refers only to presidential declarations of national emergencies. He is particularly concerned about the Judicial

Conference, which does not seem to have any rule making authority on its own. A local rule, however, can preauthorize the chief judge to act.

Professor Capra stated that each of the various subcommittees reached beyond presidential declarations of national emergencies, concluding that the proposed amendments need not be tied to such an emergency.

In response to a question, Judge Bates clarified that while nothing has lessened the urgency of moving forward, no action was expected at the January meeting of the Standing Committee. Instead, the expectation is that there will be some disuniformity among the proposals from the various committees. This Committee should send forward for discussion what it thinks best.

The Reporter stated that the standard for an emergency was close to uniform, but that there is a significant difference as to who could invoke the emergency provisions. Judge Bates emphasized that the issue of the authority of the Judicial Conference is more of an issue for the proposal before this committee than for the proposals before other committees. He added that it is problematic to throw the problem to local rulemaking, because that process is not a quick one. Some wonder whether the Judicial Conference can act quickly enough, but local rules are slow. An academic member responded that the local rules could preauthorize the chief judge to act.

Professor Capra stated that local rules would be fighting words for the Criminal Committee. He added that, under the approach taken by other committees, the Judicial Conference would not be engaged in rulemaking, but only declaring that an emergency exists, triggering the replacement rules that then take effect.

Professor Struve urged the Committee to focus on what it thought the best approach would be rather than the question of authorization, noting that Congress might bless the results with legislation if needed.

A judge member expressed concerns about someone acting unilaterally. Judge Bybee stated that he was comfortable with giving authority to the Chief Judge, noting that in the Ninth Circuit, there is an active executive committee. Mr. Byron agreed that he is not concerned about a rogue chief judge, and that a majority of the court could overrule. A different judge member stated that her court also has an executive committee, that any chief judge seeks consensus, and that a majority could override. She added that her court suspended the requirement of paper submissions, and the chief consulted with everyone. Ms. Dwyer agreed that the chief judge is appropriate as an initial decisionmaker, based on working for 32 years under 8 different chief judges.

An academic member suggested empowering the court to act, providing that unless the court orders otherwise, the Chief Circuit Judge may act on a court's behalf,

and empowering the Judicial Conference to recommend suspensions to one or more circuits, as well as reviewing and revising determinations by the court.

Professor Capra observed that this suggestion is even more at odds with other committee because it means that the Judicial Conference would not itself be taking action.

Mr. Byron stated he is happy with giving the power to the chief judge but did not oppose the alternative of empowering the court. He added that uniformity is appropriate; if the Judicial Conference has statutory authority, it should be empowered to make the decision. An academic member clarified that his only objection to the role of the Judicial Conference concerned its statutory authority.

A judge member expressed concern with giving the power to the chief judge, preferring that it be vested in the court. Professor Coquillette stated that the executive committee of the Judicial Conference moves fast when it has to and is under the control of the Chief Justice.

The Reporter suggested addressing separately (1) the power of the chief judge and (2) the power of the Judicial Conference. The Committee reached a tentative consensus to empower the court and the Judicial Conference, while permitting the chief judge to act on the court's behalf unless the court orders otherwise.

An academic member raised two additional issues: Should there be a 90-day sunset provision? Should the proposed amendment be limited, as existing Rule 2 is, by Rule 26(b)?

As to the first issue, the Reporter responded that the proposal required that the suspension be ended when the substantial impairment no longer exists, and Professor Capra stated that other committees are proposing 90-day renewable periods. Mr. Byron observed that our current situation has lasted well more than 90 days.

As to the second issue, the Reporter stated the proposal would allow the suspension of rule-based time limits, but not statutory time limits. Professor Struve suggested that this distinction be written into the text of the rule. Mr. Byron appreciated the value of being clear in the text of the rule but was concerned about trying to identify the limits of what could be suspended. An academic member suggested adding "other than times limits imposed by statute"; the Reporter suggested "other than jurisdictional times limits imposed by statute." Professor Struve suggested that precision is appropriate, and suggested "other than times limits imposed by statute and described in Rule 26(b)(1)–(2)." Mr. Byron was persuaded.

The Committee produced the following working draft:

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 court may suspend any provision of these Rules in that circuit, other than time limits imposed by statute and described in Rule 26(b)(1)–(2). The court 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 court under this rule. Unless the court orders otherwise, the Chief Circuit Judge may act on a court's behalf under this Rule.

Judges Bates urged the Committee to be prepared to defend the decision to empower the chief judge, as opposed to leaving the decision to the Judicial Conference, as Civil and Criminal propose.

Mr. Byron stated that appellate judges act collegially on behalf of the whole court in ordinary appeals. Unlike district judges, they do not act independently. The Reporter added that the issues addressed by district judges include trials, with juries and witnesses, while appellate judges at most hear oral argument, so that greater flexibility in suspending the rules is appropriate—as existing Rule 2 reflects. A judge member added that individual circuit judges exercise little authority, but individual district judges exercise considerable authority. A circuit judge's colleagues can overrule that judge's decision; a district judge's colleagues can't. The public is much more affected in the district court, considering all the ways in which the public comes to proceedings in a district court. The public has little role in the courts of appeals; in her court, only 15% of the appeals are orally argued.

Judge Bates responded that this is all basically accurate and distinguishes the chief judge of a circuit from the chief judge of a district. But the question isn't chief judge of a circuit vs. the chief judge of a district; it is chief judge of a circuit vs. the Judicial Conference.

Professor Coquillette added that this could be a real concern when the proposal is before the Standing Committee. The Judicial Conference is very collegial; the chief judges of each circuit will be involved.

A judge member supported keeping the authority in the chief judge, mainly for efficiency reasons. But if that's going to cause problems with the Standing Committee, it may be better to simply put the authority in the Judicial Conference. The chief judge will deal with the executive committee of the Judicial Conference.

Judge Bybee noted that we already have Rule 2; the proposal we are considering looks an awful lot like just using Rule 2 in every case.

Mr. Byron stated that he preferred staying with what we have, but that if the Standing Committee opposes giving this authority to anyone but the Judicial Conference, he can live with it.

An academic member suggested giving the Judicial Conference the authority to declare an emergency. That declaration, in turn, would trigger the power of the court (or the chief judge, unless the court orders otherwise) to suspend. Judge Bates stated that there might be pushback in the Supreme Court or Congress about different solutions in different parts of the country to a national emergency. He emphasized a particular concern if the emergency rule did not identify the substitute rule that would govern if the ordinary rule were suspended. He is concerned about Congress getting into the act. Professor Coquillette agreed. Professor Capra stated that the latest suggestion (giving the Judicial Conference authority to declare an emergency) would move the Appellate proposal closer to that of other committees. There would still be the need to identify which rules were suspended.

The Reporter cautioned that an emergency rule that specified which rules could be suspended ran the risk of losing the flexibility provided by existing Rule 2, which seems to have been sufficient for this pandemic.

Judge Bates observed that the Advisory Committee on Civil Rules had a similar concern and came close to not recommending an emergency rule. Criminal is in a different situation.

A judge member like the idea of doing nothing. There's no issue of statutory authority. Rule 2 has already been adopted.

Mr. Byron suggested that we propose the broad version of Rule 2 that we have been working with and pull it if we meet with significant push back. A judge member stated that he would be willing to give up on the authority of the chief judge, leaving it in the hands of the Judicial Conference, but that if we had to specify which rules could be suspended, he would withdraw the proposal.

Mr. Byron stated that there are relative risks to consider. If it is necessary to leave the authority in the Judicial Conference alone, that's probably okay. But the biggest risk would be if others insist on identifying particular rules that can be suspended and specifying their replacements. That would limit existing authority.

The Committee agreed without dissent to forward the working draft above to the Standing Committee for discussion.

The Reporter noted that the Civil Rules Committee currently lists Civil Rule 6 as one that could be suspended in an emergency. If that goes forward, it will be necessary to coordinate with this Committee.

The Committee recessed for lunch at approximately 12:45 p.m. and reconvened at approximately 1:15 p.m.

The Reporter presented the rest of the recommendations by the CARES Act subcommittee. Reviewing the Federal Rules of Appellate Procedure in light of the experience of the pandemic led the subcommittee to suggest some changes without regard to a rules emergency (agenda book page 118).

FRAP 4(c). The subcommittee recommended providing for situations where a prison mail system is unavailable by adding a new provision to the prisoner mail box rule: "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."

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 the subcommittee 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.

FRAP 33. The subcommittee recommended permitting an appeal conference to be conducted "remotely" rather than "by telephone."

FRAP 34(b). The subcommittee recommended 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. To do this, the requirement that the clerk advise all parties of the "place" for oral argument would be deleted, and the following provision would be added: "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."

FRAP 34(g). The subcommittee recommended that the rules governing use of physical exhibits apply only if argument is held in person, by adding the phrase "an in-person" before the word argument. Judge Bybee noted that physical exhibits might be used in a remote argument. The Reporter responded that Rule 34 requires that

arrangements be made for placing physical exhibits in the courtroom and removing them, requirements that would not apply to a remote argument.

FRAP 45(a). The subcommittee looked into clarifying the interplay between a court being "always open" under Rule 45 and the clerk's office being "inaccessible" under Rule 26. Given the history and apparent purpose of the "court always open" provision, and its connection to longstanding statutory provisions, the subcommittee suggested leaving the "court 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 must be in attendance during business hours can be reconciled with the possibility envisioned by Rule 26 that the clerk's office might be inaccessible. Prior to restyling, the word used was "shall," rather than "must," and "shall" often carries some element of discretion. But the stylists banned the word "shall," so the "shall" became a "must." Rather than trying to restore "shall"—as was done for Civil Rule 56 in 2010—the subcommittee recommended leaving the word "must," but imposing the duty only whenever reasonably possible.

Judge Bates stated that the phrase "reasonably possible" was not a common one. He suggested a possible cross-reference to Rule 26. Judge Bybee noted that there is always a force majeure exception. Mr. Byron suggested instead that the word "must" be replaced by the word "will," so that the rule would provide. "The clerk's office with the clerk or a deputy in attendance will be open during business hours on all days except Saturdays, Sundays, and legal holidays."

With this change, the Committee agreed unanimously to forward these proposed amendments to the Standing Committee for discussion.

B. Proposed Amendment to Rules 35 and 40—Rehearing

Professor Sachs presented the subcommittee's report regarding Rule 35 and 40 (agenda book page 125). He explained that this project has been kicking around for some time. There is considerable duplication that results from having two rules that address rehearing. The Committee previously focused on spelling out what happens when a petition for rehearing en banc is filed and the panel believes that it can fix the problem. How do we make clear that this can happen while still preserving a party's right to access the full court? Working on the specifics revealed a spaghetti string of cross-references.

As a result, the Committee asked the subcommittee to attempt to integrate the two rules. The main arguments against doing so is that the changes are mostly stylistic, that renumbering rules can produce some difficulties in legal research, and that local rules will themselves have to be renumbered. On the other hand, having a single rule governing rehearing is much less confusing for those not already familiar with appellate practice.

The subcommittee proposes that Rule 35 be abrogated and that a single rule—Rule 40—govern all petitions for rehearing. Proposed Rule 40(a) provides that a party may petition for panel rehearing, for rehearing en banc, or for either. Proposed Rule 40(b) sets forth the criteria for each kind of rehearing. Proposed Rule 40(c) brings together in one place uniform provisions governing matters such as the time to file, form, and length.

The key moves to deal with the problem that prompted this project are contained in proposed (c)(1) and (c)(5). Proposed (c)(1) provides that any amendment to a decision restarts the clock for seeking rehearing, thereby not blocking access to the full court. Proposed (c)(5) provides that a petition for rehearing en banc does not limit a panel's authority to grant relief.

Before turning to the details of the proposal, the Committee first discussed the big question: whether or not to engage in the comprehensive revision. Mr. Byron thanked Professor Sachs for the huge amount of work and reflection he put into this project. Mr. Byron stated that for the last several years he has been advocating a comprehensive revision. It provides a real benefit of clarifying the interaction of panel rehearing and rehearing en banc, and of creating a single resource rather than leaving readers flipping back and forth between two rules. This is a huge improvement.

A lawyer member stated that overall this is great, but had one concern about the statement that panel rehearing is the "ordinary" means of reconsidering a panel decision. She found that phrasing too encouraging; panel rehearing is not ordinarily done. Judge Bybee added that none of this is favored.

A judge member stated that she has never been in favor of the comprehensive revision, seeing no problem that needs fixing. The substantive standards for each kinds of rehearing are totally different. The proposed additions contained in (c)(1) and (c)(5) to deal with the identified problem can be put in one of the rules; there is no need to redo the whole thing. The comprehensive revision will create tremendous work for the courts and will make people file combined petitions for panel rehearing and rehearing en banc. Now, forty percent seek only panel rehearing; with this amendment, everyone will file for both. The ship has sailed on a comprehensive revision, but it is important to keep people from filing for both all the time. The prohibition on oral argument should be placed in (b)(1) dealing with panel rehearing.

Professor Sachs responded that it is a good idea to extend the existing prohibition on oral argument to en banc petitions. A lawyer member stated that she was not aware that the Committee had yet made a decision to consolidate Rules 35 and 40, and that she had never heard of a court hearing argument on a petition for rehearing. She suggested adding "unless the court orders otherwise." No member of the Committee could identify a situation in which a court would hold oral argument

on the question whether to grant rehearing—as opposed to hearing oral argument on the merits after deciding to grant rehearing. Mr. Byron and Judge Bybee suggested moving the prohibition on oral argument to subsection (a). Professor Sachs voiced support for making clear that the prohibition on oral argument applies to the petition for rehearing itself and feared that adding "unless the court orders otherwise" would invite motions for oral argument on the petition. The Committee agreed to move the provision regarding oral argument to subsection (a) and revise it to read, "Oral argument on whether to grant the petition is not permitted."

Discussion then turned to the first bracketed language in the subcommittee's draft (agenda book page 127). That language in (b)(2) would require that a petition for rehearing en banc also meet the standard in (b)(1) for a petition for panel rehearing.

A lawyer member stated that this bracketed language doesn't make sense. A petition for rehearing en banc might not involve a claim that the panel misapprehended any law or fact; it might simply argue that the prior precedent should be revisited. She urged deleting the bracketed language. Judge Bybee agreed, and no one urged keeping it.

Professor Sachs then explained the reasons for retaining the second bracketed language in the subcommittee's draft. That language in (b)(3) establishes the criteria for rehearing en banc that applies even when the court acts sua sponte. He also worried about the negative inference that some could draw if the provision, which is in current Rule 35, were delated.

A lawyer member stated that the language is certainly duplicative, and that she is not worried about sua sponte rehearing. A judge member urged changing as little as possible in the existing rule. This accentuates the point. The proposed rule is so much shorter than the existing rules. Judge Bybee added that any redundancy is in the existing Rule 35. A lawyer member noted that the proposed rule now says that rehearing en banc "is not favored" twice; maybe it's worth making that point twice. A judge member noted that 50% of appeals involve pro se litigants.

No member of the Committee objected to retaining this language.

A judge member suggested that proposed (c)(1), which restarts the time to file a petition for rehearing after a decision is amended, should refer to when the "panel" amends its decision, not when the "court" amends its decision. Professor Sachs responded that use of the word "court" was deliberate, to take account of the possibility of seeking rehearing of an en banc court's decision. While rare, an en banc court could make a mistake; even the Supreme Court allows petitions for rehearing of its decisions. A judge member stated that this project started because of an identified problem dealing with panel decisions; we shouldn't make this change.

Judge Bybee pointed out that using the word "panel" would include the en banc panels used in the Ninth Circuit, where it is possible to have a super en banc.

The Committee decided to use the word "panel" rather than "court."

A judge member stated that Professor Sachs had produced a phenomenal draft, and asked what happens if a party files a petition for rehearing en banc and, while it is pending, the panel changes its decision? She urged that a party should be able to stand on the already-filed petition for rehearing en banc, amend it, or file a new one.

Professor Sachs responded that, under the current draft, the earlier petition is wiped out and treated as moot. The clock starts for a new one. The party may have a very different point.

A judge member stated that the change might be minor, so a party might want to simply stand on the existing petition or amend it.

A lawyer member stated that she would file a new petition, alerting the court that she still wanted the rehearing en banc. She suggested that it might be worth clarifying this in (c)(5).

Mr. Byron agreed that a litigant's response should be clear. A new petition makes the litigant's response clear, including to the clerk. A judge member expressed concern that this will lead to pro se litigants having to file new sets of papers, even where the change was minor. Mr. Byron stated that requiring a new filing is the clearest way to know the litigant's position. Judge Bybee stated that this could be very difficult for little folks; Mr. Byron responded that a pro se letter could be treated as a petition.

The Reporter noted that we are not trying to submit a draft for the Standing Committee to approve for publication at its January meeting. The Committee decided to leave this issue to be considered further by the subcommittee.

A lawyer member raised an issue that had not been considered by the subcommittee. Subsection (c)(3) of the subcommittee's draft provides that "ordinarily" a petition will not be granted in the absence of a request for a response. She was recently involved in a case where a panel amended an opinion in response to a petition for rehearing without calling for a response. Perhaps the panel figured that since the same party prevailed, it didn't matter. But if a response had been sought, the prevailing party could have pointed out that the issue had been expressly waived. She is still dealing with the fallout. Perhaps stronger language could be used.

Judge Bybee noted that sometimes scrivener's errors are fixed without calling for a response. Sometimes parties simply want their ages stated correctly, or their names spelled correctly. A judge member suggested maybe something that required that a decision not be "substantively amended" without calling for a response. A

lawyer member stated that in another context, the subcommittee struggled with a similar question, and ultimately decided against using the modifier "substantive."

Professor Sachs then turned to the final bracketed language from the subcommittee draft, subsection (c)(4)(C) (agenda book page 128). The question is whether to include language that would add new language, not in the current rules, empowering a panel to prevent second or successive rehearing petitions; a concern is not preventing access to the full court. In response to a question from a judge member, he explained that rest of proposed section (c)(4) currently applies to panel rehearing, but that it makes sense for it to apply to both a panel and the full court. It doesn't impose a restriction on the full court.

A judge member stated that we should not add the new bracketed language, especially if we require a new petition in response to changes made by a panel. Judge Bybee noted that his court issues these orders, but he now questions whether it should.

A lawyer member stated that even if a panel is empowered to block further petitions for panel rehearing, it should not be empowered to block petitions for rehearing en banc.

A judge member urged keeping out the new language and suggested, more broadly, that subsection (c)(4) doesn't really fit the en banc court, urging that it remain limited to panel rehearing.

A lawyer member responded that no substantive change is intended, that applying subsection (c)(4) to the en banc court is the consequence of combing the two rules, and that it does fit the en banc court. Professor Sachs agreed that while it is a change, it is not a substantive change, and worries about negative inferences if the subsection is limited to panels. A judge member responded that the en banc court has inherent power to do whatever it wants. A lawyer member noted that the rule can make clear to litigants what a court may do.

A judge member drew attention to current Rule 35 (b)(3), which provides that length limitations apply to separately filed petitions for panel rehearing and rehearing en banc as if they were a single document, unless a local rule requires separate petitions. Does the subcommittee proposal change that?

Professor Sachs responded that it was intentional to require a single document subject to the word limits. In response to a question about what would happen if a party filed separate documents, Professor Sachs stated that the subcommittee did not envision that the use of the word "either" in subsection (a) would lead parties to file two separate documents. A lawyer member suggested using the word "both" rather than "either."

The concern remains whether to remove the ability of local rules to require separate documents. The Committee's recollection is that at this point only the Court of Appeals for the Fifth Circuit has such a local rule. We will check with the Fifth Circuit.

The subcommittee will continue its work in light of this discussion. A judge member stated that it was a great improvement.

C. IFP Standards—(19-AP-C)

The Reporter reported on the work of the IFP subcommittee (agenda book page 144). The subcommittee is considering a suggestion by Sai to regularize the criteria for granting IFP status and to revise the IFP form. The Civil Rules Committee has removed the item from its agenda. The forms used in the district courts are Administrative Office forms that can be revised by the Administrative Office. The form used in courts of appeals, however, is Form 4 of the Federal Rules of Appellate Procedure and adopted pursuant to the Rules Enabling Act.

There is reason to think that the there is considerable variation in the way the IFP statute is implemented across the district courts. In addition, the IFP statute, as amended by the Prison Litigation Reform Act, is a mess.

The subcommittee is looking at other forms. It also hopes to learn how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful.

Ms. Dwyer will look into this.

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

Mr. Byron presented the report of the subcommittee (agenda book page 155). The subcommittee is considering a suggestion to deal with premature notices of appeal. While the existing Rule 4(a)(2) usually works, there are situations in which there is a discernible problem, even if that problem is not large.

The solution offered by Professor Bryan Lammon, who submitted the suggestion, would allow any premature notice of appeal to become effective once a judgment or appealable order is filed. The subcommittee thinks that this proposed solution would cause more problems than it solves.

One category of cases is the most sympathetic one. These cases involve appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. A belated certification works, but what if the

case reaches final judgment without a Rule 54(b) certification? Sometimes, but not always, this results in a loss of appellate rights.

Another category of cases involves appeals from decisions regarding liability without a determination of the remedy. A third category involves appeals from reports and recommendation by magistrate judges prior to their adoption by a district judge. This final category often involves pro se litigants.

All the solutions that the subcommittee has considered so far are unsatisfactory. We do not want to create incentives for premature notices of appeal. Perhaps there is a way to increase awareness of the effect of a notice of appeal and whether it divests the district court of jurisdiction. The subcommittee will continue to look.

VI. Discussion of Matters Before Joint Subcommittees

A. Electronic Filing Deadlines (19-AP-E)

Judge Bybee reported that the joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information, but that data gathering has been delayed due to COVID-19 (agenda book page 168). He added that the Court of Appeals for the Ninth Circuit has had some discussion about whether the existing rule is unfair to young associates.

The Reporter noted that Judge Chagares continues to be involved in this project. Ms. Dwyer stated that lawyers in immigration matters want to keep the midnight deadline. It can be especially important when seeking a stay of removal.

B. Finality in Consolidated Cases after *Hall*

The Reporter reported on the work of the joint subcommittee dealing with finality in consolidated cases. The Supreme Court in *Hall v. Hall* decided that consolidated actions retain their separate identify for purposes of appeal so that if one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation. Because any fix would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), enabling district judges to release for appeal individual actions that were consolidated, the Reporter for the Civil Rules Committee is taking the lead. His report is in the agenda book (page 170).

A docket study by Emery Lee has identified thousands of consolidated cases, not including MDL cases. A sample of 400 of these consolidated cases revealed nine that produced a final judgment in one originally separate action while the rest of the consolidated proceeding remained pending. He projected that there may be hundreds of such instances every year.

No particular problem was found in the cases from this sample. Problems may exist but be hidden. Lawyers may miss the issue, and only discover it when it is too late. Lawyers spend time having to figure out whether a decision in consolidated proceedings finally resolves one of the originally separate actions. Courts may overlook the problem. The joint subcommittee intends to learn what, if anything, courts of appeals are doing to screen appeals for *Hall* problems. Perhaps Ms. Dwyer can help with that. The joint subcommittee may also reach out to the bar. For now, the joint subcommittee continues its evaluation.

The one thing that is said in favor of the rule in *Hall* is that it is clear. But while it is clear in simple cases, it is not so clear in cases where there has been a consolidated amended complaint or where additional parties have been added after consolidation. The Reporter asked members of the Committee to keep an eye out for problems.

VII. Discussion of Recent Suggestions

A. Titles in Official Capacity Actions (19-AP-G)

The Reporter stated that Sai has suggested 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 of information about how Circuit Clerks currently handle the naming of official capacity actions. Perhaps all or most courts do what the Court of Appeals for the Third Circuit does—replace an official's name with his title.

The information gathered, however, reveals that most litigants and courts use an individual's name (agenda book page 176). The Reporter noted that if parties are choosing to use individual names, despite the longstanding Rules permitting the use of official titles, maybe they have some reason to do so. Do the advantages of using official titles justify overriding the considered choice of litigants?

He added that the Civil Rules Committee removed the item from its agenda. The Department of Justice opposed the suggestion, not only because there was no problem needing fixing, but because the use of titles can be complicated. Some federal officers are appointed by the President with the advice and consent of the Senate, others are acting officers, still others perform the duty of an office as a matter of

delegation. Judge Dow was concerned that the proposed amendment could mislead litigants, particularly in the *Ex parte Young* context where a name is required.

Mr. Byron suggested removing the item from the agenda, and the Committee agreed.

B. Incorporate Civil Rule 11 (20-AP-B)

The Reporter stated that 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. The Reporter noted that there was consideration of this idea back in the 1980s, at a time when Civil Rule 11 had mandatory sanctions. He suggested removing this item from the Committee's agenda—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.

Mr. Byron recalled that the idea of explicitly adopting the Rule 11 standard in the Appellate Rules was considered in the 90s and the 00s. Rule 38 seems adequate to him, and he suggested removing the item from the agenda. There doesn't seem to be a problem.

The Committee agreed to remove this item from its agenda.

C. Pro Se Electronic Filing (20-AP-C)

The Reporter described a suggestion that electronic filing be made more widely available to pro se litigants, especially because of the pandemic (Agenda Book page 186). There have been a number of similar suggestions made to the Civil Rules Committee. Current Appellate Rule 25(a)(2)(B) establishes a presumption against electronic filing by pro se litigants, but a court order or local rule may permit it.

An academic member thought that it might become appropriate to flip the presumption and suggested revisiting the issue at the next meeting. Mr. Byron stated that this issue has come up several times. In the past, clerks—especially district court clerks—have voiced strong opposition, but maybe that has changed. Ms. Dwyer stated that Mr. Byron is correct, but that the Court of Appeals for the Ninth Circuit has allowed it. The big staffing issue in the pandemic has been sending people into the office to deal with the paper filings. There is a huge problem with incarcerated litigants. Arizona has set up kiosks in prisons; they are working well. The pushback has been from district clerks rather than circuit clerks. In the court of appeals, if someone abuses the system, we just bar them.

Judge Bates added that PDF filings sent by email are being made in the D.C. Circuit and that he is not aware of any problems. A judge member expressed concerns about repeat filers. A different judge member said that her court used to block such filings but now allows them and it hasn't been a problem. The item should not be removed from the agenda; the current presumption increases costs for pro se litigants. Perhaps we can wait to see what Civil does.

The Committee agreed to table the matter, revisiting it once we see what the Civil Rules Committee does.

D. IFP Forms (20-AP-D)

The Reporter stated that Sai has submitted a suggestion calling for quick revision to Form 4, focusing on the Form's demand for financial information about a spouse (Agenda Book page 193). This suggestion is directly related to Sai's broader suggestion regarding IFP standards (19-AP-C).

The Committee agreed to refer this suggestion to the IFP subcommittee.

E. Rule 3 (20-AP-E)

The Reporter stated that Sai has submitted a suggestion calling for a simplification of Rule 3 (Agenda Book page 205). The suggestion is really a comment on the proposed amendment to Rule 3 that has already been approved by the Standing Committee.

For that reason, it could be removed from the agenda and, if the pending amendment to Rule 3 proves problematic, a new suggestion could be entertained at that time. Alternatively, the suggestion could be referred to the Relation Forward subcommittee.

The Committee decided to refer the suggestion to the Relation Forward subcommittee.

VIII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter stated that Rule 25(d) was amended in 2019 to no longer require proof of service for documents served via the court's electronic docketing system. At the last meeting, it was reported that some courts of appeals were still requiring proof of service despite this rule change.

The Reporter added that research indicates that some courts of appeals continue to have local rules that require proof of service, but that at least one of these courts does not in practice require such proof of service, and is working on revisions to its local rules.

Mr. Byron stated that DOJ continues to have problems and urged that we reach out again. He added that the Fifth Circuit seems to be the prime offender.

IX. New Business

No member of the Committee presented any new business.

X. Adjournment

Judge Bybee thanked the participants, stating that it is wonderful to be part of this group that speaks up frankly and civilly to have an impact on important issues. He knows that it takes a lot of time out of the day, and that it can make for a very expensive day.

He announced that the next meeting would be held on April 7, 2020, in San Diego. That's optimistic, but the situation is fluid.

The Committee adjourned at approximately 4:00 p.m.

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TAB 4

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TAB 4A

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

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 7, 2020

I. Introduction

The Advisory Committee on Bankruptcy Rules met by videoconference on September 22, 2020. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee approved amendments to Official Forms 309A - I (Notice of Bankruptcy Case), using the authority granted to it by the Judicial Conference in 2016 to make "non-substantive, technical, or conforming" changes to the Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. The Advisory Committee seeks the Standing Committee's retroactive approval of these technical changes.

The Advisory Committee also voted to seek publication for comment of amendments to Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases); Rule 8003 (Appeal as of

Right—How Taken; Docketing the Appeal); and Official Form 417A (Notice of Appeal and Statement of Election).

Part II of this report presents those action items. They are organized as follows:

A. Items for Final Approval

- Official Forms 309A - I

B. Items for Publication

- Rule 3011;
- Rule 8003; and
- Official Form 417A.

Part III of this report presents information items. The first concerns a revision to the instructions for Official Form 410A (Proof of Claim, Attachment A). The second information item, regarding the bankruptcy emergency rule, is included in the agenda book with the memorandum from Professors Capra and Struve. The third information item provides an update on the restyling of the Bankruptcy Rules.

II. Action Items

A. Items for Final Approval

Action Item 1. The Advisory Committee recommends that the Standing Committee retroactively approve and provide notice to the Judicial Conference of the amendments to Official Forms 309A – I that are discussed below. Official Form 309A, as amended, is in Bankruptcy Appendix A. Retroactive approval of the same technical amendments is also sought for Official Forms 309B – I.

Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) has been changed from pacer.gov to pacer.uscourts.gov. Because the old PACER address is incorporated in several places on the 11 versions of the "Meeting of Creditors" forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the staff's concern that users will experience broken links in the year or so it would take to update the forms in the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses using the authority granted to it by the Judicial Conference to make technical changes to the Official Forms immediately, subject to later approval by the Standing Committee and notice to the Judicial Conference.

B. Items for Publication

The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2021. The rules and the Official Form in this group appear in Bankruptcy Appendix B.

Action Item 2. Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases). The proposed amendments, which were suggested by the Committee on Administration of the Bankruptcy System ("the Bankruptcy Committee"), redesignate the current text of the rule as paragraph (a), and add a new paragraph (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The Bankruptcy Committee's suggestion is consistent with its past efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds.

The Advisory Committee decided to include an additional sentence that permits a court to limit access to information in the unclaimed funds database with respect to a specific case for cause shown. The clerk of the court that hosts the unclaimed funds locator indicated that some courts do not post information on unclaimed funds that are subject to a sealing order. A second category of cases in which a limitation on access might be appropriate is that of very old cases (apparently there are some over 50 years old) that lack good information about the underlying claims.

Action Item 3. Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal). The proposed amendments revise Rule 8003(a) in several respects to conform to pending amendments to FRAP 3, which clarify that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order. The Advisory Committee has generally tried to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules so that procedures are consistent throughout two stages of a bankruptcy appeal.

Rule 8003(a)(3)(B) would be amended to avoid the misconception that it is necessary or appropriate to identify every order or decree of the bankruptcy court that the appellant may wish to challenge on appeal. It requires the attachment of "the judgment—or the appealable order or decree—from which the appeal is taken," and the phrase "or part thereof" is deleted.

Subdivision (a)(4) calls attention to the merger principle, and (a)(5) would clarify that a notice of appeal that identifies only the order disposing of a post-judgment motion is not limited to that order, but instead brings the final judgment before the appellate court for review.

Subdivision (a)(6) would be added to enable deliberate limitations of the notice of appeal. It allows an appellant to identify only part of a judgment or appealable order or decree by expressly stating that the notice of appeal is so limited. Without such an express statement, however, specific identifications would not limit the scope of the notice of appeal.

Finally, subdivision (a)(7) would be added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into the judgment, order, or decree from which the appeal is taken. In this situation, a court should act as if the notice had properly identified the judgment or appealable order or decree.

Action Item 4. Official Form 417A (Notice of Appeal and Statement of Election). Parts 2 and 3 of the form would be amended to conform to the wording of the proposed amendments to Rule 8003 that were just discussed. This change would parallel pending amendments to Appellate Form 1. If approved, parts 2 and 3 of Official Form 417A would read as follows:

Part 2: Identify the subject of this appeal

1. Describe the judgment~~,~~ ~~—~~or the appealable order~~,~~ or decree~~—~~from which the appeal is taken ~~appealed from~~: _____

2. State the date on which the judgment~~,~~ ~~—~~or the appealable order~~,~~ or decree~~—~~was entered:

_____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment~~,~~ ~~—~~or the appealable order~~,~~ or decree~~—~~from which the appeal is taken ~~appealed from~~ and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

* * * * *

The Advisory Committee chose not to propose dividing the notice of appeal form into two forms, as is proposed for Appellate Form 1. The purpose underlying the proposed FRAP and appellate form amendments is to eliminate confusion and possible traps in drafting a notice of appeal. In comparison to civil appeals, bankruptcy appeals from orders deemed to be final are common. The Advisory Committee was concerned that having separate notice-of-appeal forms for judgments and for appealable orders and decrees would increase, rather than decrease, confusion. Appellants might select the wrong form, and appellate courts would have to decide if there is any consequence of doing so. Because the Supreme Court has said that filing a notice of appeal is "generally speaking, a simple, nonsubstantive act," *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019), it seemed unlikely to the Advisory Committee that appeals would be dismissed for filing the wrong, but a similar, form. Rather than creating two forms when it may not matter which one is filed, the Advisory Committee proposes keeping one form for all appeals as of right.

III. Information Items

Information Item 1. Changes to the instructions for Official Form 410A (Proof of Claim, Attachment A). In response to a suggestion from Bankruptcy Judge Eric Frank of the E.D. Pa., the Advisory Committee agreed to insert a new paragraph in the instructions (Instructions

for Mortgage Proof of Claim Attachment) to Form 410A regarding the "Information required in Part 2: Total Debt Calculation." The concern was that the instructions are unclear when applied to mortgage debts that have been reduced to judgment through a foreclosure proceeding and merge into that judgment under the merger rule.

To deal with this ambiguity, the Advisory Committee approved inserting a new paragraph which reads as follows:

> If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the remaining amount of the judgment. Any post-judgment interest due and owing, fees and costs, and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.

The change did not require publication and was effective immediately.

Information Item 2. Bankruptcy Emergency Rule. See our report on the emergency rule attached to the joint report.

Information Item 3. Bankruptcy Rules Restyling. Parts I and II of the restyled Federal Rules of Bankruptcy Procedure have been published for comment. The Advisory Committee will be reviewing the comments at its spring meeting.

In its meetings in October 2020, the Restyling Subcommittee completed its initial review of the restyled Parts III and IV, and it has received the reactions of the style consultants to the Subcommittee's changes and comments. It expects to receive an initial draft of Part V by the end of the year. The style consultants have promised an initial draft of Part VI by February. The Restyling Subcommittee has meetings scheduled in late February to discuss Parts V and VI. The Subcommittee expects to present Parts III and IV to the Advisory Committee for its approval and submission to the Standing Committee for publication at the spring 2021 meeting. If Parts V and VI are ready by that time, they will also be presented.

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Bankruptcy Appendix A

Amendments made to Official Form 309A, which follows, were approved under the Advisory Committee's delegated authority to make technical and conforming changes to official forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. The same amendments were also made to Official Forms 309B – I.

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Information to identify the case:

Debtor 1 _____ (First Name / Middle Name / Last Name)

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

Debtor 2 (Spouse, if filing) _____ (First Name / Middle Name / Last Name)

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____ (State)

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

Case number: _____

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309A (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline **10/20**

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at https://pacer.uscourts.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____

For more information, see page 2 ▶

6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at https://pacer.uscourts.gov.		Hours open _____ Contact phone _____
7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Presumption of abuse If the presumption of abuse arises, you may have the right to file a motion to dismiss the case under 11 U.S.C. § 707(b). Debtors may rebut the presumption by showing special circumstances.	[The presumption of abuse does not arise.] [The presumption of abuse arises.] [Insufficient information has been filed to permit the clerk to determine whether the presumption of abuse arises. If more complete information is filed and shows that the presumption has arisen, the clerk will notify creditors.]	
9. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:** **You must file a complaint**: if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7), or if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). **You must file a motion** if you assert that the discharge should be denied under § 727(a)(8) or (9).	**Filing deadline:** _____
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline**: 30 days after the *conclusion* of the meeting of creditors
10. Proof of claim Please do not file a proof of claim unless you receive a notice to do so.	No property appears to be available to pay creditors. Therefore, please do not file a proof of claim now. If it later appears that assets are available to pay creditors, the clerk will send you another notice telling you that you may file a proof of claim and stating the deadline.	
11. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at https://pacer.uscourts.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 9.	

Committee Note

Official Forms 309A-I are amended to update the links to the PACER website in the forms.

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Bankruptcy Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND OFFICIAL FORMS[1]

For Publication for Public Comment

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

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Rule 3011. Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases

(a) The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.

(b) The clerk must provide searchable access on the court's website to the funds deposited under § 347(a). The court may, for cause, limit access to information in the data base for a specific case.

Committee Note

Rule 3011 is amended to require the clerk to provide searchable access (as by providing a link to the U.S. Bankruptcy Unclaimed Funds Locator) on the court's website to unclaimed funds deposited pursuant to § 347(a). The court may limit information in the data base with respect to a specific case for cause shown, including, for example, if such access risks disclosing the identity of claimants whose privacy should be protected, or if the information about the unclaimed funds is so old as to be unreliable.

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Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

(a) FILING THE NOTICE OF APPEAL.

* * * * *

(3) *Contents.* The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment~~,~~ —or the appealable order~~,~~ or decree~~,~~ —from which the appeal is taken ~~or the part of it, being appealed~~; and

(C) be accompanied by the prescribed fee.

(4) *Merger.* The notice of appeal encompasses all orders that, for purposes of appeal, merge into the identified judgment or

appealable order or decree. It is not necessary to identify those orders in the notice of appeal.

(5) *Final Judgment.* The notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Rule 7058, if the notice identifies:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 8002(b)(1).

(6) *Limited Appeal.* An appellant may identify only part of a judgment or appealable order or decree by expressly stating that the notice of appeal is so limited.

Without such an express statement, specific identifications do not limit the scope of the notice of appeal.

(7) *Impermissible Ground for Dismissal.* An appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into that judgment or appealable order or decree.

~~(4)~~ (8) *Additional Copies.* * * * * *

Committee Note

Subdivision (a) is amended to conform to recent amendments to Fed. R. App. P. 3(c), which clarified that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order or decree. These amendments reflect that a notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the appellate court. It therefore must state who is appealing,

what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus the issues on appeal.

Subdivision (a)(3)(B) is amended in an effort to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires the attachment of "the judgment—or the appealable order or decree—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to identify and attach only the judgment or the appealable order or decree from which the appeal as of right is taken.

Subdivision (a)(4) now calls attention to the merger principle. The general merger rule can be stated simply: an appeal from a final judgment or appealable order or decree permits review of all rulings that led up to the judgment, order, or decree. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law. The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' . . . whether or not there remains for adjudication a request for attorney's fees attributable to the case."

Sometimes a party who is aggrieved by a final judgment will make a motion in the bankruptcy court instead of immediately filing a notice of appeal. Rule 8002(b)(1) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that identifies only the order disposing of such a motion as limited to that order, rather

than bringing the final judgment before the appellate court for review. To reduce the unintended loss of appellate rights in this situation, subdivision (a)(5) is added. This amendment does not alter the requirement of Rule 8002(b)(3) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Subdivision (a)(6) is added to enable deliberate limitations of the notice of appeal. It allows an appellant to identify only part of a judgment or appealable order or decree by expressly stating that the notice of appeal is so limited. Without such an express statement, however, specific identifications do not limit the scope of the notice of appeal.

On occasion, a party may file a notice of appeal after a judgment or appealable order or decree but identify only a previously nonappealable order that merged into that judgment or appealable order or decree. To deal with this situation, subdivision (a)(7) is added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into the judgment, order, or decree from which the appeal is taken. In this situation, a court should act as if the notice had properly identified the judgment or appealable order or decree. In determining whether a notice of appeal was filed after the entry of judgment, Rule 8002(a)(2) and (b)(2) apply.

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[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

   For appeals in an adversary proceeding.

   ❑ Plaintiff
   ❑ Defendant
   ❑ Other (describe) _____

   For appeals in a bankruptcy case and not in an adversary proceeding.

   ❑ Debtor
   ❑ Creditor
   ❑ Trustee
   ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment—or the appealable order or decree—from which the appeal is taken:
   _____

2. State the date on which the judgment—or the appealable order or decree—was entered:
   _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment—or appealable order or decree—from which the appeal is taken and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

[**Note to inmate filers:** If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4170 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

Committee Note

Parts 2 and 3 of the form are amended to conform to wording in the simultaneously amended Rule 8003. The new wording is intended to remind appellants that appeals as of right from orders and decrees are limited to those that are "appealable"—that is, either deemed final or issued under § 1121(d). *See* 28 U.S.C. § 158(a)(2). It also seeks to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires identification of only "the judgment—or the appealable order or decree—from which the appeal is taken."

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TAB 4B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of Sept. 22, 2020
Held Remotely by Conference Call and Microsoft Teams

The following members attended the meeting:

Bankruptcy Judge Dennis Dow, Chair
Circuit Judge Thomas Ambro
Bankruptcy Judge Stuart M. Bernstein
Circuit Judge Bernice Bouie Donald
Bankruptcy Judge A. Benjamin Goldgar
Jeffery J. Hartley, Esq.
Bankruptcy Judge Melvin S. Hoffman
David A. Hubbert, Esq.
District Judge Marcia S. Krieger
Thomas Moers Mayer, Esq.
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Professor David A. Skeel
District Judge George Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
District Judge John D. Bates, incoming Chair of Standing Committee
Professor Daniel Coquillette, consultant to the Standing Committee
Professor Catherine Struve, reporter to the Standing Committee
Professor Daniel J. Capra, liaison to the CARES Act Subcommittee
District Judge Sara Darrow, Chair of the Committee on the Administration of the Bankruptcy System
Circuit Judge William J. Kayatta, Jr., liaison from the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Brittany Bunting, Administrative Office

Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Shelly Cox, Administrative Office
David A. Levine, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Daniel J. Isaacs-Smith, Administrative Office
Kevin Crenny, Rules Law Clerk
Molly T. Johnson, Federal Judicial Center
Nancy Whaley, National Association of Chapter 13 Trustees
Christopher N. Coyle, Bankruptcy Attorney, VandenBos & Chapman, LLP
Teri E. Johnson, Bankruptcy Attorney, Law Office of Teri E. Johnson, PLLC
John Hawkinson, freelance journalist

Discussion Agenda

1. Greetings and introductions

Judge Dennis Dow welcomed the group and thanked them for joining this meeting remotely. He introduced Judge Campbell, Judge Bates, Judge Darrow, Cathie Struve, Dan Coquillette, Dan Capra, Molly Johnson, and the new Rules Law Clerk Kevin Crenny, and the other observers. He noted that there were recent additions to the materials that have been added to the updated agenda. He thanked outgoing members of the Advisory Committee, Judge Stuart Bernstein, Judge A. Benjamin Goldgar, Jeffery J. Hartley, and Thomas M. Mayer. Judge Dow also asked Scott Myers to describe use of the software program used for the meeting.

2. Approval of minutes of remote meeting held on April 3, 2020.

Mr. Mayer and Ms. Elliott made suggestions for amendments to the minutes. The minutes were approved with the amendments by motion and vote.

3. Oral reports on meetings of other committees

(A) June 23, 2020 Standing Committee meeting

Judge Dow gave the report. Each Advisory Committee reported on its efforts in response to the directive of Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") , Pub. L. 116-136, which required that "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.)." Judge Dow reported on the review of the rules by the bankruptcy subcommittee and the plan to present a draft of a generally-applicable rule for emergencies at the next Advisory Committee meeting. The Standing Committee recommended that the various Advisory Committees coordinate in their consideration proposed emergency rules. Professor Dan Capra was appointed to assist in the coordination efforts.

The Advisory Committee presented proposed amendments to four rules that were published for comment last August. The amendments are to Rules 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination), 3007 (Objections to Claims), 7007.1 (Corporate Ownership Statement), and 9036 (Notice and Service Generally). The Standing Committee gave final approval to those amendments and transmitted them to the Judicial Conference. The Advisory Committee also submitted conforming amendments to five official forms in response to changes made to the Bankruptcy Code in the CARES Act that were approved without publication under the Advisory Committee's delegated authority to make technical and conforming changes to official forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee retroactively approved (and undertook to provide notice to the Judicial Conference concerning) the amendments to the five official forms.

The Advisory Committee also presented for publication (1) restyled Parts I and II of the Bankruptcy Rules that are proposed as part of the rules restyling project; and (2) amendments to thirteen rules and ten official forms that were previously issued on an interim basis in response to the Small Business Reorganization Act of 2019 ("SBRA"); as well as one additional form, Official Form 122B, proposed for amendment in response to SBRA. The Standing Committee voted to publish those rules and amendments. The Standing Committee also approved for publication amendments to Rule 3002(c)(6) (Time for Filing Proof of Claim), Rule 5005 (Filing and Transmittal of Papers), Rule 7004 (Process; Service of Summons, Complaint), Rule 8023 (Voluntary Dismissal).

Judge Dow reported to the Standing Committee on the approval of a modification to Interim Rule 1020 for one year only to reflect the changes implemented by the CARES Act that allow additional small business debtors to proceed under subchapter V of chapter 11. The Standing Committee approved that modification by email vote concluded April 11, and the Executive Committee of the Judicial Conference approved the amendment on April 14 and authorized its distribution. The interim rule was distributed to all chief judges of the district and bankruptcy courts on April 20, 2020.

Finally, Judge Dow reported to the Standing Committee on the adoption of Director's Forms relating to a discharge for debtors who proceed under subchapter V of chapter 11.

(B) April 4, 2020 and October 20, 2020 Meetings of the Advisory Committee on Appellate Rules

Judge Donald asked Bridget Healey to make the report. The Appellate Committee gave final approval to Federal Rule of Appellate Procedure 3, and conforming amendments to FRAP 6 and to Forms 1 and 2. The Appellate Committee had been looking at an amendment to Rule 42 but decided not to go forward with it at the meeting. At the upcoming meeting the Committee will revisit Rule 42 and consider some issues relating to *in forma pauperis* cases.

(C) April 1, 2020 and October 16, 2020 Meetings of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report. This is his last report as liaison to the Civil Rules Committee.

The spring Civil Rules Committee was conducted telephonically because of the Covid-19 health emergency.

A joint subcommittee from the Appellate, Civil, and Bankruptcy Rules Committees is considering whether some amendment, probably to Fed. R. Civ. P. 42(a) or 54(b), would be appropriate in the wake of the Supreme Court's *Hall v. Hall* decision. At the subcommittee's request, the FJC studied whether as a practical matter *Hall* poses enough of a problem to justify an amendment. The FJC completed its study and found no evidence of any practical problems. The subcommittee therefore has decided not to proceed at this time.

Another joint subcommittee continues to study whether the e-filing deadline should be moved from midnight to the time when the clerk's offices closes.

After considerable discussion, the Committee gave final approval to the proposed amendments to Rule 7.1 published for comment last year. Among other changes, Rule 7.1(a)(1) would be amended to make the ownership disclosure requirement for nongovernmental corporate parties applicable to a nongovernmental corporation that seeks to intervene as a party. (A comparable amendment to Bankruptcy Rule 7007.1(a) was published for comment at the same time.) The sticking points in the Committee's discussion were proposed changes to Rules 7.1(a)(2) and (b), which are not relevant to bankruptcy, and the change to Rule 7.1(a)(1), which was non-controversial. The Committee will vote by email on a revised Committee Note that conforms to the proposed amended Rule.

The Committee will study a proposed amendment to Rule 17(d). Rule 17(d) says that a public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added. The proposed

amendment would make the rule mandatory rather than permissive ("must" be designated by official title rather than "may"). The idea is to avoid the need for substitution of the official's successor by name when the official leaves office. The Appellate Rules Committee has a similar proposal before it.

The Committee decided not to address proposals relating to (a) judicial involvement in settlement conferences, (b) sanctions for failing to participate in settlement conferences in good faith, and (c) so-called procedural safeguards in local ADR rules. The item was removed from the agenda.

The Committee decided not to consider proposed amendments to Rules 7(b)(2) and 10 addressing the forms of captions in pleadings and motions. The item was removed from the agenda.

The next Civil Rules Committee is to be held virtually on October 16.

Judge Bates thanked Judge Goldgar for his insights in the work of the committee during his service as liaison.

(D) June 11, 2020 meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")

Judge Darrow provided the report.

She thanked Judge Bernstein for his contributions to the Bankruptcy Committee.

The Bankruptcy Committee met by videoconference on June 11, 2020. Before that meeting, the Committee took action to address the impact of the COVID-19 pandemic on the bankruptcy system. Following the enactment in March 2020 of the CARES Act, and based on the possibility at the time that Congress might quickly move forward with further legislation in response to COVID-19, the Bankruptcy Committee recommended a legislative proposal that was included in the judiciary's package of legislative proposals transmitted to Congress in April 2020.

That proposal would authorize bankruptcy courts to extend statutory deadlines and toll statutory time periods under title 11 and chapter 6 of title 28 of the United States Code during the COVID-19 national emergency, upon a finding that the emergency conditions materially affect the functioning of a particular bankruptcy court of the United States. The authorization would expire 30 days after the date that the COVID-19 national emergency declaration terminates, or upon a finding that emergency conditions no longer materially affect the functioning of the particular bankruptcy court, whichever is earlier. Unfortunately, since the legislative proposal

was transmitted to Congress in April, Congress has taken no action on it and it has not been included in any of the draft COVID-19 stimulus legislation introduced to date.

At its June meeting, the Bankruptcy Committee considered whether to recommend a permanent grant of authority during an ongoing emergency, which could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. The Committee deferred making any recommendation until the COVID-19 emergency has subsided or ended and courts have resumed normal operations, and to evaluate the potential impact of any Bankruptcy Rule changes under consideration by the Bankruptcy Rules Committee that would impact or overlap with the proposal. As drafted, the permanent grant of authority under consideration would not extend to the Bankruptcy Rules.

Subcommittee Reports and Other Action Items

4. Report by Appeals, Privacy, and Public Access Subcommittee

(A) Report on possible amendments to Bankruptcy Rule 8003 to conform to proposed amendments to FRAP 3(c)

Judge Ambro introduced the issue. Last year the Advisory Committee on Appellate Rules published proposed amendments to FRAP 3(c) (Contents of the Notice of Appeal), which is intended to resolve the different practices in different courts of appeals with respect to whether a notice of appeal that mentions a specific order could inadvertently result in the appellant losing the right to appeal other orders that merge into the judgment. The Standing Committee has given its final approval to the amendments to FRAP 3, and the Subcommittee now recommends conforming changes to the equivalent Bankruptcy Rule, Rule 8003.

Professor Gibson provided the report. There are many bankruptcy cases that apply the merger rule, the rule that interlocutory orders merge into a final judgment and an appeal can be had from the interlocutory orders by filing a notice of appeal from entry of the final judgment. Adopting the amendments to FRAP 3(c) for Bankruptcy Rule 8003 would therefore not introduce any new doctrine or difficulty for bankruptcy appeals that does not already exist. Instead, the confirming amendment is intended to prevent appellants from unintentionally narrowing the scope of their appeals.

Moreover, the Advisory Committee has tried to keep Part VIII rules parallel to the appellate rules so that procedures are consistent throughout the stages of a bankruptcy appeal. A failure to make conforming changes to Rule 8003 might suggest that the case law the amendments reject for appeals to courts of appeals is still applicable under Rule 8003.

Judge Campbell asked if "decree" should be mentioned in line 11 on p. 204, as it is in line 7. Professor Gibson agreed.

Judge Goldgar noted that "judgment" is defined in Rule 9001(7) as "any appealable order," so it seems redundant to use the additional terms. Professor Gibson noted that the Civil Rules have the same definition, but not everyone understands that judgment means something other than what is entered at the end of a case, and we are trying to conform to the Civil Rule. Professor Struve agreed that use of all terms – judgment, order and decree -- makes it clear that they are all included, and the Civil Rules have always broken out judgments and orders. Judge Hoffman noted that there are final decrees in bankruptcy cases, so reference to decrees is also appropriate.

Judge Goldgar pointed out that the references to "decree" should be added in several places on p. 205.

The Advisory Committee approved the Rule 8003 and its committee note as amended and directed that they be submitted to the Standing Committee for publication.

(B) Report on Suggestion 20-BK-G from the Bankruptcy Committee to amend Rule 3011

Judge Ambro introduced the topic. Professor Bartell provided the report. The Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) submitted a suggestion requesting that the Advisory Committee recommend amendments to Federal Rule of Bankruptcy 3011 for the purpose of requiring the clerk to publish notice of funds paid into court pursuant to § 347(a) of the Bankruptcy Code. The suggestion is consistent with past efforts of the Bankruptcy Committee to reduce the balance of unclaimed funds and to limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds.

The proposed amendment to Rule 3011 would designate the current language of the Rule as paragraph (a) and would add a new paragraph (b) to require the clerk to provide searchable access on the court's website to data about funds deposited pursuant to § 347(a). The Subcommittee made two changes from the suggested language. It changed the requirement that the clerk "publish" information about unclaimed funds -- which the Subcommittee thought might suggest that the clerk had to list names – to a requirement that the clerk provide access to the information. Second, the Subcommittee eliminated the phrase "unless the court order otherwise" at the beginning of the new section.

Subsequent to the meeting, Bridget Healy and Scott Myers discussed the recommendation with Dana Elliot, one of the staff attorneys supporting the Bankruptcy Committee, and David Levine, Chief of the Judicial Policy Division. They provided some background on why the Bankruptcy Committee wanted the "unless the court orders otherwise" clause. It was suggested by the clerk of the court that hosts the unclaimed funds locator that some courts do not post information on unclaimed funds that are subject to a sealing order for some reason. An example given was claimants with unclaimed funds in a church diocese case. (The Subcommittee seemed to have anticipated that concern in part and attempted to address it by eliminating the word "publish" from the language suggested by the Bankruptcy Committee.) A second category are unclaimed funds from very old cases (apparently there are some over 50 years old), and lack of good information about the underlying claims. There may be other reasons to give a court discretion in the rule as well, but those were the examples that prompted the Bankruptcy Committee to include court discretion language in the suggestion.

Judge Goldgar expressed concern about the language "unless the court orders otherwise" as contrary to circuit guidance which requires a case by case determination. Ken Gardner said that particular unclaimed funds could be sealed in the unclaimed funds register, and that doing so is different from requiring the clerk to make the locator searchable. Judge Dow suggested adding language to (b) as follows: "The court may limit access to information in the database with respect to a specific case for cause shown." The proposed addition was accepted by Judge Darrow on behalf of the Bankruptcy Committee.

The Advisory Committee approved the proposed amendments to Rule 3011 and the committee note with the modification suggested by Judge Dow and directed that they be submitted to the Standing Committee for publication.

5. Report by the Business Subcommittee

(A) Consider Suggestion 20-BK-D from Thomas Moers Mayer regarding Rule 7007.1

Professor Bartell provided the report. Thomas Moers Mayer made a suggestion that Rule 9014(c) be modified to include Rule 7007.1 in the list of bankruptcy rules from Part VII that are applicable to contested matters.

Rule 7007.1 requires disclosure by any corporation that is party to an adversary proceeding (other than the debtor or a governmental unit) of any corporation that owns, directly or indirectly, 10% or more of any class of the corporation's equity interests. The Rule was derived from Fed. R. App. P. 26.1 and is similar to Fed. R. Civ. P. 7.1. The purpose of the disclosure required by the Rule is to assist the judge in making an informed decision on disqualification.

Rule 7007.1 was drafted at the direction of the Standing Committee acting at the request of the Committee on Codes of Conduct. It was approved by the Advisory Committee in 2001. At the time, the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements, after lengthy discussions, declined to make it applicable to contested matters because of the complexity and speed with which contested matters, such as motions for relief from the stay, are presented to the court.

The Subcommittee agreed that including Rule 7007.1 in the list of Part VII rules applicable to all contested matters in Rule 9014(c) may not be advisable, although the Subcommittee did not find all the reasons itemized by the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements particularly persuasive. For example, the Subcommittee did not see any logic in distinguishing contested matters based on whether they sought relief from the stay or something else.

However, the Subcommittee believes that in certain contested matters disclosure of the type described in Rule 7007.1 is highly desirable to allow the bankruptcy judge to make an informed decision on disqualification.

The Subcommittee did not come to any conclusion on how to identify which contested matters should trigger compliance with Rule 7007.1. Possibilities that were discussed included matters involving a significant amount in controversy, or any contested matter if the court so orders, or all contested matters in non-consumer cases, or all contested matters in chapter 11 and chapter 15 cases only.

The Subcommittee decided to solicit the views of the Advisory Committee on whether disclosure should be required in all or some contested matters, and if in only some contested matters, which ones.

Judge Goldgar expressed the view that requiring disclosure in chapter 13 cases would be impossible. Mr. Mayer said that in business cases it seems strange to require disclosure in adversary proceedings, which are relatively rare, and not in contested matters, which are plentiful. Goldgar suggested limiting disclosure to chapter 11 and 15 cases. Mr. Mayer suggested adding chapter 9. Mr. Mayer then noted that requiring disclosure by chapter is not a perfect alignment with “big” cases (there are “big” chapter 7 cases). He would be fine with a rule requiring disclosure based on debt limit or size of the case. He understands it can’t apply to all cases. He thought that perhaps this should be solved by local rulemaking rather than the federal rules.

Judge Bernstein noted that bankruptcy judges have the authority under Rule 9014(c) to direct that Rule 7007.1 be applicable in a particular contested matter and thought we should just rely on the discretion of the judge to get the information necessary for disqualification when necessary.

The Advisory Committee decided to take no further action on the suggestion.

6. Report by the Consumer Subcommittee

(A) Consideration of Suggestion 20-BK-E from CACM for rule amendment establishing minimum procedures for electronic signatures of debtors and others

Professor Gibson presented the report. Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management ("CACM"), submitted a suggestion based on a question her committee received from Bankruptcy Judge Vincent Zurzolo (C.D. Cal.). Judge Zurzolo inquired whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig noted that in 2013 CACM "requested that the Rules Committee explore creating a national federal rule regarding electronic signatures and the retention of paper documents containing original signatures to replace the model local rules." That effort was eventually abandoned, however, largely because of opposition from the Department of Justice. Among the reasons for the DOJ's opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult.

Judge Fleissig's letter was addressed to Judge David Campbell, chair of the Standing Committee, and he referred it to the Advisory Committee. In doing so, he noted that, although the suggestion relates specifically to bankruptcy, it is an issue that is relevant to the work of the other rules advisory committees. He requested that the Advisory Committee take the lead in pursuing the issues.

The use of electronic signatures by debtors and others without a CM/ECF account is a matter that the Advisory Committee spent several years considering (2012-2014), only to abandon the proposed rule after reviewing the comments received following publication. Based on the Committee's earlier experience, the Subcommittee believes it would be desirable to get some input regarding the DOJ's position as early as possible. While it doubts that the Department will take any definitive position before seeing what is proposed, it does not want to get too far down the road without knowing whether the DOJ remains opposed, given currently

available technology, to any use of electronic signatures (without the retention of wet signatures) by debtors and others without CM/ECF filing privileges.

If this project goes forward, the Subcommittee will seek the involvement of someone with knowledge of current e-signature products, their security safeguards, and the feasibility of their use with bankruptcy software and the CM/ECF filing system. It will explore whether someone at the AO or FJC could provide this expertise. It will also reach out to relevant bankruptcy organizations for input on the desirability of allowing e-signatures by non-registered users.

David Hubbert recommended that this project go forward, and suggested that he could recommend that the Deputy Attorney General conduct a survey on the topic. The DOJ would not look at a specific product, but just the general topic of electronic signatures and fraud. Molly Johnson could also survey courts on their experience during the pandemic with electronic signatures.

The Advisory Committee authorized pursuit of the CACM suggestion and will consider which subcommittee will take the lead.

(B) Consideration of Suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1

Judge Goldgar introduced the topic and described the problem in chapter 13 of debtors who complete their chapter 13 plans only to find out that their mortgage lenders assert that they have not made all required payments on their home mortgages. Professor Gibson provided the report. As was discussed at the last three Advisory Committee meetings, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).

Judge Goldgar appointed a working group to review the suggestions and make a recommendation to the Subcommittee. The Subcommittee has carefully considered the Suggestions and the drafts of proposed amendments submitted by the two groups. At its meeting on July 21, it approved a draft to present to the Advisory Committee for discussion at the fall meeting. After obtaining that feedback, the Subcommittee hopes to prepare a final draft of the proposed amendments, along with a committee note and implementing forms, for consideration for publication at the spring 2021 Advisory Committee meeting.

Professor Gibson described the proposed changes to Rule 3002.1. The title to the Rule would change to refer to Chapter 13. Subdivision (a) would be modified only to make it applicable to reverse mortgages that do not have regular payments made in installments.

Subdivision (b) is intended to provide the debtor and the trustee notice of any changes in the home mortgage payment amount during the course of a chapter 13 case so that the debtor can remain current on the mortgage. The two main changes to this subdivision are the addition of provisions about the effect of late payment change notices and detailed provisions about notice of payment changes for home equity lines of credit (HELOCs). Proposed subdivision (b)(2) would provide that late notices of a payment increase would not go into effect until the required notice period (at least 21 days) expires. There would be no delay, however, in the effective date of an untimely notice of a payment decrease. Members of the Subcommittee debated whether the Rules Enabling Act, 28 U.S.C. § 2075, allows a rule to impose a delay in a payment increase. Some thought that it is permissible for the rule to impose such a consequence for failure to comply with a procedural requirement, while others thought that such a provision improperly modifies a substantive right. The Subcommittee decided that the best course would be to publish the rule with this provision in it and see whether it draws any concerns.

Judge Hoffman expressed concerns with the penalty provision. He suggested instead eliminating any penalties imposed on the debtor for failure to meet the new payment requirements if the notice of a payment increase was untimely. Others pointed out that such a provision also altered the contract provisions and would be equally questionable under the Rules Enabling Act, if the existing provision is. Ms. Miller said that this suggestion came through the mortgage liaison committee between the mortgage servicers and chapter 13 trustees. She said this penalty provision is consistent with caselaw since about 2004.

Professor Gibson described the new subdivision (b)(3) which would replace language added to the rule in 2018 and would provide that a HELOC claimant would only file annual payment change notices—which would include a reconciliation figure (net over- or underpayment for the past year)—unless the payment change in a single month was for more than $10. This provision, too, would ensure at least 21 days' notice before a payment change took effect.

There were mostly stylistic changes to Subdivision (c) and (d), although subdivision (d) has been moved to subdivision (j). Subdivisions (e)and (f) implement a new mid-case assessment of the status of the mortgage. The Suggestions proposed such an addition so that a debtor would be informed of any deficiencies in payment while there is still time in the chapter 13 case to become current before the case is closed. As drafted, the procedure would begin with the trustee providing notice of the status of payments to cure any prepetition arrearage. In a conduit district—one in which the trustee rather than the debtor makes the postpetition mortgage

payments—the trustee would also state the amount and due date of the next contractual payment. The mortgage lender would then have to respond (subdivision (f)) by stating any mortgage or arrearage amounts on which it contends the debtor is not current. The debtor or trustee could object to the response. If no objection was made, the amounts stated in the lender's response would be accepted as correct. New official forms would be created for both the notice and the response.

Judge Hoffman noted that on line 116, the reference to "trustee" should be to "claim holder." Questions were raised about the use of the term "contractual payment" in line 112 and whether it should say "postpetition payment." The general consensus was that the context made the term clear.

Regarding (f)(1), Judge Hoffman thought the description of the response does not correspond to the scope of the objection. Professor Gibson and Ms. Miller expressed the view that the language covers everything to which the claim holder could object.

Judge Goldgar questioned use of the phrase "prepetition arrearage calculation." Professor Gibson and Ms. Miller will consider a better description of the concept.

Judge Hoffman questioned the word "correct" in line 132. The Advisory Committee supported changing it to "binding."

Subdivisions (g)–(i) provide for an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure would be changed, however, from a notice to a motion procedure. The trustee would begin the procedure by filing a motion to determine the status of the mortgage. An official form would be created for this purpose. The claim holder would have to respond, again using an official form to provide the required information. Either the trustee or the debtor could object to the response. This process would end with a court order detailing the status of the mortgage. If the claim holder failed to respond to the trustee's motion, the order would state that the debtor is current on the mortgage. If there was a response and no objection to it was made, the order would accept as accurate the amounts stated in the response. If there was both a response and an objection, the court would determine the status of the mortgage. Subdivision (i)(4) specifies the contents of the order.

Subdivision (k) is the sanctions provision, and has only stylistic changes. The Subcommittee decided that it was not necessary to provide for an order compelling the servicer to respond and allowing contempt if it does not. The consequences of failure to respond were deemed sufficient.

Ms. Miller commented that the amended rule is going to be a great benefit to the parties and the court. Judge Hoffman commented that the language of line 140— "whether any arrearage has been cured" — is inconsistent with the existing language —"whether any default has been cured" — and with statutory language. He also expressed the view that the language made no sense because arrearages are not cured. Deb Miller suggested "whether any prepetition default has been cured." That was accepted by the Advisory Committee, and Professor Gibson will search the draft to be sure that it is used consistently throughout. Judge Hoffman commented on lines 210-212 and suggested adding "and other escrow amounts" after "taxes." That suggestion was accepted.

The Advisory Committee supported the continuing work on the draft rule and associated forms.

7. Report by the Forms Subcommittee

(A) Consideration of Suggestion 20-BK-C from Judge Eric Frank for an amendment to Official Form 410A or its instructions

Professor Bartell provided the report. Bankruptcy Judge Eric Frank of the E.D. Penn. submitted a suggestion with respect to the instructions (Instructions for Mortgage Proof of Claim Attachment) to Form 410A (Proof of Claim, Attachment A) regarding the "Information required in Part 2: Total Debt Calculation." He notes that the instructions are unclear when applied to mortgage debts that have been reduced to judgment through a foreclosure proceeding and merge into that judgment under the merger rule.

Form 410A is the successor to Attachment A to former Official Form 10, an attachment that was adopted in 2011 to implement Rule 3001(c)(2) added the same year. Rule 3001(c)(2) requires that certain supporting information be provided by a mortgage claimant in an individual debtor case. The form requires an itemization of prepetition interest, fees, expenses and charges included in the claim and a statement of the amount necessary to cure any default. It also requires the claimant to provide a loan history showing when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. The form is intended to provide specificity with respect to the components of a claim secured by an individual debtor's principal residence and, if the debtor was in default prior to the bankruptcy filing, the amount necessary to cure that prepetition default.

The problem with Rule 3001(c)(2) and Form 410A is that they assume that the mortgage debt being described by the claimant is represented by a contractual obligation of the debtor — a note and a mortgage. Any such debt will therefore have a principal amount, will accrue interest from its inception until it is paid in full, and may carry with it contractual obligations to pay fees

and costs and escrow amounts for taxes and insurance. Once the note and mortgage have merged into a judgment, the amounts owing by the debtor will be determined not by the note and mortgage but by the judgment itself.

Attachment A to Form 410A requires the creditor to provide a Total Debt Calculation by adding the specified principal balance, interest due, fees, costs due, and escrow deficiency for funds advanced, and subtracting total funds on hand, to find the total debt as of the filing date. If a secured claim has merged into a foreclosure judgment, the term "principal balance on the debt" is misleading; it could be read to be either the amount of the judgment or alternatively the principal balance on the debt if no judgment had been obtained. In addition, any postjudgment interest, fees, costs and escrow deficiencies specified in the mortgage will be continuing obligations of the debtor only insofar as the judgment recognizes those obligations or state law otherwise provides that they survive the merger of the mortgage into the judgment.

The Subcommittee recommended inserting a single new paragraph in the instructions to Form 410A with respect to the information to be included in Part 2 before the paragraph beginning with: "Also disclose the *Total amount of funds on hand.*" This new paragraph would read as follows:

> If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the amount of the judgment. Any post-judgment interest due and owing, fees and costs and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.

Judge Goldgar suggested inserting a comma after the word "costs." Judge Campbell questioned whether some of the judgment might have been paid prepetition so that "amount of the judgment" was overbroad. Ms. Miller suggested dealing with that concern by inserting the word "remaining" before "amount of the judgment." The Advisory Committee approved that change, and approved the proposed amendment as modified to the instructions to Form 410A. The change does not require publication and will be immediately implemented by the AO.

(B) Proposed conforming amendments to Official Form 417A (Notice of Appeal and Statement of Election)

Professor Gibson provided the report. The Subcommittee was asked to recommend to the Advisory Committee whether to propose amendments to Official Form 417A that conform to amendments to Appellate Form 1 (Notice of Appeal) that have been proposed by the Advisory Committee on Appellate Rules and published for public comment.

This Subcommittee decided to recommend using the language of the proposed amendment to Rule 8003(a)(3)(B) but not creating two separate notice-of-appeal forms. The Subcommittee thought that using separate forms would potentially create confusion.

Professor Gibson noted that the comma after the word "order" should be deleted in Parts 2 and 3 of the proposed form.

The Advisory Committee approved the proposed amendments to Form 417A and committee note and directed they be submitted to the Standing Committee for publication with the goal of making them effective when the amendments to Rule 8003 go into effect.

(C) Recommendation of No Action Regarding Suggestion 20-BK-F (Valdislav Kachka) to Revise "Explanation of Discharge in a Chapter 7 Case"

Professor Bartell provided the report. Vladislav Kachka, an attorney in Pennsylvania, suggested changes to the language included in the section labelled "Explanation of Bankruptcy Discharge in a Chapter 7 Case" in Official Form 318 (Discharge of Debtor). The concern of Mr. Kachka is that under Pennsylvania law a civil judgment creates an automatic lien against real property that a defendant owns at the time of the judgment and property acquired by the defendant thereafter. If the defendant obtains a discharge of the judgment in bankruptcy after the judgment is entered, the lien no longer attaches to postpetition property of the defendant. However, an abstract of judgment entered against the defendant continues to appear on a title report and many underwriters will not certify that the property has clear title when the defendant attempts to obtain financing for a post-discharge property purchase because the underwriters fail to understand that the judgment lien does not attach to that property.

Mr. Kachka suggested that if the Explanation of Bankruptcy Discharge in a Chapter 7 Case includes language specifically stating that a discharged judgment does not create a lien on property acquired after the discharge, it will provide debtors something they can show the underwriters without having to embark on a detailed explanation of § 524 of the Bankruptcy Code.

The Subcommittee considered the substance of Mr. Kachka's suggestion, and language that might be added to Form 318 (and the other forms used for discharge under other chapters of the Code), and ultimately concluded not to recommend any change to the forms. There were two reasons for the Subcommittee's decision.

First, the Subcommittee does not think that an amendment to the language in the Explanation section of the discharge orders would alleviate the problem Mr. Kachka seeks to address. The Subcommittee believes that a title company or other party involved in a real estate

transaction would be unlikely to rely on language in the Explanation section of the discharge order, and would still demand a "comfort order" signed by the bankruptcy judge explicitly stating that the post-petition property is not subject to the lien before insuring title to that property.

Second, although Mr. Kachka is absolutely correct that a post-petition lien cannot attach to property obtained by a debtor after bankruptcy to secure a debt that has been discharged, putting language into the forms to that effect could open the door to further requests for specific language describing exactly what is and is not discharged and the effect of the discharge. The Subcommittee was not willing to start down the road of providing legal advice about the meaning and scope of § 524 of the Code, even when there is no dispute about its accuracy, especially where any benefit in doing so would be questionable.

For those reasons, the Subcommittee recommended no action be taken on this suggestion. The Advisory Committee concurred with the Subcommittee's recommendation.

8. Report by the Restyling Subcommittee

Judge Marcia Krieger, chair of the Subcommittee, and Professor Bartell provided the report. Judge Krieger began with an expression of gratitude to the members of the Subcommittee for their work. Professor Bartell thanked Judge Campbell for his leadership in this area, and those staff members at the Administrative Office who assisted with the programs to facilitate the process. She also thanked the style consultants for their contributions.

Professor Bartell provided a status report. The Subcommittee has almost completed its review of Part III of the Rules, after which its comments will be forwarded to the style consultants for their reaction. The Subcommittee will then begin its review of Part IV of the rules. It has two more meetings scheduled for mid-October. The Subcommittee expects to present both Parts to the Advisory Committee for its approval and submission to the Standing Committee for publication at the spring meeting.

9. Emergency Rules Subcommittee

Professor Gibson provided the report. The Subcommittee presented to the Advisory Committee a discussion draft of a proposed new Rule 9038 to address operation of the bankruptcy courts during an emergency. She explained that the Subcommittee, under the leadership of Judge Hoffman, had met five times since the middle of April and had concluded that an emergency rule that that would allow time periods in the Bankruptcy Rules to be extended when there is a declared emergency that adversely affects the operation of the bankruptcy courts would be desirable.

Professor Gibson drafted such a rule, trying to the extent possible to adopt a uniform approach to that pursued by the other advisory committees. Professor Capra has served as liaison between the committees to promote such uniformity. Although that uniformity has not yet been completely achieved, the current drafts of the bankruptcy, civil, and criminal rules have many elements in common. She then highlighted the issues in the proposed rule, and the extent to which they diverged from the approach of the other advisory committees.

The rule addresses what is an emergency (called a "rules emergency" in the draft). There are two requirements for a rules emergency: extraordinary circumstances and a resulting impairment of the court's ability to function in accordance with the rules. The extraordinary circumstances must relate to public health or safety or affect access to the court. Subsequently the criminal rules subcommittee decided to make the definition more restrictive, adding the requirement that "no viable alternative measures would eliminate such substantial impairment within a reasonable time." The current draft of the civil rule does not include the no-viable-alternative requirement. (The appellate rules have no comparable provision.)

Professor Capra said that probably no civil rule will be adopted for emergency situations because the Civil Advisory Committee thinks the existing rules are sufficiently flexible. Judge Goldgar said that he would change "viable" to "feasible." Professor Gibson thought that (a)(2) was not needed because there would be no substantial impairment if there was a feasible alternative. Judge Wu agreed and would delete (a)(2). Judge Goldgar thought that (a)(2) required an inappropriate decision by a judge. Judge Krieger wondered if we really have any need for an emergency rule. Mr. Mayer pointed out that the existing bankruptcy rules limit the flexibility of bankruptcy judges to modify deadlines and otherwise adopt local rules to deal with the emergency so an emergency rule is needed. The Advisory Committee agreed to drop (a)(2).

Judge Hoffman thought (a)(1) should not be limited to "impairing the ability of a court to perform its functions" but should include the parties. Professor Capra said that the only reason parties cannot perform their functions is because courts cannot function. Mr. Mayer supported the rule as drafted. Judge Campbell said that criminal defense attorneys currently can't get access to their clients because of lockdown and therefore cannot prepare for trial. In civil cases, parties cannot complete depositions or inspect properties. There are emergency situations in which the courts are not affected but the parties are prevented from doing what they need to do. Professor Capra thinks the language would operate in those situations because the court would be unable to perform its functions if the parties could not.

The proposed rule identifies who may declare an emergency. The various subcommittees are not in agreement about who should be authorized to declare a rules emergency. The civil and criminal drafts give this authority only to the Judicial Conference of the United States. The

appellate draft also authorizes the chief judge of a circuit to do so for the courts in that circuit. The Subcommittee thought it important to also provide authority at the bankruptcy court level because of the specialized nature of the Bankruptcy Rules and the belief that emergency action could be taken more swiftly and with greater knowledge of local conditions at that level.

Judge Goldgar asked why the chief district judge is omitted. Professor Gibson noted that the chief district judge is omitted in the civil and criminal rules. Professor Coquillette said that the executive committee of the Judicial Conference operates very quickly and can get the information it needs from individual districts. Judge Krieger said that after 9-11 the S.D.N.Y. routed its cases to the E.D.N.Y. and she supports including the chief bankruptcy judge in the district. Judge Wu asked about review of a determination by a bankruptcy judge; Professor Capra suggested that we could include language that allowed the Judicial Conference to overrule the determination. Judge Bates did not think the situation posed by Judge Krieger is unique to bankruptcy — district courts had the same problem for civil and criminal matters. He expressed his concern that allowing the bankruptcy judge to make the determination may be a move too far for Congress, which used a presidential declaration as the trigger during the current pandemic. Judge Goldgar said that the chief district judge in his district said she had no authority to give directions to the bankruptcy court during the current pandemic. Professor Capra said that this is a distinct issue from who makes the declaration. Mr. Hartley noted that someone needs to be able to act unilaterally quickly until someone higher up makes a decision. Judge Krieger said that she has encountered problems that no one else knows about — HVAC problems, or plumbing problems, for example—and that no one higher up is going to know what has happened in that court. Professor Capra said that this rule is not about the burst pipe problem. The rule is intended for major emergencies. Judge Bates said that current rules are flexible enough to deal with Judge Krieger's hypothetical situations. Deb Miller said it is important that there be a quick, uniform approach in the case of an emergency. Professor Gibson wondered if having three different potential decision-makers might create confusion. Judge Goldgar said he personally has access to a member of the Judicial Conference so he feels comfortable with that. Judge Campbell noted that the first draft of the CARES Act would have legislatively amended the rules. In light of that history, Congress is going to be looking for national emergency rules, and probably expects centralized decision-making. There would have to be a really good reason why bankruptcy judges need authority that district court judges do not need in criminal or civil cases. Judge Dow supports allowing the decision to be made by the chief bankruptcy judge, and points out that all we are talking about is extending deadlines. Judge Hoffman suggested eliminating the chief bankruptcy judge but including the chief circuit judge.

The Subcommittee voted on whether to limit decision-making to the Judicial Conference. That motion was defeated with only one vote — Judge Goldgar — in favor. The Subcommittee then voted on whether to allow either the Judicial Conference or chief judge of the circuit to declare a rules emergency. That motion was supported by five votes. The Subcommittee then

voted between two options: allowing the Judicial Conference or chief judge of the circuit to declare a rules emergency and second, allowing the chief bankruptcy judge also to make the declaration. The former option was supported by Judges Bernstein, Hoffman, Goldgar, and Oetken, and Mr. Retherford. The latter option, with three levels of decisionmakers, was supported by Ms. Miller, Mr. Mayer, Judge Wu, Judge Krieger, Mr. Hartley, and Judge Dow. Mr. Hubbert abstained. As a majority of the Advisory Committee supported that approach, the rule will continue to include the existing provisions allowing the chief bankruptcy judge to declare a rules emergency.

Professor Gibson will modify subpart (b)(4) (dealing with early termination of a rules emergency) to include the ability of the chief judge of the circuit or the Judicial Conference to overrule a decision of the chief bankruptcy judge as to the existence of a rules emergency.

The proposed rule provides for extensions of time limits set forth in the rules (other than those mandated by the Bankruptcy Code). As drafted, the authority to permit extensions of time limits on a district-wide basis is given to the chief bankruptcy judge, regardless of who made the declaration of the emergency. The Subcommittee thought this approach was appropriate because a local actor will be in the best position to assess conditions and determine the rule departures that are needed. Judge Campbell suggested revised language in (c)(1) to eliminate the requirement that the chief bankruptcy judge in a district has to authorize a bankruptcy judge to order extensions in a particular case. A conforming change will be made to (c)(3).

Judge Goldgar wants the ability not merely to extend time limits, but the ability to modify local rules. Professor Gibson suggested that this is not a matter for the federal rules. Professor Capra and Professor Struve also agreed. Professor Struve suggested that the reference to Bankruptcy Code in line 39 should be to any statute. Judge Bernstein asked whether the chief bankruptcy judge should be able to order extensions for specific cases as indicated by line 34 — the presiding judge is the one who would know about that. Everyone agreed that the language would so require.

An extended or tolled time period will terminate either 30 days after the rules emergency declaration terminates or when the original time period would have expired, whichever is later — unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, that date would be compared to the original termination date (and of course will be the later of the two dates since it is an extension). The court may provide an additional extension in a specific case or proceeding.

The draft rule left space for consideration of additional rules provisions that might be considered for inclusion in an emergency rule. The first is an authorization for remote hearings. Virtually all bankruptcy courts switched to remote means of conducting any hearings that could

not be postponed following the declaration of the Covid-19 emergency. Such action could be required in any type of emergency that endangers public health and safety or impairs access to the court. The Advisory Committee concluded that inserting such a provision in the emergency rule would suggest that existing local orders providing for remote hearings constitute a departure from the Bankruptcy Rules and are not authorized. Professor Capra agreed. The rule will eliminate the placeholder for remote hearings.

The other rules that the Subcommittee has identified for consideration are those requiring service or transmission by first class mail. It has been suggested that in some types of emergencies, the U.S. postal system might be disrupted, and thus compliance with mailing requirements in the rules might be difficult or impossible. Judge Dow does not know what we would propose as an alternative. The Advisory Committee concluded that no emergency provisions were needed for this situation.

Other procedures that the Subcommittee considered and decided not to address in an emergency rule are ones governing electronic filing by unrepresented parties, payment of filing fees online by unrepresented parties, and electronic signature requirements. The Subcommittee determined that the existing Bankruptcy Rules on these topics either contain sufficient flexibility to allow adjustments during an emergency or leave the issues to regulation by local rules or orders.

The final provision of the proposed draft, which is in brackets, is the last provision of the current criminal rule draft. This "soft landing" provision is intended in part to do what subdivision (c)(2) of the Subcommittee's draft aims for — to prevent unfairness in the transition period after the termination of an emergency declaration. Subdivision (c)(2) addresses only time period extensions and tolling, whereas the criminal rule provision applies to all types of rule departures authorized by the emergency rule. Given that the bankruptcy rule will now address only time extensions, this provision will not be necessary.

Judge Bates asked whether the Advisory Committee had determined that an emergency rule is necessary. The concern would be that adopting a rule dealing only with extensions of deadlines might create the implication that nothing else can be modified in an emergency. Professor Gibson thought that the emergency rule was indeed necessary because of all the deadlines included in the bankruptcy rules, and that this rule should be presented to the Standing Committee in January for its consideration. Judge Dow agreed that the rule is needed.

10. Future meetings

The spring 2021 meeting has tentatively been scheduled for April 8–9, 2021.

11. New Business

There was no new business.

12. Adjournment

The meeting was adjourned at 3:15 p.m.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Business Subcommittee.

   A. Recommendation of no action regarding Suggestion 20-BK-A from the Foundation for Defense of Democracies for proposed rulemaking concerning national security matters (Professor Bartell).

2. Consumer Subcommittee.

   A. Recommendation of referral of Suggestion 20-BK-B to make the court's database of electronic creditor notice addresses available to any case participant required to serve notices on creditors. (Professor Gibson).

3. Recommendation for technical changes to all versions of Official Form 309 to update PACER internet address, to amend national instruction to Form 309 to list all versions of the form, and to permit courts to update the internet links as needed on those forms in the future. (Scott Myers)

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TAB 5A

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 9, 2020

Introduction

The Advisory Committee on Civil Rules met on a teleconference platform that included public access on October 16, 2020. Draft minutes from the meeting are attached to this report.

Part I of this report presents three items for action. The first recommends approval for adoption of amendments to Rule 7.1 that were published for comment in August 2019. The others recommend approval for publication of an amendment to clarify the intended meaning of Rule 15(a)(1) and an amendment to broaden the means for providing notice of a magistrate judge's recommended disposition under Rule 72(b)(1).

Part II of this report provides information about ongoing subcommittee projects. The CARES Act Subcommittee draft Rule 87 addressing declaration of a Civil Rules emergency by the Judicial Conference, as reviewed by the Advisory Committee and approved for discussion along with the emergency rules drafts developed by other advisory committees, is discussed in two places. The joint all-committees report describes the common elements of the various drafts and notes some of the differences. The Civil Rules Committee's report on draft Rule 87 is integrated with the joint report. Part IIA refers back to the joint report. The Advisory Committee has not determined whether any emergency rules provision is necessary for the Civil Rules. When it comes time to recommend publication, the Advisory Committee may recommend simultaneous publication of amendments of specific rules that would take the place of any emergency rules provisions, with an invitation to comment on the wisdom of adopting any emergency rules provision.

Part IIB presents brief accounts of the ongoing work of three other subcommittees. The Advisory Committee has suspended consideration of possible interlocutory appeal rules for MDL proceedings, but the MDL Subcommittee is actively exploring a draft rule that would establish provisions similar to the class action provisions that address the court's role in settlement, and appointment and compensation of lead counsel. A joint subcommittee with the Appellate Rules Committee is exploring possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. Another joint subcommittee continues to consider the time when the last day for electronic filing ends.

Part III describes continuing work on projects carried forward on the agenda for further work. Rule 12(a) seems to recognize that a statute may alter the time to respond under Rule 12(a)(1), but not to recognize statutes that would alter the time set by Rule 12(a)(2) or (3); this proposal remains on the agenda after failing of adoption by an even vote. A potential ambiguity in Rule 4(c)(3) may affect the procedure for ordering a United States marshal to serve process in an *in forma pauperis* or seaman case. Other items include the Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties and the information required in applications for *in forma pauperis* status.

Part IV describes new items that have been added to the agenda and are being carried forward for further work, including the Rule 26(b)(5)(A) provisions for privilege logs; an outside proposal to adopt a broad rule governing practices for sealing court records; and a proposal to amend the Rule 9(b) provisions for pleading malice, intent, knowledge, and other conditions of a person's mind.

Part V describes two proposals that are not being pursued further. One was a proposal to amend Rule 17(d) to require that a public officer who sues or is sued in an official capacity be named only by title, not name. The other was to amend Rule 45 to make it clear that the list of places where a subpoena can compel compliance does not supersede federal statutes that provide for nationwide service and compliance.

I. Action Items

A. For Final Approval: Amendment to Rule 7.1

Two distinct proposals to amend Rule 7.1(a) were published in August 2019. Further consideration of the proposal in light of the public comments demonstrated the wisdom of making a conforming amendment of Rule 7.1(b). The amendments were brought to the Standing Committee with a recommendation for adoption in June 2020. The topic was remanded for further consideration of the part of Rule 7.1(a)(2) that addresses the time of the citizenships that establish or defeat complete diversity. A revised version of that provision was developed after lengthy deliberation. The revised version is recommended for adoption, and is transmitted along with an alternative that takes the simpler approach of omitting any reference to the times of the citizenships.

The proposed amendment to Rule 7.1(a)(1) and the conforming amendment to Rule 7.1(b) are discussed first. They have not presented any difficulty, but the report that recommended them for adoption at the June meeting is presented again for convenience. The more complicated questions raised by Rule 7.1(a)(2) are discussed after that.

The proposed full rule text recommended for adoption, marked to show changes since publication by double underlining, is:

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

(~~1~~A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(~~2~~B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* ~~Unless the court orders otherwise, a~~

~~party i~~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 that names—and identifies the citizenship of —every individual or entity whose citizenship is attributed to that party or intervenor ~~at the time~~ when:

(A) the action is filed in or removed to federal court, and

(B) any subsequent event occurs that could affect the court's jurisdiction.

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement * * *.

Rule 7.1(a)(1)

The proposal to amend Rule 7.1(a)(1) published in August 2019 reads:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

~~(1)~~ (A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

~~(2)~~ (B) states that there is no such corporation.

This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). It drew three public comments. Two approved the proposal. The third suggested that the categories of parties that must file disclosure statements should be expanded for both parties and intervenors, a subject that has been considered periodically by the advisory committees without yet leading to any proposals for amending the parallel rules.

The Advisory Committee recommends approval for adoption of the Rule 7.1(a)(1) amendment.

Rule 7.1(b)

Discussion of public comments on the time to make diversity party disclosures under proposed Rule 7.1(a)(2) led the Advisory Committee to recognize that the time provisions in Rule 7.1(b) should be amended to conform to the new provision for intervenor disclosures in Rule 7.1(a)(1):

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:
(1) file the disclosure statement * * *.

* * * * *

This is a technical amendment to conform to adoption of amended rule 7.1(a)(1) and can be approved for adoption without publication.

Rule 7.1(a)(2)

Rule 7.1(a)(2) is a new disclosure provision designed to establish a secure basis for determining whether there is complete diversity to establish jurisdiction under 28 U.S.C. § 1332(a). The Advisory Committee recommends that it be approved for adoption with changes suggested by the public comments, as revised to address the concerns raised in the Standing Committee discussion last June.

The core of the diversity jurisdiction disclosure lies in the requirement that every party or intervenor, including the plaintiff, name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The proposed rule text has been modified to identify more accurately the time that is relevant to determining the citizenships that control diversity jurisdiction.

The citizenship of a natural person for diversity purposes is readily established in most cases, although somewhat quirky concepts of domicile may at times obscure the question. Section 1332(c)(1) codifies familiar rules for determining the citizenship of a corporation without looking to the citizenships of its owners.

Noncorporate entities, on the other hand, commonly take on the citizenships of all their owners. The rules are well settled for many entities. The rule also seems to be well settled for limited liability companies. The citizenship of every owner is attributed to the LLC. If an owner is itself an LLC, that LLC takes on the citizenships of all of its owners. The chain of attribution reaches higher still through every owner whose citizenship is attributed to

an entity closer along the chain of owners that connects to the party LLC. The great shift of many business enterprises to the LLC form means that the diversity question arises in an increasing number of actions filed in, or removed to, federal court.

The challenges presented by the need to trace attributed ownership are a function of factors beyond the mere proliferation of LLCs. Many LLCs are not eager to identify their owners——the negative comments on the published rule included those that insisted that disclosure is an unwarranted invasion of the owners' privacy. Beyond that, the more elaborate LLC ownership structures may make it difficult, and at times impossible, for an LLC to identify all of the individuals and entities whose citizenships are attributed to it, let alone determine what those citizenships are. But if it is difficult for an LLC party to identify all of its attributed citizenships, it is more difficult for the other parties and the court, whose only likely source of information is the LLC party itself.

As difficult as it may be to determine attributed citizenships in some cases, the imperative of ensuring complete diversity requires a determination of all of the citizenships attributed to every party. Some courts require disclosure now, by local rule, standard terms in a scheduling order, or more ad hoc means. And there are cases in which inadvertence, indifference, or perhaps strategic calculation have led to a belated realization that there is no diversity jurisdiction, wasting extensive pretrial proceedings or even a completed trial.

Disclosure by every party when an action first arrives in federal court, or at a later time that may displace the relevance of the time of filing the complaint or notice of removal, is a natural way to safeguard complete diversity. Most of the public comments approve the proposal, often suggesting that it will impose only negligible burdens in most cases. Summaries of the comments were attached to the June report.

The public comments indirectly illuminated the value of developing further the published rule text that identified the time that controls the existence of complete diversity as "the time the action is filed." Many of the comments supporting the proposal suggested that defendants frequently remove actions from state court without giving adequate thought to the actual existence of complete diversity. Some of these comments feared that the published rule text did not speak clearly to the need to distinguish between citizenship at the time a complaint is filed in federal court and citizenship at the time a complaint is filed in state court, to be followed by removal. Removal, for example, may become possible only after a diversity-destroying party is dropped

from the action in state court.

Committee discussion of this question last April emphasized the rules that require complete diversity at some time other than the original filing in federal court or removal to it. One example is changes in the parties after an action is filed. Other and more complex examples may arise in determining removal jurisdiction. Disclosure should aim at the direct and attributed citizenships of each party at the time identified by the complete-diversity rules. The time at which the court makes the determination is not relevant, although the purpose of requiring disclosure is to facilitate determination as early as possible.

These observations led to revising the rule text to the form presented to the Standing Committee last June, calling for disclosures of citizenships:

> (A) at the time the action is filed in or removed to federal court; or
> (B) at another time that may be relevant to determining the court's jurisdiction.

Discussion in the Standing Committee focused on two perceived problems with this formulation.

The first problem arose from concern that the rule would be misread, taking it to address the time for filing the disclosure statement rather than the time of the citizenships that must be considered in determining diversity jurisdiction. That concern could be met by adding redundant but perhaps helpful words to the rule text: " * * * a party or intervenor must, unless the court orders otherwise, file <u>at the time set by Rule 7.1(b)</u> a disclosure statement * * *." But it is better met by substituting a new formula for "at the time" and "at another time" in the rule text. That change is shown in the revised rule text.

The second problem arose from concern that many parties would be confused by the reference to "another time that may be relevant to determining the court's jurisdiction." Diversity will be determined in most cases by the citizenships that exist at the time the action is initially filed in federal court, or at the time it is removed. But many lawyers know that the rules that govern diversity jurisdiction can be complicated, and fear that they must undertake time-consuming and costly research to be sure that their cases do not come within one of the variations on the basic rule. Some might be simply bewildered. The proposal was remanded for further consideration of this concern.

The Advisory Committee's deliberations on remand are summarized in the draft October Minutes. The Advisory Committee

renewed its belief that it is useful to adopt rule text that directs attention to the problem that diversity jurisdiction is not permanently fixed by the citizenships that exist at the time a case first comes to the federal court, whether by initial filing or removal. And it concluded that clear language can reduce, indeed virtually eliminate, the risk that lawyers will be driven to undertake unnecessary research into diversity jurisdiction doctrine. The recommended new language focuses on events subsequent to filing or removal, providing assurance by focusing directly on changes in the shape of the litigation. Substituting "when" for "at the time" also should address the concern about confusion between the time for making disclosure and the times of the citizenships to be disclosed:

> * * * must file a disclosure statement * * * when:
>
> (A) the action is filed in or removed to federal court, and
> (B) any subsequent event occurs that could affect the court's jurisdiction.

Although the Advisory Committee recommends this revised version for adoption, it offers an alternative recommendation for adoption in the event that the revised version does not assuage the concerns that led the Standing Committee to remand. The alternative would simply omit everything in subparagraphs (A) and (B) as shown above. The rule text would say nothing about the times of the citizenships that determine whether there is diversity jurisdiction. This version does what is required to establish a disclosure practice that will provide a secure foundation for prompt and accurate determinations of jurisdiction. That is the most important task set for the rule.

This alternative version also responds to the problem presented by any attempt to use rule text to remind the parties of the complexities that occasionally arise from the more esoteric corners of diversity jurisdiction requirements. No court rule can change those requirements. Any attempt to provide a comprehensive digest would inevitably be incomplete, and might well be inaccurate on one or another points. Referring to "another time that may be relevant" showed the risks of a simple reference. Referring to "any subsequent event" may not fully allay this concern. Rule 7.1(b) provides an indirect reminder of the need to supplement an earlier disclosure "if any required information changes." That includes a change in the information that is required as well as a change in the information itself. The committee note can point to the general issue, providing a rough guide of the need to remain alert for developments in the litigation that may call for additional disclosures.

Two additional paragraphs from the June report may be provided to fill out the reminder of other issues that have not been challenged in earlier discussions.

A problem remains when a party's disclosure statement, perhaps illuminated by responses to follow-up discovery, shows that the party cannot identify all of the citizenships that may be attributed to it. The committee note observes that the disclosure rule does not address this problem. Renewed committee discussion rejected a suggestion that the Note should be revised to suggest that a party could ask the court to order that no more than reasonable inquiry is required. The rule cannot reduce the informational burdens required by the doctrines of subject-matter jurisdiction. Nor does it seem wise to attempt to answer the questions that will arise when the party asserting jurisdiction is unable to pry complete information from another party who has far better access to information about its owners, members, or others whose citizenships are attributed to it.

Some public comments opposed adoption of the diversity disclosure proposal. Two of them came from bar groups that have provided helpful advice on many occasions in the past, the American College of Trial Lawyers and the City Bar of New York. Each suggested that a better answer to the dilemma of determining the citizenship of LLCs would be for Congress or the Supreme Court to treat them as corporations. In addition, they suggested that some LLCs may experience great difficulty in determining all attributed citizenships, making it better to rely on targeted discovery in the few cases that present genuine puzzles about citizenship. They also observed that the LLC form is often adopted to protect the privacy of the owners, a point supplemented by other comments suggesting that privacy is particularly important for "non-citizen" owners. An added concern was that expansive diversity disclosures may include so much information that they distract attention from the information that is important in considering judicial recusal, the original purpose of Rule 7.1.

The proposed disclosure rule is recommended for adoption in one of the two forms advanced for discussion. The version that alerts the parties to the need to consider subsequent events that may change the calculus of diversity is the first recommendation. But if it still seems too risky, little is likely to be gained by considering still further variations on subparagraphs (A) and (B). The alternative recommendation is to forgo any attempt to allude to "subsequent events" in rule text by simply omitting subparagraphs (A) and (B) revised. It is not a perfect answer to the puzzles created by the requirement of complete diversity. But it will go a long way toward eliminating inadvertent exercise of federal jurisdiction in cases that should be decided by state courts, and——at least as important——toward protecting against tardy

revelations of diversity-destroying citizenships that lay waste to substantial investments in federal litigation.

Clean Rule Text

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* 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 that names——and identifies the citizenship of——every individual or entity whose citizenship is attributed to that party or intervenor when:

(A) the action is filed in or removed to federal court, and

(B) any subsequent event occurs that could affect the court's jurisdiction.

COMMITTEE NOTE

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of jurisdiction.

Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent.

Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar——such as partnerships and limited partnerships——and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-matter jurisdiction that this rule does not address. A supplemental statement is required if events subsequent to the initial filing in federal court or removal

to it require a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provision in Rule 7.1(a)(1) that extends the disclosure obligation to intervenors.

B. For Publication: Cure Literal Gap in Rule 15(a)(1) *Suggestion 19-CV-Z*

A drafting mishap leaves the way open to read a dead zone into the middle of the Rule 15(a)(1) provision for amending a pleading once as a matter of course. The problem arises from the word "within," and is readily remedied by substituting "no later than." Describing the problem shows that correction is easy.

Using italics and overlining to emphasize the problem word, and underlining to identify the cure, Rule 15(a)(1) provides:

> (a) AMENDMENTS BEFORE TRIAL.
> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course ~~*within*~~ no later than:
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

The problem is that a period introduced by "within" is measured by the required interval counted from the described event. An amendment "within" 21 days from service of a responsive pleading or one of the described Rule 12 motions begins at service, not before. If a responsive pleading is required, subparagraph (A) allows one amendment as a matter of course within 21 days after serving the pleading; that period then closes. The responsive pleading or motion, however, may not have been served by that time. The situations that appear on the face of the rules arise when the time to plead or move is longer than 21 days, most commonly 60 days. Or the time may be extended by agreement of the parties, or perhaps a scheduling order. In those situations, there is a gap in the right to amend. It expires after 21 days from serving the pleading, and is revived only on service of the responsive pleading or motion.

The death and revival of the right to amend once as a matter of course make no sense. It might be hoped that the folly of this unintended result is so apparent that no one would adopt the

literal reading of "within." But lawyers have struggled with the issue, and a number of reported opinions show that courts have had to work to reach the right result. The question is more than theoretical. And it can be fixed so readily that amendment is appropriate.

Substituting "no later than" for "within" makes the intended meaning clear. When a responsive pleading is required, the right to amend once as a matter of course arises on serving the pleading and continues until 21 days after service of a responsive pleading or a designated Rule 12 motion, whichever is earlier.

The Advisory Committee recommends publication for comment of an amendment that substitutes "no later than" for "within" in Rule 15(a)(1).

Clean Rule Text

(a) AMENDMENTS BEFORE TRIAL.
(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course no later than:
(A) 21 days after serving it, or
(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

COMMITTEE NOTE

Rule 15(a)(1) is amended to substitute "no later than" for "within" to measure the time allowed to amend once as a matter of course. A literal reading of "within" would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. [The amendment could not come "within" 21 days after the event until the event had happened.] There is no reason to suspend the right to amend in this way. "No later than" makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

C. For Publication: Rule 5 Service Under Rule 72(b)(1)

Rule 72(b)(1) directs a magistrate judge to enter a recommended disposition "when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement." It concludes with this sentence: "The clerk must promptly mail a copy to each party."

Mailing a copy is out of step with current electronic docket practices. Rule 77(d)(1) was amended in 2001 to direct that the clerk serve notice of entry of an order or judgment "as provided in Rule 5(b)."

Criminal Rule 59(b)(1) includes a provision analogous to Civil Rule 72(b)(1), directing the magistrate judge to enter a recommendation for disposition of described motions or matters, and concluding: "The clerk must immediately serve copies on all parties."

The Advisory Committee recommends that Rule 72(b)(2) be amended to incorporate all Rule 5(b) methods for serving notice:

(b) DISPOSITIVE MOTIONS AND PRISONER PETITIONS.

(2) *Findings and Recommendations.* * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must ~~promptly~~ ~~mail~~ immediately serve a copy ~~to~~on each party as provided in Rule 5(b).

COMMITTEE NOTE

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b). [Service of notice of entry of an order or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works well.]

II. Information Items

A. Draft New Rule 87 (Procedure in Emergency)

The report on draft new Rule 87 is included in the joint report on emergency rules for all the advisory committees. As noted earlier, the Civil Rules Committee may recommend simultaneous publication of Rule 87 and, as an alternative to adopting Rule 87, amendments to several regular rules.

B. Subcommittee Activities

1. Multidistrict Litigation Subcommittee

The MDL subcommittee has recently had three issues pending before it. One of them——screening claims——is still under study, and awaiting further information. The second issue was whether to provide by rule for expanded interlocutory appellate review in MDL proceedings. On this issue, after much study, the subcommittee has come to a consensus that rulemaking should not be pursued at this time. The Advisory Committee accepted this recommendation at its October meeting. The third issue——judicial supervision of the selection of leadership counsel and of settlement in MDL proceedings——remains under study.

Screening and the "Census" Idea

The subcommittee's consideration of the "screening" issue began in response to assertions that often a considerable portion of the claims asserted in MDL mass tort situations were unsupportable. Problems with these claims included that the claimant in question did not use the drug or the medical device involved in the litigation, or that the claimant did not have the health condition allegedly caused by the product, or that the claimant used the product too briefly for it to cause the problem, or that the claimant developed symptoms too long after discontinuing use of the product for the product to be a cause of the symptoms. It seemed generally agreed that such unsupportable claims were sometimes presented, though there was debate about whether they often constituted a large proportion of the cases. In addition, there was debate about why such claims would appear in MDL proceedings.

The initial proposal was that the court impose a rigorous automatic requirement that every claimant submit proof of use of the product and development of pertinent symptoms promptly at the commencement of litigation. But early conferences showed that often Plaintiff Fact Sheets (PFSs) were instead obtained in the early stages of MDL proceedings. The subcommittee obtained research assistance from the FJC that indicated that in almost all very large MDLs the court did in fact employ a PFS, and that courts also often required Defendant Fact Sheets (DFSs) as well.

Unlike the proposal that such early submissions all adhere to a form prescribed in a rule, however, actually these fact sheets were ordinarily keyed to the case before the court and took a good deal of time to draft. So it was not clear that any rule could meaningfully prescribe what should be in each one. And some of these documents became fairly elaborate, meaning that providing responses was often burdensome. Some experienced transferee judges

questioned the utility of these detailed documents, commenting that the first page or few pages of a PFS or a DFS often will suffice. Moreover, courts did not undertake to review the submissions on their own motion, but defendants could call to the court's attention deficiencies in some submissions, and dismissal could result with little investment of court time if the deficiencies were not cured. Given the divergences among PFS regimes for differing MDLs, it seemed difficult to devise a rule formula that would improve practice generally.

As these discussions moved forward, parties in various cases began to develop a simplified alternative to a PFS that came to be called a "census" of claims pending in the MDL court. Variations of that method are in use in as many as three major MDL matters, including one pending before Judge Rosenberg, a member of the subcommittee.[1]

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[1] The four proceedings are:

In re Juul (Judge Orrick, N.D. CA.): In October 2019, Judge Orrick directed counsel involved in the MDL proceeding In re Juul Labs, Inc., Marketing, Sales Practices, and Product Liability Litigation (MDL 2913) to develop a plan to "generat[e] an initial census in this litigation," with the assistance of Prof. Jaime Dodge of Emory Law School, who has organized several events attended by members of the MDL Subcommittee. The census requirements applied to all counsel who sought appointment to leadership positions. It appears that relatively complete responses were submitted in December 2019, after which the judge appointed leadership counsel. Disclosures from defendants were due during January. The census method can provide plaintiff-side counsel with a uniform set of questions to ask prospective clients. The census requirements under Judge Orrick's order apply not only to cases on file but also any other clients with whom aspiring leadership counsel had entered into retention agreements. Discussions are under way on the next steps in the litigation, which may involve plaintiff profile sheets or a PFS. The census in this case was not primarily designed as a vetting device, but it is possible that having in hand a list of the sorts of information the court expects from claimants may prompt some counsel to be more focused in evaluating potential claims than would otherwise occur.

In re 3M (Judge Rodgers, N.D. FL): The claims relate to alleged hearing damages related to earplugs that were largely distributed by the military. After appointment of leadership counsel, the judge had counsel design an initial census. But that undertaking involved obtaining military records, an effort that added a layer of complexity to the census. In addition, the due date for census responses was different depending on whether the case had been formally filed or was entered into an "administrative docket" the judge had created. As a general matter, the census was completed in December 2019.

The "census" technique may serve several purposes in mass tort MDLs, including organizing the proceedings, providing a "jump start" to discovery, and possibly contributing to the designation of leadership counsel.

It remains unclear how effective the "census" technique has been in serving any of those purposes. When more is known, it may appear that it is not something appropriately included in a rule, but instead a management technique that could be included in the Manual for Complex Litigation, or disseminated by the Judicial Panel. So this first topic remains under study.

Interlocutory Appellate Review——Recommendation Not to Pursue at this Time Approved by Advisory Committee

The original proposal for a rule providing an additional route to interlocutory review in MDL proceedings, perhaps limited to mass

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In re Zantac (Judge Rosenberg, S.D. FL): This litigation involves a product designed for treatment of heartburn. The MDL includes class claims and individual personal injury claims, and some may go back decades. The Panel order for transfer was entered in February 2020. The litigation is still in the early stages of organization, but much has been done, particularly with regard to the use of census methods. There are 645 filed cases, of which 27 are putative class actions, and a substantial number (in the thousands) of unfiled cases on a registry. The court ordered an initial census including all filed claims and any unfiled claims represented by an applicant for a leadership position. There were 63 applicants for leadership positions. The court received initial census forms for all of the filed cases, including personal injury, consumer, medical monitoring claims among other claims. The court indicated that this was helpful to its consideration of leadership applicants, which have since been appointed. The court also created a registry, which allowed for the filing of a 4-page "census plus" form for unfiled claimants; in broad terms, registry claimants received tolling of the statute of limitations from participating defendants and certain assistance with medical/ purchase records. The census plus form, which was also required for all filed plaintiffs, required information on which product(s) were used, the injuries alleged, and a certification by the plaintiff/claimant. In addition, the form required plaintiffs/claimants to either attach documents showing proof of use and injury, state that they were already ordered privately or through the registry but not yet received, or indicate that no records are expected to exist. The census plus forms are due on a rolling basis, with the first due date (for filed plaintiffs) having passed in July; the second tranche of forms were due in August, but this was extended for certain claimants due to a technical error with a private vendor to September, and was to have been completed in November. [This report includes developments at the time the Advisory Committee agenda book for the October meeting was submitted.]

tort proceedings, called for a right to immediate review without the "veto" that 28 U.S.C. § 1292(b) provides the district court by permitting review only when the district judge certifies that the three criteria specified in the statute are met. Under § 1292(b), the court of appeals has discretion whether to accept the appeal. But the original proposal was to remove that discretion with regard to interlocutory appeals in MDL proceedings, and require the court of appeals to accept the appeal.

From that beginning, the discussion evolved. The notion of mandatory review was dropped relatively early on, and proponents of a rule instead urged something like Rule 23(f), giving the court of appeals sole discretion whether to accept the appeal, and including no provision for input from the transferee district judge on whether an immediate appeal would be desirable. In addition, proponents of a new rule made considerable efforts to provide guidance on distinguishing among MDL proceedings (limiting the new appellate opportunity to only certain MDLs), and on distinguishing among orders, to focus the additional opportunity for interlocutory review on the situations in which it was supposedly needed.

The proponents of expanded interlocutory review came mainly from the defense side, and principally from those involved in defense of pharmaceutical or medical device litigation. The basic thrust of those favoring an additional route for interlocutory review was that interlocutory orders can sometimes have much greater importance in MDL proceedings, which may involve thousands of claims, than in individual litigation. So there might be greater urgency to get key issues resolved, particularly if they were "cross-cutting" issues that might dispose of many or most of the pending cases. One example of such issues was the possibility of preemption of state law tort claims.

Another concern was that some transferee judges might resist § 1292(b) certification when it was justified in order to promote settlement. On the other hand, some suggested that permitting expanded interlocutory review might actually further settlement; defendants unwilling to make a substantial (sometime very substantial) settlement based on one district judge's resolution of an issue like preemption might have a different attitude if a court of appeals affirmed the adverse ruling.

In addition, it was urged that the final judgment rule leads to inequality of treatment. Should defendants prevail on an issue such as preemption, or succeed in excluding critical expert testimony under *Daubert*, plaintiffs often could appeal immediately because that would lead to entry of a final judgment in defendants' favor. But when they failed to obtain complete dismissal of plaintiffs' claims, defendants urged, they would not get a similar immediate route to appellate review.

There was strong opposition from plaintiff-side lawyers. One argument was that the existing routes to interlocutory review suffice in MDL proceedings. There are already multiple routes to appellate review, particularly under 28 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). For recent examples of interlocutory review sought or obtained in MDL proceedings, *see In re National Opiate Litig.*, 956 F.3d 838 (6th Cir. 2020) (granting writ of mandamus on defendants' petition); *In re General Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374 (S.D.N.Y. 2019) (certifying issue for appeal under § 1292(b) on plaintiffs' motion; court of appeals granted review); *In re Blue Cross Blue Shield Antitrust Litig.*, 2018 WL 3326850 (N.D. Ala., June 12, 2018) (certifying issue for appeal under § 1292(b) on defendants' motion; court of appeals did not grant review). Expanding review assertedly would lead to a broad increase in appeals and produce major delays without any significant benefit, particularly when the order is ultimately affirmed after extended proceedings in the court of appeals. And, of course, the "inequality" of treatment complained of is a feature of our system for all civil cases, not just MDLs.

Both sides provided the subcommittee with extensive submissions, including considerable research on actual experience with interlocutory review in MDL proceedings. There was very serious concern, including among judges, about the delay consequences of such review.

In addition, the Rules Law Clerk provided the subcommittee with a memorandum. Some conclusions seem to follow from these materials:

1. There are not many § 1292(b) certifications in MDL proceedings.

2. The reversal rate when review is granted is relatively low (about the same as in civil cases generally).

3. A substantial time (nearly two years) on average passes before the court of appeals rules.

4. The courts of appeals (and district courts) appear to acknowledge that there may be stronger reasons for allowing interlocutory review because MDL proceedings are involved.

The subcommittee has received a great deal of input and help in evaluating these issues. Representatives of the subcommittee have attended (and often spoken at) at least 15 conferences around the country (and one in Israel) dealing with issues the subcommittee was considering. Two of them were full-day events

organized by Emory Law School to focus entirely on the interlocutory review issues.

The most recent conference——on June 19, 2020——involved lawyers and judges with extensive experience in MDL proceedings more generally, not only "mass tort" litigation. Two members of the Standing Committee participated. In all, the participants included ten district judges and four court of appeals judges. Both the current Chair of the Judicial Panel and the previous Chair participated. Two former Chairs of the Standing Committee participated, as well as a number of other judges with experience on the Rules Committees. There were also two judicial officers from the California state courts——a Superior Court judge who is in the Complex Litigation Department of Los Angeles Superior Court and a Justice of the California Court of Appeal who provided the subcommittee with a memorandum on a 2002 statute adopted in California that provided for interlocutory review on grounds very similar to those in § 1292(b).

After this conference, the subcommittee met by conference call to discuss its recommendation to the full Advisory Committee on whether to pursue a rule for expanded interlocutory review. The starting point is that the many events attended by members of the subcommittee, entirely or largely addressed to the appellate review question, have provided a thorough examination of the subject. And an additional starting point was that the existing routes to interlocutory review provide meaningful review in at least some cases. Particularly in light of the low rate of reversal when review is granted, it is difficult to conclude that there is evidence of a serious problem to be solved by expanding interlocutory review.

Against this background, all subcommittee members concluded that proceeding further with this idea was not warranted in light of the many difficulties with doing so (some of which are mentioned below in a footnote, as they would remain important were the subcommittee to continue down this path). Some of the reasons mentioned by subcommittee members can be summarized as follows:

Delay: There is clearly a significant issue with delay, and in some circuits it may be more substantial than in others. Though allowing expanded avenues for review need not be linked to a stay of proceedings in the district court, the more that one focuses review on "cross-cutting" issues, the greater the impulse to pause proceedings until that issue is resolved.

Broad judicial opposition: Though there are some judges who have participated in events attended by members of the subcommittee who expressed willingness to consider expanded interlocutory review, by and large judges were opposed. Court

of appeals judges often resisted any idea of "expedited" treatment on appeal of MDL matters (suggested as an antidote to the delay problem), and many regarded existing avenues for interlocutory review as sufficient to deal with real needs for review.

Undercutting the federal court's potential "leadership" role when there is parallel litigation in state courts: When there are federal MDL proceedings, particularly in "mass tort" litigation, it often happens that there is also parallel state court litigation, and the federal MDL court can provide something of a "leadership" role and coordinate with the state court judges. But if the progress of the federal MDL were stalled by an interlocutory appeal, at least some of the state courts likely would not be willing to wait for the resolution of a potentially lengthy period of appellate review. Resulting fragmentation of the overall litigation would be undesirable and inconsistent with the overall objective of § 1407, which seeks consistent management and judicial efficiency. That would be an unintended consequence, but still could be serious; indeed, a judge who participated in the June 19 event called it the "Achilles heel of MDL."

Difficulties defining the kinds of MDL proceedings in which the new avenue for appeal would apply: Originally, the proposal for expanding interlocutory review focused on "mass tort" MDLs. That category does seem to include most of the MDLs with very large claimant populations. But it's not clear that it would include all of them. The VW Diesel litigation, for example, involved tens of thousands of claimants, but was mainly claiming economic rather than personal injury damages. And data breach MDLs may become more common, raising potentially difficult issues about what is a "personal injury" claim.

An additional difficulty is to determine whether there should be a numerical cutoff to trigger the opportunity for review. Whatever number were chosen to trigger the right to expanded review (e.g., 500 claimants, 1,000 claimants), there could be difficulties determining when that milestone was passed. Some research suggests that some MDL proceedings receive huge numbers of new entrants long after the centralized proceedings were begun. Triggering a new interlocutory review opportunity then would not seem productive. Moreover, there could sometimes be a question about whether one should "count" the unfiled claims on a registry, as in the Zantac litigation.

Finally, if the new appellate route were available in all MDLs (perhaps because no sensible line of demarcation among MDL proceedings could be articulated in a rule), rather than only

some of them, there might be questions about why an MDL centralization order would expand the opportunity for interlocutory review when individual cases or consolidated actions in a given district might involve many more claimants (perhaps hundreds or thousands) but not be eligible for expanded interlocutory review.

Difficulties defining the kind of rulings that could be reviewed, and burdening the court of appeals: Another narrowing idea that was proposed was to limit the new route to review to rulings on certain legal issues——e.g., preemption motions or *Daubert* decisions or jurisdictional rulings——but none of those limitations appeared easy to administer, and these rulings did not seem so distinctive as to support a special route to immediate review.

Another idea was to focus on "cross-cutting" rulings, those that are "central" to a "significant" proportion of the cases pending in the district court. That determination could be particularly challenging for a court of appeals, as it might mean that the appellate court would need to become sufficiently familiar with all the litigation before the district court to determine whether the rule's criteria were satisfied. A Rule 23(f) petition for review, by way of contrast, would not require consideration of such varied issues dependent on the overall and individual characteristics of what is often sprawling litigation.

Undercutting the district court: As noted below, the subcommittee has concluded that if it is to proceed further along this path, it is important to ensure a central role for the district court, if not a "veto" as provided in § 1292(b). Only the district court will be sufficiently familiar with the overall litigation to advise the court of appeals on the role of the ruling under challenge in the overall progress of the litigation. Though one might rewrite § 1292(b) to change the "materially advance the ultimate termination of the litigation" standard in the statute to take into account the limit of § 1407 to "pretrial" proceedings, the existing standard does not seem to have deterred transferee judges from certifying issues for interlocutory review. Any new rule would have to ensure that the district court's perspective was included, not only to assist the court of appeals but also to recognize the need to avoid unnecessary disruption of proceedings in the district court.

For these reasons and others, the subcommittee recommended that further efforts on expanding interlocutory review not be pursued at this time, and the Advisory Committee accepted that

recommendation at its October meeting.[2]

[2] The subcommittee also reported to the Advisory Committee on additional issues that would likely have to be confronted if further work on this subject were done:

Appeal as of right: The original proposal was for a right to appeal from any ruling falling within a defined category in any MDL proceedings involving "personal injury" claims. The subcommittee has reached consensus that no rule should command that the court of appeals entertain such an appeal. Any rule would have to provide the court of appeals discretion to decide whether to accept a petition for review.

Expedited treatment of an appeal in the court of appeals: Another suggestion was that a Civil Rule direct that the court of appeals "expedite" the resolution of appeals it has decided to accept under the hypothetical new rule. It is not clear how a Civil Rule could require such action by a court of appeals. Putting that issue aside, the subcommittee has reached consensus that there is no persuasive reason for requiring that the court of appeals alter the sequence of decisionmaking it would otherwise adopt and advance these appeals ahead of other matters, such as criminal cases, broad-based (even national) injunctions regarding governmental activity, cases accepted for review under existing § 1292(b) or Rule 23(f), or ordinary appeals after final judgment.

Ensuring a role for district court: As noted above, the subcommittee is committed to ensuring a role for the district court in advising the court of appeals on whether to grant review. Not only is that advice likely critical to provide the court of appeals with sufficient information to permit it to make a sensible determination whether to grant review, but it is also critical to safeguarding against disrupting the district court's handling of the centralized litigation. The goal of § 1407 transfer is to provide a method for coordinated and disciplined supervision of multiple cases (perhaps inclining state courts to follow federal "leadership" with regard to cases pending in state courts) and, as noted above, the delays that can attend interlocutory review could disrupt that coordinated supervision.

Devising a method for the district court's input to be provided: The best method for providing a district court role likely would present drafting challenges, however. Numerous models already exist, including § 1292(b) (district court certification required); Appellate Rule 21(b)(4) (the court of appeals may invite or order the district judge to address a petition for mandamus); Cal. Code Civ. Pro. §166.1 (permitting any party to request, or the trial court judge to provide without a request, an indication whether the trial court judge believes immediate review would materially advance the conclusion of the litigation). Alternatively, a rule could give the district court a period of time (say 30 days) to express its views on the value of immediate review, perhaps including specifically the question whether immediate review would be useful only if the appeal were resolved within a specified period of time. The subcommittee has not reached consensus on which method would be best to ensure a role for the district court should this effort continue.

Court Role in Supervision of Leadership Counsel and Reviewing Global Settlements——Ongoing Study and a Miniconference

The third and final issue presently on the subcommittee's agenda is the possibility of developing a rule addressing appointment of leadership counsel, judicial supervision of compensation of leadership counsel, and judicial oversight of "global" settlements sometimes negotiated by leadership counsel. This set of issues appears in important ways to be the most challenging of the questions the subcommittee has confronted.

Owing to the attention focused on the two other issues that the subcommittee has been reviewing, it has thus far given little attention to this topic. On September 10, 2020, the subcommittee met by conference call to discuss ways forward on this topic. The consensus view was that the subcommittee needed more information about these issues. Though it has had the benefit of important FJC research on the use of the PFS method to organize MDL mass tort litigation, and of numerous conferences and submissions about the possibility of a rule expanding interlocutory review, it has not received comparable input on this third topic.

The method identified for providing the needed perspective is to convene a conference involving experienced participants who present a variety of perspectives. The objective would be to make certain that there were diversity among the invitees, not only in terms of defense-side and plaintiff-side lawyers, but also emphasizing the need for diversity in race, gender, age, and other ways. One thing emphasized was involving lawyers who had sought leadership appointment in MDLs but not been selected. Academic participants should also be included, hopefully representing a range of attitudes on this subject. And of course, it will be critical to involve experienced judges.

Scope of a rule——types of MDL cases: As noted above, limiting a rule to "personal injury" MDL proceedings seems unlikely to work. Similarly, the prospect of limiting a rule to a certain kind of ruling (e.g., preemption or a "cross-cutting" issue) seems unpromising. It may be, then, that interlocutory review under the rule would have to be available in all MDL proceedings and as to any type of ruling. But that might prompt a question: Why should there be a special route to review in an MDL proceeding with eight cases, but not in a single-district consolidated proceeding with 800 claimants? Moving toward a rule that applied to all cases (as does the Cal. Code Civ. Pro. § 166.1, mentioned above) could raise questions about whether the rulemaking process really is authorized to relax the statutory criteria in § 1292(b) for all cases. True, § 1292(e) says that rulemaking may provide for interlocutory appeals not otherwise provided under existing sub-sections of the statute, but a rule that in effect could be said to relax one or more requirements of § 1292(b) in all cases might be resisted on the ground it really goes beyond the rulemaking power authorized by § 1292(e).

The subcommittee invites the Standing Committee's help in identifying suitable participants for this planned event. The goal will be to hold the event in advance of the Advisory Committee's Spring 2021 meeting, and perhaps be able to report then with more definite views on how and whether to proceed along these lines.

Because less work has been done on this subject than others, the following introduction is similar to previous presentations on this subject, but it identifies the issues and challenges of this part of the project.

A starting point is to recognize that, fairly often, it seems that the gathering power of MDL proceedings might on occasion bear a significant resemblance to the class action device, perhaps to approach being a de facto class action from the perspective of claimants. But the history of rules for these two semi-parallel devices has differed considerably, particularly regarding supervision of counsel, attorney's fees for leadership counsel, and settlement review.

The class action settlement review procedures were recently revised by amendments that became effective on December 1, 2018, which fortified and clarified the courts' approach to determining whether to approve a proposed settlement. Earlier, in 2003, Rule 23(e) was expanded beyond a simple requirement for court approval of class action settlements or dismissals, and Rules 23(g) and (h) were also added to guide the court in appointing class counsel and awarding attorney's fees and costs to class counsel. Together, these additions to Rule 23 provide a framework for courts to follow that was not included in the original 1966 revision of Rule 23.

In class actions, a judicial role approving settlements flows from the binding effect Rule 23 prescribes for a class action judgment. Absent a court order certifying the class, there would be no binding effect. After the rule was extensively amended in 1966, settlement became normal for resolution of class actions, and certification solely for purposes of settlement also became common. Courts began to see themselves as having a "fiduciary" role to protect the interests of the unnamed (and otherwise effectively unrepresented) members of the class certified by the court.

Part of that responsibility connects with Rule 23(g) on appointment of class counsel, which requires class counsel to pursue the best interests of the class as a whole, even if not favored by the designated class representatives. The court may approve a settlement opposed by class members who have not opted out. The objectors may then appeal to overturn that approval; otherwise they are bound despite their dissent. Now, under amended Rule 23(e), there are specific directions for counsel and the court to follow in the approval process.

MDL proceedings are different. True, sometimes class certification is a method for resolving an MDL, therefore invoking the provisions of Rule 23. But if that happens it often does not occur until the end of the MDL proceeding. Meanwhile, all of the claimants ordinarily have their own lawyers. Section 1407 only authorizes transfer of pending cases, so claimants must first file a case to be included. ("Direct filing" in the transferee court has become fairly widespread, but that still requires a filing, usually by a lawyer.) As a consequence, there is no direct analogue to the appointment of class counsel to represent unnamed class members (who may not be aware they are part of the class, much less that the lawyer selected by the court is "their" lawyer). The transferee court cannot command any claimant to accept a settlement accepted by other claimants, whether or not the court regards the proposed settlement as fair and reasonable or even generous. And the transferee court's authority is limited, under the statute, to "pretrial" activities, so it cannot hold a trial unless that authority comes from something beyond a JPML transfer order.

Notwithstanding these structural differences between class actions and MDL proceedings, one could also say that the actual evolution of MDL proceedings over recent decades——perhaps particularly "mass tort" MDL proceedings——has somewhat paralleled the emergence since the 1960s of settlement as the common outcome of class actions. Whether or not this outcome was foreseen in the 1960s when the transfer statute was adopted, it seems to be the norm today.

This evolution has involved substantial court participation. Almost invariably in MDL proceedings involving a substantial number of individual actions, the transferee court appoints "lead counsel" or "liaison counsel" and directs that other lawyers be supervised by these court-appointed lawyers. The Manual for Complex Litigation (4th ed. 2004) contains extensive directives about this activity:

> § 10.22. Coordination in Multiparty Litigation——Lead/Liaison Counsel and Committees
> § 10.221. Organizational Structures
> § 10.222. Powers and Responsibilities
> § 10.223. Compensation

So sometimes——again perhaps particularly in "mass tort" MDLs——the actual evolution and management of the litigation may resemble a class action. Though claimants have their own lawyers (sometimes called IRPAs——individually represented plaintiffs' attorneys), they may have a limited role in managing the course of the MDL proceedings. A court order may forbid the IRPAs to initiate discovery, file motions, etc., unless they obtain the approval of the attorneys appointed by the court as leadership counsel. In class actions, a court order appointing "interim counsel" under

Rule 23(g) even before class certification may have a similar consequence of limiting settlement negotiation (potentially later presented to the court for approval under Rule 23(e)), which might be likened to the role of the court in appointing counsel to represent one side or the other in MDL proceedings.

At the same time, it may appear that at least some IRPAs have gotten something of a "free ride" because leadership counsel have done extensive work and incurred large costs for liability discovery and preparation of expert presentations. The Manual for Complex Litigation (4th) § 14.215 provides: "Early in the litigation, the court should define designated counsel's functions, determine the method of compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions."

One method of doing what the Manual directs is to set up a common benefit fund and direct that in the event of individual settlements a portion of the settlement proceeds (usually from the IRPA's attorney's fee share) be deposited into the fund for future disposition by order of the transferee court. And in light of the "free rider" concern, the court may also place limits on the percentage of the recovery that non-leadership counsel may charge their clients, sometimes reducing what their contracts with their clients provide.

The predominance of leadership counsel can carry over into settlement. One possibility is that individual claimants will reach individual settlements with one or more defendants. But sometimes MDL proceedings produce aggregate settlements. Defendants frequently are not willing to fund such aggregate settlements unless they offer something like "global peace." That outcome can be guaranteed by court rule in class actions, because preclusion is a consequence of judicial approval of the classwide settlement, but there is no comparable rule for MDL proceedings.

Nonetheless, various provisions of proposed settlements may exert considerable pressure on IRPAs to persuade their clients to accept the overall settlement. On occasion, transferee courts may also be involved in the discussions or negotiations that lead to agreement to such overall settlements. For some transferee judges, achieving such settlements may appear to be a significant objective of the centralized proceedings. At the same time, some have wondered whether the growth of "mass" MDL practice is in part due to a desire to avoid the greater judicial authority over and scrutiny of class actions and the settlement process under Rule 23.

The absence of clear authority or constraint for such judicial activity in MDL proceedings has produced much uneasiness among

academics. One illustration is Prof. Burch's recent book *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* (Cambridge U. Press, 2019), which provides a wealth of information about recent MDL mass tort litigations. In brief, Prof. Burch urges that it would be desirable if something like Rules 23(e), 23(g), and 23(h) applied in these aggregate litigations. In somewhat the same vein, Prof. Mullenix has written that "[t]he non-class aggregate settlement, precisely because it is accomplished apart from Rule 23 requirements and constraints, represents a paradigm-shifting means for resolving complex litigation." Mullenix, Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act, 37 Rev. Lit. 129, 135 (2018). Her recommendation: "[B]etter authority for MDL judicial power might be accomplished through amendment of the MDL statute or through authority conferred by a liberal construction of the All Writs Act." Id. at 183.

Achieving a similar goal via a rule amendment might be possible by focusing on the court's authority to appoint and supervise leadership counsel. That could at least invoke criteria like those in Rule 23(g) and (h) on selection and compensation of such attorneys. It might also regard oversight of settlement activities as a feature of such judicial supervision. However, it would not likely include specific requirements for settlement approval like those in Rule 23(e).

But it is not clear that judges who have been handling these issues feel a need for either rules-based authority or further direction on how to wield authority already widely recognized. Research has found that judges do not express a need for greater or clarified authority in this area. And the subcommittee has not, to date, been presented with arguments from experienced counsel in favor of proceeding along this line. All participants——transferee judges, plaintiffs' counsel and defendants' counsel——seem to prefer avoiding a rule amendment that would require greater judicial involvement in MDL settlements.[3]

For the present, the subcommittee has begun discussing this subject. This very preliminary discussion has identified a number of issues that could be presented if serious work on possible rule proposals occurs. These issues include the following:

[3] One more recent development deserves mention. In September 2019, Judge Polster used Rule 23 to certify a "negotiation class" to negotiate a settlement on behalf of local governmental entities with claims involved in the Opioids MDL. After accepting an appeal under Rule 23(f), the Sixth Circuit, by a 2-1 vote, ruled that such certification was not authorized by Rule 23. *In re National Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020). A petition for rehearing en banc has been filed.

Scope: Appointment of leadership counsel and consolidation of cases long antedate the passage of the Multidistrict Litigation Act in 1968. As with the PFS/census topic, a question on this topic would be whether it applies only to some MDLs, to all MDLs, or also to other cases consolidated under Rule 42. The Manual for Complex Litigation has pertinent provisions, and has been applied to litigation not subject to an MDL transfer order. Its predecessor, the Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960), antedated Chief Justice Warren's appointment of an ad hoc committee of judges to coordinate the handling of the outburst of Electrical Equipment antitrust cases, which proved successful and led to the enactment of § 1407.

Standards for appointment to leadership positions: Section 10.224 of the *Manual for Complex Litigation* (4th ed. 2004) contains a list of considerations for a judge appointing leadership counsel. Rule 23(g) has a set of criteria for appointment of class counsel. Though similar, these provisions are not identical. Any rule could opt for one or another of those models, or offer a third template. When an MDL includes putative class actions, it would seem that Rule 23(g) is a reasonable starting place, however.

Interim lead counsel: Rule 23(g) explicitly authorizes appointment of interim class counsel. The goal is that the person or persons so appointed would be subject to the requirements of Rule 23(g)(4) that counsel act in the best interests of the class as a whole, not only those with whom counsel has a retainer agreement. In some MDL proceedings, an initial census or other activity may precede the formal appointment of leadership counsel. Whether such interim leadership counsel can negotiate a proposed global settlement (as interim class counsel can negotiate before certification about a pre-certification classwide settlement) could raise issues not pertinent in class actions. It may be that the more appropriate assignment of such interim counsel should be——as seems to be true of the MDL proceedings where this has occurred——to provide effective management of such tasks as an initial census of claims.

Duties of leadership counsel: Appointment orders in MDL proceedings sometimes specify in considerable detail what leadership counsel are (and perhaps are not) authorized to do. Such orders may also restrict the actions of other counsel. Significant concerns have arisen about whether leadership counsel owe a duty of loyalty, etc., to claimants who have retained other lawyers (the IRPAs). Some suggest that detailed specification of duties of leadership counsel from the outset

would facilitate avoiding "ethical" problems later on. The subcommittee has heard that some recent appointment orders productively address these issues.

It seems true that the ordinary rules of professional responsibility do not easily fit such situations. Regarding class actions, at least, Restatement (Third) of the Law Governing Lawyers § 128 recognized that a different approach to attorney loyalty had been taken in class actions. It may be that similar issues inhere in the role of leadership counsel in MDL proceedings. Both the wisdom of rules addressing these issues, and the scope of such rules (on topics ordinarily thought to be governed by state rules of professional responsibility) are under discussion. Given that most (or all) claimants involved in an MDL actually have their own lawyers (not ordinarily true of most unnamed class members), it may be that rule provisions ought not seek to regulate these matters.

Common benefit funds: Leadership counsel are obliged to do extra work and incur extra expenses. In many MDLs, judges have directed the creation of "common benefit funds" to compensate leadership counsel for undertaking these extra duties. A frequent source of the funds for such compensation is a share of the attorney fees generated by settlements, whether "global" or individual. In some instances, MDL transferee courts have sought thus to "tax" even the settlements achieved in state-court cases not formally before the federal judge. From the judicial perspective, it may appear that the IRPAs are getting a "free ride," and that they should contribute a portion of their fees to pay for that ride.

Capping fees: Somewhat in keeping with the "free ride" idea, judges have sometimes imposed caps on fees due to IRPAs at a lower level than what is specified in the retainer agreements these lawyers have with their clients. The rules of professional responsibility direct that counsel not charge "unreasonable" fees, and sometimes authorize judges to determine that a fee exceeds that level. It is not clear whether this "capping" activity is as common as orders creating common benefit funds. Whether a rule should address, or try to regulate, this topic is uncertain.

Judicial settlement review: As some courts put it, the court's role under Rule 23(e) is a "fiduciary" one, designed to protect unnamed class members against being bound by a bad deal. But ordinarily in an MDL each claimant has his or her own lawyer. There is no enthusiasm for a rule that interferes with individual settlements, or calls for judicial review of them (although those settlements may result in a required payment into a common benefit fund, as noted above).

So it may seem that a rule for judicial review of settlement provisions in MDL proceedings is not appropriate. But it does happen that "global" settlements negotiated by leadership counsel are offered to claimants, with very strong inducements to them or their lawyers to accept the agreed-upon terms. In such instances, it may seem that sometimes the difference from actual class action settlements is fairly modest. Indeed, in some instances there may be class actions included in the MDL, and they may become a vehicle for effecting settlement.

As noted above, it appears that some leadership appointment orders include negotiating a "global" settlement as among the authorities conferred on leadership counsel. Even if that is not so, it may be that leadership counsel actually do pursue settlement negotiations of this sort. To the extent that judicial appointment of leadership can produce this situation, then, it may also be appropriate for the court to have something akin to a "fiduciary" role regarding the details of such a "global" settlement.

Ensuring that any MDL rules mesh with Rule 23: As noted, MDLs include class actions with some frequency. So sometimes Rules 23(e), (g) and (h) would apply. But it is certainly possible that in some MDLs there are both claims included in class actions and other claims that are not. If the MDL rules for the topics discussed above do not mesh with Rule 23, that could be a source of difficulty. Perhaps that is unavoidable; this potential dissonance presumably already exists in some MDL proceedings. But the possibility of tensions or even conflicts between MDL rules and Rule 23 merits ongoing attention.

At present, the basic question is whether there should be some formal statement of many practices that have been adopted——and sometimes become widespread——in managing MDL proceedings. Whether such a statement ought to be in the rules is not clear. There are alternative locations, including the Manual for Complex Litigation, the annual conference the Judicial Panel puts on for transferee judges, and the JPML's website. Perhaps it could be sufficient to expect that experienced MDL litigators will carry the issues and related practices from one proceeding to another, and experienced MDL transferee judges will communicate among themselves and with those new to the fold.

The idea of relying on informal circulation of information about such practices prompted a repeated concern——there is good reason to make efforts to expand and diversify the ranks of lawyers who take on leadership positions. That is one of the reasons why the subcommittee conference call on September 10 included emphasis on involving younger lawyers and, perhaps particularly, those who

had sought but not yet received appointment to a leadership position. Anything that formalizes best practices should not impede progress on this important effort. On the other hand, some formal statement might be advantageous by making these practices known more widely and more accessible to those not steeped in this realm of practice.

Another consideration is the possibility that some judges or litigators might entertain doubts about the courts' authority to do the sorts of things that have commonly been done to manage MDL proceedings. Though Rule 23 is a secure basis for judicial authority to review the terms of proposed settlements, in MDL proceedings not involving Rule 23 the judicial role is more advisory or supervisory. There may be serious questions about whether a rule can authorize a judge to "approve" or perhaps even comment on the terms of a proposed settlement in an MDL. There seems scant basis for judicial authority to bind individual parties to a proposed settlement simply because they have been aggregated, sometimes unwillingly, under § 1407.

So it may be that if more formalized provisions are needed the anchor could be the court's authority to designate a leadership structure, something that has been widely recognized. The reality is that judges may prescribe specific duties for leadership counsel (and also on occasion restrict the authority of non-leadership lawyers to act for their clients). A judge's authority to appoint and prescribe responsibilities for leadership counsel might also include continuing authority to supervise the performance of the leadership lawyers, including in connection with settlement negotiation. This undertaking could introduce further complexity in addressing the nature of possible responsibilities leadership counsel have to claimants who are not their direct clients.

In the background, then, are questions about whether the mere creation of an MDL proceeding provides authority for a federal judge to regulate attorney-client contracts, ordinarily governed by state law. One thought is that establishing a leadership structure is a matter of procedure that can properly be addressed by a Civil Rule. Establishing the structure in turn requires definition of leadership roles and responsibilities, and also requires providing financial support for the added work and attendant risks and responsibilities assumed by leadership counsel. Even accepting these structural elements, however, does not automatically carry over to creating a role for the MDL court in reviewing proposed terms for settlements, particularly of individual claims. Judges have differing views on the appropriate judicial role in providing settlement advice. Even in terms of broader "global" settlements, a wary approach would be required in considering an attempt to regularize a role for judges in working toward settlements in MDL proceedings.

At least the following questions have already emerged:

1. Is there any need to formalize rules of practice——whether in structuring management of MDL proceedings or in working toward settlement——that are already familiar and that continue to evolve as experience accumulates?

2. Do MDL judges actually hold back from taking steps that they think would be useful because of doubts about their authority?

3. There are indications that any formal rulemaking would initially be resisted by all sides of the MDL bar and by experienced MDL judges. Is that an important concern that should call for caution? Or is it a good reason to look further into the arguments of some academics that it is important to regularize the insider practices that characterize a world free of formal rules?

4. Even apart from concerns about the reach of Enabling Act authority, would many or even all aspects of possible rules interfere improperly with attorney-client relationships?

5. Would rules in this area unwisely curtail the flexibility transferee judges need in managing MDL proceedings?

6. Would rule provisions for common-benefit fund contributions, and for limiting fees for representing individual clients, impermissibly modify substantive rights, even though courts are often enforcing such provisions without any formal authority now?

7. Would formal rules for designating members of the leadership somehow impede efforts to bring new and more diverse attorneys into these roles?

During the Advisory Committee's October 2020 discussion, the plan for a conference on these issues met with approval. Standing Committee insights and guidance would be helpful. The Appendix below offers a sketch of a possible rule approach to some of these issues, along with notes raising questions. The inclusion of this sketch does not imply that the subcommittee or the Advisory Committee is convinced that proceeding down this rulemaking road is warranted. It also should be noted that while the sketch attempts to raise the full range of issues that have surfaced on this very broad topic, the subcommittee may decide after further study to narrow its focus to a much smaller subset of these issues——or, of course, not to recommend pursuit of any of them.

APPENDIX
Sketch of Possible Rule approach

The sketch below is offered solely to provide a concrete example of how the topics discussed above might be addressed in a rule. As emphasized in this agenda memo, the subcommittee has not made any decision about whether to recommend attempting to draft a rule. Indeed, even if some provisions regarding these matters would be useful, it need not follow that they should be embodied in a rule, as opposed to a manual or instructional materials for the Judicial Panel.

Rule 23.3. Multidistrict Litigation Counsel

(a)(1) *Appointing Counsel.* When actions have been transferred for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407, the court may appoint [lead][4] counsel to perform designated [acts][responsibilities] on behalf of[5] all counsel who have appeared for similarly aligned parties.[6] In appointing [lead] counsel the court:

(A) must consider:

(i) the work counsel has done in preparing and filing individual actions;

(ii) counsel's experience in handling complex litigation,

[4] It may work to leave the many tiers of counsel to the committee note. There may or may not be a single "lead" counsel——it is at least possible to designate an executive committee or some such without identifying a single lead counsel. In addition to lead counsel, there may or may not be a steering or executive committee, subcommittees for discovery or whatever, liaison counsel to work with other counsel in the MDL proceeding, liaison counsel to work with lawyers and actions in state courts, and so on through the needs of a particular MDL. The court may or may not want to be involved in appointing all of these various roles.

[5] It is not clear that we want to designate class counsel to represent parties other than their own clients. Probably we cannot say "to represent" other lawyers who represent clients in the MDL proceeding. "Manage" the proceedings might imply too much authority. "Coordinate" addresses the basic purpose. "Coordinate the efforts of all counsel [on a side]" might work, but it may leave the way open to disruption by individual lawyers not appointed to any role.

[6] This is an elastic concept, but perhaps better than "[all] plaintiffs" or "[all] defendants." Large numbers of third-party defendants have not appeared in our discussions, but the more general phrase may be better.

multidistrict litigation, and the types of claims asserted in the proceedings;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to the proceedings;

(B) may consider any other matter pertinent to counsel's ability to perform the designated [acts][responsibilities];

(C) may order potential [lead] counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and taxable costs;

(D) may include in the appointing order provisions about the role of lead counsel and the structure of leadership, the creation and disposition of common benefit funds under Rule 23.3(b), discussion of settlement terms [for parties not represented by lead counsel] under Rule 23.3(c), and matters bearing on attorney's fees and nontaxable costs [for lead counsel and other counsel] under Rule 23.3(d); and

(E) may make further orders in connection with the appointment[, including modification of the terms or termination].

(2) *Standard for Appointing Lead Counsel.* The court must appoint as lead counsel one or more counsel best able to perform the designated responsibilities.

(3) *Interim Lead Counsel.* The court may designate interim lead counsel to report on the ways in which an appointment of lead counsel might advance the purposes of the proceedings.

(4) *Duties of Lead Counsel.* Lead counsel must fairly and adequately discharge the responsibilities designated by the court [without favoring the interests of lead counsel's clients].

(b) COMMON BENEFIT FUND. The court may order establishment of a common benefit fund to compensate lead counsel for discharging the designated responsibilities. The order may be

modified at any time, and should [must?]:
(1) set the terms for contributions to the fund [from fees payable for representing individual plaintiffs]; and
(2) provide for distributions to class counsel and other lawyers or refunds of contributions.

(c) SETTLEMENT DISCUSSIONS. If an order under Rule 23.3(a)(1)(D) authorizes lead counsel to discuss settlement terms that [will? may?] be offered to plaintiffs not represented by lead counsel, any terms agreed to by lead counsel:
(1) must be fair, reasonable, and adequate;[7]
(2) must treat all similarly situated plaintiffs equally; and
(3) may require acceptance by a stated fraction of all plaintiffs, but may not require acceptance by a stated fraction of all plaintiffs represented by a single lawyer.

(d) ATTORNEY FEES.
(1) *Common Benefit Fees.* The court may award fees and nontaxable costs to lead counsel and other lawyers from a common benefit fund for services that provide benefits to [plaintiffs? parties?] other than their own clients.[8]

[7] This is a particularly difficult proposition. In one way it seems obvious, and almost compelled by the analogy to Rule 23(e). But the justification depends on the proposition that a leadership team may face the same de facto conflicts of interests as class counsel. The incentive to settle on terms that produce substantial fees——both for representing individual plaintiffs and for common-benefit activities——may be real. But the comparison to Rule 23 is complicated by the right of each individual plaintiff to settle, or refuse to settle, on whatever terms that plaintiff finds adequate.

[8] Another tricky question. Lead counsel services often provide benefits both to lead counsel's clients and to other parties, usually——perhaps always?——other plaintiffs. But some services may provide benefits only to others' clients. A particular member of the leadership team, for example, may have clients who used only one version of a product that, in different forms, caused distinctive injuries to others, but the work can easily cross those boundaries. And we have occasionally heard hints about leadership counsel who have no clients at all. Is it feasible to write anything about the distinction into rule text? And is there any reason to try: if my hard work would be just as hard if I were representing only my own clients, but it confers great benefit on other lawyers who are spared the need to duplicate the work, why not provide some compensation for the benefit?

(2) *Individual Contract Fees.* The court may modify the attorney's fee terms in individual representation contracts when the terms would provide unreasonably high fees in relation to the risks assumed, expenses incurred, and work performed under the contract.

2. Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

More than two years ago, the Supreme Court ruled that complete disposition of all claims among all parties to what began as an independent action is a final judgment for appeal purposes even if the action was completely consolidated with one or more other actions for all purposes. At the same time, it suggested that if this interpretation of Rule 42(a) with 28 U.S.C. § 1291 creates problems, the Rules Enabling Act process provides the means for addressing the problems. *Hall v. Hall*, 138 S. Ct. 1118 (2018).

The Appellate Rules and Civil Rules Committees have formed a joint subcommittee to study this question. The Federal Judicial Center has completed an exhaustive docket study requested by the subcommittee. The study explored all civil actions filed in the federal courts in the years 2015, 2016, and 2017. Because all of those actions were filed before *Hall v. Hall* was decided, and because final dispositions take time, final judgments in these actions were about evenly divided between the period before and the period after the decision. The actions filed before the decision had the potential to show the effects of the four different finality rules adopted in different circuits before the Court picked one of them without discussing the others.

The search included actions swept into MDL proceedings, but excluded them from the study. Among the remaining actions, the search found 20,730 originally independent actions that became consolidated into 5,953 "lead" actions. A sample of 400 lead actions yielded 385 that fit the *Hall v. Hall* template. Forty-eight percent of them were resolved by settlement, and another nineteen percent were voluntarily dismissed. The dispositions of those that remained included nine in which an originally independent action was finally concluded before final disposition of the whole consolidated action. Appeals were taken in six of these. Study of these cases did not reveal any appeal problems arising from the new finality rule.

Extension of the FJC study would be costly. It is not clear whether this sort of docket study can reveal any problems that may emerge even at the simple level of appeal opportunities lost for failure to understand or to remember this corner of finality

doctrine. It is clear that a docket study cannot explore the practical problems that this finality rule may generate for district courts, the courts of appeals, and the parties. These problems reflect issues similar to those that led to adoption and revision of the partial final judgment provision in Rule 54(b).

When an appeal is taken in compliance with the *Hall v. Hall* rule, the district court may face difficult choices in managing the parts of the consolidated action that remain before it. Consolidation ordinarily reflects commonalities among the consolidated cases. A ruling that completely disposes of one of them may affect others, and often all. It may be tempting, even important, to defer further proceedings until the appeal provides guidance on the common issues. But there may be offsetting reasons to press ahead, at the risk of investing in proceedings that will have to be undone after the appeal is decided.

The courts of appeals face the inevitable risk that decision of a first appeal will be followed by subsequent appeals that raise the same or similar questions on a common record.

The parties are similarly affected. A losing party may be forced to take an appeal even though it would be better to await complete disposition of the consolidated action and join an appeal taken by others. The parties who remain in the district court may feel it is important to provide support for the appeal, even recognizing that as nonparties to the appeal they may choose to duplicate their efforts on a later appeal if the first does not succeed. And they have interests parallel to the interests of the district court and court of appeals in avoiding either the delay of suspending proceedings pending appeal or the waste of continuing proceedings that may need to be repeated.

The subcommittee will undertake informal inquiries in a few courts of appeals to see whether judges and court staffs can shed light on how the new finality rule is working. There is no special urgency about determining whether to develop alternative rules of finality for consolidated proceedings. The new rule is clear. When known and remembered, it is easy——even if inconvenient——to comply. Better empirical information may become available, whether to support or allay the concerns.

3. E-Filing Deadline Joint Subcommittee

All but the Evidence Rules include identical provisions defining the end of the last day for electronic filing. Civil Rule 6(a)(4)(A), like the others, sets the end “at midnight in the court’s time zone.”

The question addressed by the subcommittee is whether the time

should be set earlier. One possibility, among others, would set the time at the close of the clerk's physical office.

The FJC has undertaken a comprehensive study of electronic filing patterns. The subcommittee will resume active deliberations when the FJC study is completed.

III. Information Items: Proposals Carried Forward

A. Rule 12(a): Filing Times and Statutes
Suggestion 19-CV-O

Discussion of this item, sketched below, failed to gain a recommendation to publish by an evenly divided Advisory Committee vote. It will be carried forward for consideration at the spring meeting.

Paragraphs (1), (2), and (3) of Rule 12(a) set the general times to respond at 21 days in (1), and 60 days in (2) and (3). Rule 12(a)(1) begins by deferring to statutes that set different times: "Unless another time is specified by this rule or a federal statute * * *." Rules 12(a)(2) and (3) do not include a similar recognition of different statutory times in actions against the United States, its agencies, or its officers sued in an official capacity (2) or in an individual capacity for official acts (3). The structure of Rule 12(a) makes it at best difficult to transport the qualification in (1) to (2) and (3). But there are federal statutes——the Freedom of Information Act and the Government in Sunshine Act——that set the time to answer at 30 days, not the 60 days provided by Rule 12(a)(2). No statute setting a different time for actions covered by Rule 12(a)(3) has been found, but there may be such a statute and it is always possible that one or more may be enacted.

The Advisory Committee believes there is no reason to supersede statutory provisions by Rule 12(a), nor to complicate the task of persuading a court that a later-enacted statute has superseded Rule 12(a) when it applies. A clarifying amendment is readily drafted:

> (a) TIME TO SERVE A RESPONSIVE PLEADING. Unless another time is specified by a federal statute, the time for serving a responsive pleading is as follows:
> (1) *In General.* ~~Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:~~
> (A) A defendant must serve an answer * * *.

Both practical and conceptual reasons were advanced for making the

amendment.

As a practical matter, it may require some advocacy to persuade a court clerk to issue a summons requiring a response within a statutory period that supersedes the general 60-day provisions in subdivision (2) or, if a statute be found, in subdivision (3). The lawyer who proposed an amendment encountered just such a situation.

As a conceptual matter, it is unseemly to have a rule that reflects deference to statutes in one setting but not in others where inconsistent statutes exist or may come to exist. It does not seem likely that a court would accept an argument that by negative implication from paragraph 12(a)(1), paragraphs (2) and (3) supersede any inconsistent statute adopted before they were adopted. But the argument may well be made, and the rule text may create unnecessary work for court clerks and attorneys who seek to honor statutory provisions.

The argument against making the amendment is pragmatic. The Department of Justice reports that it responds within the statutory 30 days for actions that present only claims under the Freedom of Information Act or the Government in Sunshine Act, although it may request an extension. In actions that combine claims under those statutes with other claims that fall into the general 60-day response period, they ordinarily seek an extension to allow the response within 60 days. They believe there is no practical problem, and are concerned that reflecting the statutory periods in amended rule text might make some judges more reluctant to extend the time to respond.

B. Rule 4(c)(3): Service by the U.S. Marshals Service in *In Forma Pauperis* Cases

Suggestion 19-CV-A

An ambiguity may lurk in the Rule 4(c)(3) provision for service by a United States marshal in actions brought *in forma pauperis* or by a seaman. It can be read to mean that the court must order service by the marshal in every such case. But it also might be read to mean that the court must order service by the marshal only if the plaintiff requests it.

This item was added to the agenda in response to a suggestion made in the Standing Committee at the January 2019 meeting. It is easy to draft rule text that escapes any possible ambiguity. But it has not proved so easy to determine what the unambiguous answer should be——a motion is always required to win an order, a motion is never required to win an order, or an order is made unnecessary by an order that recognizes i.f.p. or seaman status. Attempts to gain insights from the Marshals Service that go beyond recognizing the

burdens they bear when required to make service have not yet been successful, and have stalled in face of the COVID-19 pandemic.

C. Rule 5(d)(3)(B): E-Filing by Unrepresented Person

Suggestions 20-CV-J, K, L, M, N, O, P, Q, S, U, V, W, and X

The electronic filing provisions of Rule 5(d)(3) were amended in 2018. After careful debate, Rule 5(d)(3)(B) permits an unrepresented party to file electronically "only if allowed by court order or by local rule."

The COVID-19 pandemic has brought the question back for further consideration. Filing by nonelectronic means often presents unrepresented parties with still greater challenges than before, including both the physical acts required to file and attendant risks of infection. Courts have responded to these problems in different ways. A preliminary survey of experience in the district courts of the Ninth Circuit showed different responses and different experiences. The flexibility built into Rule 5(d)(3)(B), as with so many other Civil Rules, enables courts to adopt the responses that best fit their local circumstances. An emergency rule does not seem necessary.

The Advisory Committee concluded that it should continue to gather information about experience under the pandemic before considering possible amendments of the current rule.

D. *In Forma Pauperis* Disclosures

Suggestion 19-CV-Q

Last April the Advisory Committee considered a proposal that included serious challenges to the many items of information that are commonly required to apply for i.f.p. status. It concluded then that these questions are better addressed elsewhere, including in the Administrative Office as they relate to the i.f.p. forms it provides, and perhaps in the Committee on Court Administration and Case Management. The topic was retained on the agenda, however, on the understanding that the Appellate Rules Committee is considering these matters in relation to Appellate Rules Form 4.

This topic will carry forward to consider the deliberations of the Appellate Rules Committee.

IV. New Items Carried Forward

A. Rule 26(b)(5)(A): Privilege Logs

Suggestions 20-CV-R and 20-CV-DD

Two suggestions focus on practice under Rule 26(b)(5)(A). The

specific focus is on privilege logs, which have become the routine method of satisfying the rule's requirement that a party that withholds information on grounds of privilege make that claim and provide information about what is withheld. The proposal is that the rule be amended to add specifics about how parties are to provide details about materials withheld from discovery due to claims of privilege or protection as trial-preparation materials. These submissions identify a problem that can produce waste. But it is not clear that any rule change will helpfully change the current situation.

The basic difficulty is that an extremely detailed listing of the withheld materials may sometimes be unworkable or extremely costly to produce without providing significant benefit to the parties or the court. But there is no enthusiasm for retracting the general requirement that parties provide notice about what they have withheld. The subject is being carried forward for further study.

1993 adoption of Rule 26(b)(5)

Before 1993, parties withheld materials covered by a privilege from discovery without enumerating what was withheld. Often they relied on some sort of "general objection" that no privileged materials would be produced. Indeed, since Rule 26(b)(1) says only "nonprivileged matter" is within the scope of discovery, one might have asserted that the objection was not needed. In any event, it would often be very difficult for other parties to determine what had not been turned over based on a claim of privilege. There were suspicions that sometimes parties were overly aggressive in their privilege claims.

In 1993, therefore, Rule 26(b)(5)(A) was added. It now provides:

> (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
> (i) expressly make the claim; and
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

This provision (modeled on a similar provision added to Rule 45 in 1991) sought to dispel the uncertainty that existed

before it went into effect, but did not seek to impose a heavy new burden on responding parties. Hence, the committee note accompanying the 1993 amendment advised:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Notwithstanding this directive, there is reason to worry that overbroad claims of privilege still occur. As Judge Grimm noted in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008): "[B]ecause privilege review and preparation of privilege logs is increasingly handled by junior lawyers, or even paralegals, who may be inexperienced and overcautious, there is an almost irresistible tendency to be over-inclusive in asserting privilege protection."

But privilege logs——the customary expectation for complying with Rule 26(b)(5)(A)——were a poor solution to the problem, as Judge Grimm also recognized (id.):

> In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or in camera review of the documents themselves.

For further discussion, *see* 8 Fed. Prac. & Pro. § 2016.1.

2008-09 Advisory Committee Consideration

At the April 2008 Advisory Committee meeting, Prof. Gensler (then the academic member of the Advisory Committee) raised concerns about the actual experience implementing Rule 26(b)(5)(A). Thereafter, further background work was done and the question was further discussed at the Advisory Committee's November 2008 meeting. This discussion was about both the content of privilege logs and the timing for them. One point made was: "Vendors have become insistent that electronic screening software can do the job at much lower cost." Several members of the Advisory Committee reported then that the parties usually work out arrangements that cope with the potential difficulties. The matter was continued on the Committee's calendar, but no further action has been taken.

Pertinent Post-1993 Rule Changes

Since 1993, other rule changes have added provisions that could affect the possible burden of complying with Rule 26(b)(5)(A).

First, in 2006 Rule 26(b)(5)(B) was added, providing that any party could make a belated assertion of privilege, after production, which would require all parties that received the identified information to sequester the information unless the court determined that the privilege claim was unsupported. At the same time, Rule 26(f) was amended to add what is now in Rule 26(f)(3)(D), directing that the parties' discovery plan discuss issues about claims of privilege. But these rule changes did not precisely address the question whether production constituted a waiver, particularly a subject-matter waiver.

Second, in 2008 Congress enacted Fed. R. Evid. 502. In Rules 502(d) and 502(e), that rule gives effect to party agreements that production of privileged material will not constitute a waiver of privilege. In addition, even in the absence of an agreement, Rule 502(b) insulates inadvertent production against privilege waiver if the producing party "took reasonable steps to prevent disclosure." Rule 502 *does* directly address the question whether a waiver has occurred.

Owing to these post-1993 rule changes, therefore, one may conclude that the burdens of complying with Rule 26(b)(5)(A) have abated somewhat. A significant concern had been that failure to log a particular item would work a waiver even if the item was not produced. But it seemed that courts finding such waivers did so only as a sort of sanction for relatively flagrant disregard of the Rule 26(b)(5)(A) obligation, not for a simple slip-up. Due to Rule 26(b)(5)(B), there is now a procedure to retrieve a mistakenly-produced privileged item, leaving it to the party that

obtained the item to seek a ruling in court that it is not privileged. Rule 502, then, directs that no waiver be found for inadvertent production of a privileged item if reasonable steps were taken to review before production, and that even if reasonable steps were not taken the parties could guard against waiver by making an agreement under Rule 502(d). In short, the pressure of a waiver due to oversight——particularly the risk of a subject-matter waiver——has abated considerably since 1993.

Meanwhile, it may be that technology now exists to provide a useful assist to the parties in preparing a privilege log. Technology-assisted review (TAR) is often or routinely employed to review large volumes of electronically-stored information to identify responsive materials. As discussed in 2008 by the Advisory Committee, software was then being promoted as effectively identifying not only responsive materials, but also materials that might be claimed to be privileged. It may be that such programs could then also generate at least a draft privilege log.

Nonetheless, there have also been criticisms of the reported requirement of some courts that parties prepare a "document-by-document" privilege log. As Judge Facciola observed in *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98-99 (D.D.C. 2012):

> [I]n the era of "big data," in which storage capacity is cheap and several bankers' boxes of documents can be stored with a keystroke on a three inch thumb drive, there are simply more documents that everyone is keeping and a concomitant necessity to log more of them. This, in turn, led to the mechanically produced privilege log, in which a database is created and automatically produces entries for each of the privileged documents. * * *
>
> But, the descriptor in the modern database has become generic; it is not created by a human being evaluating the actual, specific contents of that particular document. Instead1q 7` ;l4aZBg45s35to99i657, the human being creates one description and the software repeats that description for all the entries for which the human being believes that description is appropriate. * * * This raises the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive as it is useless.

Cost of Responding to Discovery and Withholding Privileged Materials Without Preparing a Privilege Log

It seems worth noting that preparing the privilege log may often be a relatively minor cost in comparison to responding to discovery of ESI more generally. Whether or not a privilege log is

prepared, much work is necessary to respond to discovery of ESI. Responsive materials must be located in what is sometimes an enormous quantity of digital data. In addition, either simultaneously or after the responsive materials are extracted, the specific items potentially covered by privilege must be identified and set apart.

After those potentially privileged items are identified and set apart, a legally trained person must verify that it would indeed be legitimate to withhold them from production on that ground. And then care must be taken at least to keep a record of what was withheld on this ground. It would seem that all of these steps would have been required under the pre-1993 rules, and that they would continue to be necessary if Rule 26(b)(5)(A) were amended. So it may be that the additional cost of preparing a privilege log is not a large part of this overall cost of responding to discovery, even though preparing a document-by-document log may in many cases require a disproportionate effort, or at least be a waste of time.

Current Submissions

The LCJ submission (20-CV-R) stresses the difficulties of privilege logs in an era of ESI, emphasizing Judge Facciola's views. Indeed, along with Jonathan Redgrave (20-CV-DD), Judge Facciola proposed in 2010 that "the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement." Facciola & Redgrave Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, 4 Fed. Cts. L. Rev. 19 (2010). Implementing what Judge Facciola urged by rule could be difficult, however.

The LCJ submission describes some local district court rules about privilege logs, and also some state court rules. It acknowledges the good sense of what the committee note to the 1993 amendment to Rule 26(b)(5)(A) (quoted above) said about discussion and cooperation among counsel, but reports that "the suggestion has been largely ignored." It also urges that a rule provide for "presumptive exclusion of certain categories" of material from privilege logs, such as communications between counsel and the client regarding the litigation after the date the complaint was served, and communications exclusively between in-house counsel or outside counsel of an organization. Invoking proportionality, it emphasizes that "flexible, iterative, and proportional" approaches are more effective and efficient than document-by-document privilege logging. As mentioned above, even though the 1993 committee note accompanying Rule 26(b)(5)(A) recognized that detailed logging is not generally appropriate, "the case law has

largely missed the Committee's perspicacity." One might say that the Advisory Committee's urging did not produce the desired outcome.

The specific LCJ proposal seems more limited. It is to add the following to Rule 26(b)(5) and also to Rule 45(e)(2) on subpoenas:

> If the parties have entered an agreement regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

Would a Rule Amendment Improve Matters?

There is a limit to what rules can prescribe. The more general concern with proportionality calls for common-sense judgments about what discovery is really warranted under the circumstances of specific cases. That is difficult or impossible to prescribe in the abstract in a rule.

It may be that improvement by rule of the handling of what Rule 26(b)(5)(A) requires is not really possible because so much depends on the circumstances of the individual case. "Presumptive exclusion of certain categories" (not actually proposed by the submission, as quoted above) could introduce additional grounds for litigation about whether the categories apply in specific circumstances. And it may be worth noting something said during the November 2008 Advisory Committee meeting:

> An observer suggested that an effort to come up with a rule will only intensify costs. There is no real problem. "People work it out." The log is the last thing produced. And in some cases the parties may tacitly agree not to produce them at all, or to generate them only for particular categories of documents.

Alternatively, one might ultimately urge that Rule 26(b)(5)(A) should be abrogated. Perhaps the experience for more than a quarter century under this rule shows that it did not work, or does not now work. This submission does not urge doing that, and it is likely that valid concerns about unrevealed but overbroad claims of privilege mean that the rule should be retained.

But it is not clear that a rule can do more than the rule already does, particularly when augmented by the directive in Rule 26(f)(3)(D), calling for the parties to address "any issues

about claims of privilege." And it seems that the committee notes accompanying the original rule in 1993 and the revision of Rule 26(f) in 2006 speak to the concerns raised by the LCJ submission.

Introductory Discussion at Advisory Committee Meeting

At the Advisory Committee's October meeting, there was considerable discussion of the burdens and costs of privilege logs. Lawyer members of the Advisory Committee, in particular, reported that privilege logs can raise serious problems, particularly if the parties fail to work out an agreed method of satisfying Rule 26(b)(5)(A). At the same time, some judicial members reported not seeing problems frequently, but also that the lawyers (and perhaps magistrate judges) would be more likely to have experience with possible problems.

The resolution was to pursue the subject and study both the extent of the problems and the possibility that a rule change could make things better. There was no enthusiasm for going back to the pre-1993 situation in which no notice about withheld materials was required, but it was unclear how a rule change could materially improve matters. These issues remain under study, and would benefit from Standing Committee input.

B. Sealing Court Records
Suggestion 20-CV-T

Prof. Eugene Volokh (UCLA) has submitted a proposal for adoption of a Rule 5.3 on sealing of court records, on his own behalf and also on behalf of the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation. The rule proposal is presented in the Appendix below. It is being carried forward for further study.

The focus of this rule proposal is sealing of materials filed in court. In a broad sense, it focuses on a topic that has been on the Advisory Committee's agenda repeatedly over the last few decades. In the mid 1990s, there were two published drafts of possible amendments to Rule 26(c) that would have modified the standards for protective orders, in part by addressing the question of stipulated protective orders and filing confidential materials under seal pursuant to such orders or local rules. These proposals drew much attention and caused some controversy, and were eventually withdrawn. In March 1998 the Advisory Committee concluded that it would no longer pursue possible rule amendments on this topic.

Meanwhile, in Congress there have been various versions of a Sunshine in Litigation Act during recent decades, directed toward

protective orders regarding materials that might bear on public health.

Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all Advisory Committees that responded to concerns then that federal courts had "sealed dockets" in which all materials filed in court were kept under seal. The FJC did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files, and that most of the ones uncovered resulted from applications for search warrants that had not been unsealed after the warrant was served.

In short, there has been considerable controversy and concern about sealed court files and discovery confidentiality, but the civil rules have not been amended to address those concerns.

The Civil Rules do not have many provisions about sealing court files. Rule 5(d) does direct that various disclosure and discovery materials not be filed in court until they are used in the action. When filing does occur, that can raise an issue about filing confidential materials under seal. Rule 5.2 provides for redactions from filings and for limitations on remote access to electronic files to protect privacy. In that context, Rule 5.2(d) does say that the court "may order that a filing be made under seal without redaction." The committee note to that provision says that it "does not limit or expand the judicially developed rules that govern sealing."

This submission, however, does propose a rule governing sealing that might limit or expand such judicially developed rules. An initial question might be whether there is a need for such a rule. Prof. Volokh's cover letter says that "[e]very federal Circuit recognizes a strong presumption of public access" that is "founded in both the common law and the First Amendment." It adds that more than 80 districts have adopted local rules governing sealing, and says that the rule proposal "borrows heavily from those local rules." Footnotes to the proposal provide voluminous case law authority for these propositions and cite a large number of existing local rules.

According to the cover letter, nevertheless "a uniform rule governing sealing is needed; despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously."

There is no question that inappropriate sealing of court records is an important concern. But it is not clear that the problem is so widespread that an effort to develop a national rule is warranted. And if a national rule were promulgated, it is worth

noting, that could affect the validity of the cited local rules. *See* Rule 83(a)(1) ("A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 [the Rules Enabling Act]"). Nor is it clear that a national rule would much reduce the frequency of inappropriate sealing, depending in part on what might be defined as inappropriate.

If there is a problem that warrants an effort to develop a national rule, the draft language submitted by Prof. Volokh would require extensive work. The following are examples of some of the issues:

Possible additional burdens on courts: Various features of the proposal require courts to make "particularized findings." Rule 52(a)(1) directs a court after a nonjury trial to enter findings of fact and conclusions of law. Rule 23(b)(3) does say a court should certify a class only on finding that the superiority and predominance of common questions standards are met (though it does not have a specific findings requirement). It is not clear that there is a "particularized findings" requirement elsewhere in the civil rules. Cases under Rule 26(c) do say that a party seeking a protective order must make a particularized showing to justify entry of the order. *See* 8A Fed. Prac. & Pro. § 2035 at 157-58. But these cases do not require the court to make particularized findings when entering such an order.

Motion or objection by any "member of the public" without a need first to move to intervene: The rule would empower any "member of the public" to make a motion to unseal documents filed under seal "at any time." The proposed rule would explicitly excuse a motion to intervene for this purpose. There is a developed body of case law on intervention to challenge the seal on filed materials. *See* 8A Fed. Prac. & Pro. § 2044.1. This rule would evidently supplant that body of case law.

Challenges to sealing would be authorized by any "member of the public" at any time: The rule would direct that a motion is timely at any time, "regardless of whether the case remains open or has been closed." With CM/ECF it may be that accessing a closed case presents little difficulty, but such open-ended re-opening of cases is not the norm in the rules. Compare Rule 60(c)(1) (limiting a motion under Rule 60(b) to "a reasonable time," and for mistake, newly discovered evidence, or fraud to one year).

Defining "member of the public" could be challenging: The draft does not provide a more specific definition. Ordinarily

a proposed intervenor under Rule 24 must make some showing in support of a motion to intervene. If that is not required, it could become important to determine who is a "member of the public" entitled to challenge filing under seal without intervening. Would that right belong only to U.S. citizens or permanent residents? Would there be a ground for requiring that such a "member of the public" show some recognized interest in the contents of the sealed filing?

Materials filed under seal would automatically be "deemed unsealed" 60 days after "final disposition" of a case: This "final disposition" standard might resemble the final judgment standard for appeals. It likely means completion of all trial court proceedings and exhaustion or disregard of any proceedings on direct appeal, including a petition for certiorari. It might be taken to resemble Rule 54(a) ("'Judgment' a used in these rules includes a decree and any order from which an appeal lies"). But surely that standard would not apply if there were an appeal under 28 U.S.C. § 1292(a)(1) (preliminary injunctions) or § 1292(a)(2) (appointing receivers). It presumably would not apply to interlocutory orders certified for immediate appeal by the district court under 28 U.S.C. § 1292(b). How it would work in cases gathered pursuant to an MDL transfer if final judgment were entered in some but not all is uncertain. Whether the "final disposition" occurs only after all appeals have been exhausted might raise questions. It is not clear who would monitor these developments; if after a notice of appeal was filed, for example, there were a settlement, the clerk's office might not be aware of that development and the need to set the "60 days clock" running.

Motions to renew the seal are presumptively invalid unless filed more than 30 days before automatic unsealing: Coupled with the automatic unsealing mentioned above, this provision could mean, in effect, that 31 days after "final disposition" of a case the court would be without power to keep the materials under seal.

A special website, or a "centralized website" might be required: The proposal seems to direct that there be some special method of posting motions to seal, and suggests that "a centralized website maintained by several courts" might be useful. It also directs that this posting occur "within a day of filing."

A review of the proposal in the Appendix will likely suggest other issues. It does not seem that these issues must arise merely because a sealing rule is promulgated. To the contrary, a rule could likely be drafted that would not raise the specific issues

identified above. But any such rule might be expected to generate considerable controversy. For example, trade secrets and other commercially valuable information are placed under seal with some frequency. Limiting that protection might prompt serious concerns. Although there may presently be occasions in which sealing decisions appear, in retrospect, to be debatable, that alone does not make this topic different from others governed by the rules, on which it may sometimes happen that a court makes a decision later found to be erroneous.

Besides considering whether there is a need for such a rule, one might also reflect on how the rule would relate to existing and future case law on these subjects. The submission emphasizes that the case law is based on the Constitution and a common law right of access. Those grounds for access have developed over decades, and can be found in many cases cited in footnotes in the submission. If a rule were adopted, that might raise questions about whether it is different from that case law. If in a given circuit the case law is arguably more permissive about filing under seal and does not require all that a rule requires, does that mean the rule is supplanting that case law? If the rule is solely implementing the case law, does the rule change if the case law changes?

During the Advisory Committee's October meeting, discussion focused on the importance of court transparency. At least some matters would raise concerns. For example, the False Claims Act directs that a qui tam action be filed under seal. Another example that came up is that petitions to enforce arbitration awards that (which themselves are generally confidential) could raise concerns.

It was also noted that somewhat similar issues might be pertinent to the Appellate Rules. Indeed, there may be notable differences among the circuits on sealing. The Appellate Rules Committee studied these issues a few years ago, but did not conclude that any rule change was indicated.

For the present, the Advisory Committee concluded that the topic deserved further study. In particular, a review of local rules on sealing might shed light on (a) whether there is any need for a national rule along the lines proposed, and (b) whether divergences among local rules themselves are a reason for giving serious thought to a nationally uniform rule.

The Advisory Committee would welcome insights from members of the Standing Committee on the sealing issue.

APPENDIX

Suggestion 20-CV-T: Proposed Rule 5.3[9]

Rule 5.3

(a) PRESUMPTION OF PUBLIC ACCESS TO COURT RECORDS. Unless the court orders otherwise, all documents filed in a case shall be open to the public (except as specified in Rule 5.2 or by statute). Motions to file documents under seal are disfavored and discouraged. Redaction and partial sealing are forms of sealing, and are also governed by this rule, except insofar as they are governed by Rule 5.2. [Proposed Advisory Committee Note: This rule is intended to incorporate the First Amendment and common-law rights of access, and to provide at least as much public access as those rights currently provide.]

(b) REQUIREMENTS FOR SEALING A DOCUMENT. At or before the time of filing, any party may move to seal a document in whole or in part.

(1) Any party seeking sealing must make a good faith effort to seal only as much as necessary to protect any overriding privacy, confidentiality, or security interests. Sealing of entire case files, docket sheets, or entire documents is rarely appropriate. When a motion to seal parts of a document is granted, the party filing the document must file a publicly accessible redacted version of the document.

(2) If the interests justifying sealing are expected to dissipate with time, the party seeking sealing must make a good faith effort to limit the sealing to the shortest necessary time, and the court must seal the document for the shortest necessary time.

(3) There is an especially strong presumption of public access for court opinions, court orders, dispositive motions, pleadings, and other documents that are relevant or material to judicial decisionmaking or prospective judicial decisionmaking.

(4) Because sealing affects the rights of the public, no document filed in court may be sealed in whole or in part merely because the parties have agreed to a motion to seal or to a protective order, or have otherwise agreed

[9] Footnotes omitted.

to confidentiality.

(c) RETROACTIVE SEALING. Sealing of a document that has already been openly filed is allowed only in highly unusual circumstances, such as when information protected under Rule 5.2 is erroneously made public.

(d) PUBLIC FILING OF MOTIONS TO SEAL. A motion to seal must be publicly filed and must include a memorandum that:

(1) Provides a general description of the information the party seeks to withhold from the public.

(2) Demonstrates compelling reasons to seal the documents, stating with particularity the factual and legal reasons that secrecy is warranted and explaining why those reasons overcome the common law and First Amendment rights of access.

(3) Explains why alternatives to sealing, such as redaction, are inadequate.

(4) States the requested duration of the proposed seal.

(d) NOTICE AND WAITING PERIOD.

(1) Motions to seal shall be posted on the court's website, or on a centralized website maintained by several courts, within a day of filing.

(2) The court shall not rule on the motion until at least 7 days after it is posted, so that objections may be filed by parties or by others, unless the motion explains with particularity why an emergency decision is required.

(e) ORDERS TO SEAL. If a court determines that sealing is necessary, it must state its reasons with particularized findings supporting its decision. Orders to seal must be narrowly tailored to protect the interest that justifies the order. Orders to seal should be fully public except in highly unusual circumstances; and if they are in part redacted, any redactions should be narrowly tailored to protect the interest that justifies the redaction.

(f) UNSEALING, OR OPPOSING SEALING.

(1) Sealed documents may be unsealed at any time on motion of a party or any member of the public, or by the court sua sponte, after notice to the parties and an opportunity to be heard, without the need for a motion to intervene.

(2) Any party or any member of the public may object to a motion to seal, without the need for a motion to intervene.
(3) The motion to unseal or the objection to a motion to seal shall be filed in the same case as the sealing order or the motion to seal, regardless of whether the case remains open or has been closed.
(4) All sealed documents will be deemed unsealed 60 days after the final disposition of a case, unless the seal is renewed.
(5) Any motion seeking renewal of sealing must be filed within 30 days before the expected unsealing date, and the moving party bears the burden of establishing the need for renewal of sealing.

C. Rule 9(b): Pleading Conditions of Mind
Suggestion 20-CV-Z

Dean A. Benjamin Spencer, a committee member, has submitted a proposal to amend the second sentence of Rule 9(b). Rule 9(b) now provides:

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The proposal would amend the second sentence to provide:

Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

Dean Spencer developed this proposal at length in an article, A. Benjamin Spencer, *Pleading Conditions of the Mind under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 Cardozo L. Rev. 2015 (2020). As implied by the title, the article focuses on one part of the decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-87 (2009). The Court ruled that the complaint did not adequately plead a purpose to discriminate against Iqbal, concluding that permission to plead such matters "generally" does not mean that a conclusional allegation of purpose will do. Instead, "generally" is intended only to distinguish the particularity requirement for alleging fraud or mistake, leaving allegations of purpose, intent, and the like to the general standards of Rule 8(a)(2) as developed in the *Iqbal* opinion.

The article examines lower court implementation of Rule 9(b) in such areas as employment discrimination and the "actual malice" element of defamation claims. The results are found to raise undesirable barriers to valid claims. The history of Rule 9(b) is also explored, starting with the English statute invoked to explain Rule 9(b)'s second sentence in the 1938 committee note. Unbroken interpretation of the English statute, going back many years before 1938, shows that a bare allegation of knowledge, intent, or the like is accepted as an allegation of fact without further elaboration. The language in the proposed amendment is drawn in large part from the English statute.

This proposal will be included in the spring agenda. It raises obviously sensitive issues. The Supreme Court has adopted amendments designed to modify its own interpretations of a rule, and recently has suggested that the Enabling Act process is the appropriate means to address problems that may flow from its procedural rulings. But all such amendments must be studied carefully, searching for strong reasons to depart from the Court's considered judgment.

The setting of *Iqbal* itself suggests another sensitive element, pleading standards for claims that are met by an official-immunity defense. So too the burden of persuasion is set high in proving actual malice in an action for defamation of a public figure. Employment discrimination claims may not involve such sensitivities, but the very process of considering many different types of claims could be the first step along a path that was explored and abandoned several times between 1993 and 2007. The questions then were whether to establish heightened pleading standards for one or another substantive areas, beginning with official immunity. Shifting the focus to establishing reduced pleading standards for one or another substantive areas does not alter the challenges that must be faced.

V. Items Removed from Agenda

A. Rule 17(d): Naming Official Parties

Suggestion 19-CV-FF

This proposal from a regular contributor of rules suggestions would amend Rule 17(d):

> (d) PUBLIC OFFICER'S TITLE AND NAME. A public officer who sues or is sued in an official capacity ~~may~~must be designated by official title rather than by name, but the court may order that the officer's name be added.

Two reasons were offered in support. The amendment would avoid the need for automatic substitution of the successor in office under Rule 25(d) when the originally named officer leaves the office. It also would retain a single caption for the case, making it easier to track its progress by name without having to adjust for what may be a long chain of successive officers.

These potential benefits were met by concerns about the uncertainties that may surround the concept of "official title." A great many public actors wield titles. It is not always clear whether a title is "official" in some meaningful sense. The most likely sense in this context is that there is an office occupied by, but separate from, the individual holder. But determining whether there is an "office" in this sense may prove difficult, not only for federal agents but for the state and local government workers who may sue or be sued in an official capacity.

The Eleventh Amendment raises added concerns when an action is brought against a state actor as defendant. The fiction that an action against a state actor in an official capacity is not an action against the state, when it applies, may be strained by a rule that mandates suit against the title (or office) rather than the actor. The committee note to the 1961 amendments of Rule 25 reflects a confident view that these problems are not significant, but caution is appropriate.

Discussion at two meetings developed the view that as to federal officers there is little practical need for the proposed amendment. The Department of Justice finds that substitution is effected routinely, without fuss or difficulty. The processes that underlie this experience are likely to work for state and local officers as well.

The Advisory Committee removed this proposal from the agenda, concluding that the potential problems combined with the lack of practical need justify removing this proposal from the agenda.

B. Rule 45: Nationwide Subpoena Service Statutes

Suggestion 20-CV-H

A proposal from two Harvard Law School students focused on the interaction of the 2013 amendments to Rule 45 and the provision of the False Claims Act (FCA), 31 U.S.C. § 3731(a), that: "A subpoena requiring the attendance of a witness at trial or hearing conducted under section 3730 of this title may be served at any place in the United States." The concern was that the 2013 amendments might inadvertently have undercut § 3731(a) and some other statutes by nullifying previous nationwide service of process pursuant to those statutes. On its face, this seems curious because, as amended in 2013, Rule 45(b)(1) provides that "A subpoena may be served at any

place within the United States." So it seems to say the same thing as the FCA. But the possibility that the amendment inadvertently worked a change was examined.

The 2013 amendment was certainly not intended to make a change in FCA practice. Though the revisions to the rule did change some provisions about where one must comply with a subpoena (which were consolidated in current Rule 45(c)), none of those directly concerned the statutes addressed in the proposal. Moreover, though there was a considerable amount of comment on the 2013 amendment during the public comment period (including from the Department of Justice), no such concerns emerged.

Investigation of the legislative genesis of § 3731(a) revealed that it was indeed adopted in response to a 1978 request from the DOJ to solve problems that had previously arisen in FCA actions when the witnesses could not be subpoenaed to attend trial in the venue where the action had to be brought. The sparse case law did not indicate that the rule change had produced a problem.

What seems to be the most thoughtful and leading case is *U.S. v. Wyeth*, 2015 WL 8024407 (D. Mass. Dec. 4, 2015), in which the court in an FCA case held that the statutory mandate for nationwide compliance applied despite the 2013 amendments to Rule 45. The court noted some other statutes that might present similar issues——15 U.S.C. § 23 (antitrust suits); 38 U.S.C. § 1984(c) (disputes involving veterans' insurance); 18 U.S.C. § 1965(c) (RICO). Relying on the 1978 amendment to the FCA, the court concluded that "language like that of § 3731(a) not only *can* authorize both nationwide service and nationwide enforcement of a subpoena, but usually does." The court concluded further that "[t]he legislative history of § 3731(a) supports the holdings of the majority of district courts that enforcement of a False Claims Act subpoena is not subject to the geographical limitation now found in Fed. R. Civ. P. 45[(c)]."

During the Advisory Committee meeting, the DOJ representative reported that it had encountered no difficulties in continuing to employ the subpoena power adopted in 1978, and saw no need for a rule revision. There was no support for carrying this matter forward on the agenda.

TAB 5B

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DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
October 16, 2020

The Civil Rules Advisory Committee met by Teams teleconference on October 16, 2020. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Jennifer C. Boal; Hon. Jeffrey B. Clark; Judge Joan N. Ericksen; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt, Esq. Incoming Committee members David Burman, Esq., and Judge David Godbey, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge John D. Bates, Chair; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Professor Daniel J. Capra participated as liaison to the CARES Act Subcommittees. Susan Soong, Esq., participated as Clerk Representative. The Department of Justice was further represented by Joshua E. Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., Kevin Crenny, Esq., and Bridget M. Healy, Esq., represented the Administrative Office. John S. Cooke, Director, Dr. Emery G. Lee, and Jason Cantone, Esq., represented the Federal Judicial Center.

Members of the public who joined the meeting are identified in the attached Teams attendance list.

Judge Dow opened the meeting by noting that there is a long agenda, and with messages of thanks and welcome.

The Administrative Office staff were thanked for all the work in arranging, training members in, and monitoring the wonders of technology that make a remote meeting possible. Preparation for this first meeting as chair showed that the work of assembling the agenda book is more challenging than would have been imagined.

The next meeting will likely be scheduled for some time during the week of March 22 - 26, 2021. Perhaps it will be possible to resume meeting in person.

In the ranks of comings and goings, Judge Bates counts for both. He is leaving our Committee, but will continue to be involved with the work in his new role as Chair of the Standing Committee. The Chief Justice “kept him for us.”

Virginia Seitz has provided great help as a veteran of many subcommittees. Judge Goldgar has been a friend for long before he or Judge Goldgar became judges, and is “my bankruptcy guru.”

New members are Judge David Godbey, Northern District of Texas, and David Burman, Esq., of Perkins Coie in Seattle. They are engaging with this meeting while pandemic-related delays have forestalled completion of the process that will establish full voting status. They are welcome additions.

The new "rules clerk" is Kevin Creeny. The Committee will make as much use of his talents as it can manage in the competition with other committees.

Professor Capra, Reporter for the Evidence Rules Committee, has taken on new responsibilities as coordinator of the CARES Act Subcommittees established by the other four advisory committees. He has provided invaluable service in coordinating their approaches and moving divergence toward convergence.

Judge Dow reported on the June meeting of the Standing Committee. The CARES Act was a major topic of discussion. The proposal that the new diversity disclosure rule, Rule 7.1(a)(2) be recommended for adoption was remanded for further consideration of the provision that attempts to direct the parties' attention to the need to provide information about citizenships as they exist at the moment that controls the existence of complete diversity. That question is on today's agenda. The proposals to amend Rule 12(a)(4) and to adopt Social Security review rules were approved for publication. Approval marked the success of long and hard work by the Social Security Review Subcommittee.

Legislative Report

Julie Wilson reviewed the chart of pending legislation that would affect one or another of the sets of rules. The only new event since the report last April is passage of the Due Process Protections Act, which adds a new subdivision (f) to Criminal Rule 5. The bill awaits the President's signature.

The many other bills summarized on the chart may lapse without further action when this Congress expires and gives way to a new Congress next January.

April 2020 Minutes

The draft Minutes for the April 1, 2020 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Rule 7.1

The remand of Rule 7.1 by the Standing Committee was introduced by a summary of the provision that proved troublesome. Proposed new Rule 7.1(a)(2) requires a statement that, in actions

in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must name and identify the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The immediate impetus for the proposal, which reflects current practice in many courts, is to reflect the rule that for diversity purposes the citizenship of an LLC is the citizenship of all of its owners, including citizenships that are attributed to an owner. The proposal reaches beyond LLCs, however, to include every situation in which a nonparty's citizenship is attributed to a party for the determination whether there is complete diversity.

The published proposal called for disclosure of citizenships "at the time the action is filed." Several public comments suggested that defendants often remove state-court actions without giving adequate thought to the complexities of attribution rules, and that the rule should be revised to point to the time of removal. The draft considered at the April meeting looked to disclosure "at the time the action is filed in, or removed to, federal court." Discussion of this draft pointed out that it remained incomplete. The rules that measure the existence of complete diversity for establishing or defeating jurisdiction occasionally look to a time different from the time of initial filing or removal. The draft was revised to reflect this complication.

The proposal taken to the Standing Committee called for disclosure of citizenships attributed to a party:

> (A) at the time the action is filed in or removed to federal court; or
> (B) at another time that may be relevant to determining the court's jurisdiction.

The Standing Committee was concerned that some lawyers are not sophisticated students of the somewhat obscure elaborations of the rules that may require a determination of citizenships at a time different from filing the action or removing it; "at another time that may be relevant" was intended to point lawyers toward the need to be alert to these rules. But this provision might provoke many lawyers to engage in unnecessary research in the vast majority of cases in which diversity is established or defeated at the time of first filing or removal.

A somewhat different concern also was raised. The requirement to disclose citizenships "at the time[s]" described in subparagraphs (A) and (B) might be mistaken as speaking only to the time for making the disclosure, not to the "time" of the citizenships that must be disclosed. Although this mistake should not be made, thought might be given to adding a redundant but perhaps helpful cross-reference to the provisions of Rule 7.1(b)

that govern the time for making a Rule 7.1 disclosure:

> * * * a party or intervenor must, unless the court orders otherwise, file <u>at the time set by Rule 7.1(b)</u> a disclosure statement * * *

Although there should be no mistaking the meaning of the rule without these words, good drafting may at times be improved by adding redundant words for the benefit of those who will not read carefully. This question will be presented to the Committee for further consideration by e-mail exchanges after this meeting concludes if warranted by new rule text.

The simplest way to address the potential confusion that troubled the Standing Committee would be to eliminate any reference to the time of the attributed citizenships that must be considered in measuring complete diversity. A rule that refers only to the time of initial filing, or to the time of initial filing and the time of removal, would be incomplete and could divert attention from the need to consider additional or renewed disclosures when diversity must be measured as of a time different from initial filing or removal. No rule could set out all the diversity rules as they stand now, much less as they may be further elaborated in the future. Nor can an Enabling Act rule modify any part of the rules of subject-matter jurisdiction. And any general formula that adverts to the need to consult the diversity rules is likely to be subject to the same risks as "relevant to determining the court's jurisdiction."

A committee member suggested that it is important to retain rule text that signals the need to consider the rules that in some cases require that jurisdiction be measured by citizenships as they exist at some time other than filing or removal. This proposal read:

> (A) at the time the action is filed in or removed to federal court; or
> (B) at any other time that controls the determination of jurisdiction.

The member who advanced this proposal explained that the "any other relevant time" approach seems misleading on its face. The Committee Note explains it, but we cannot expect that people will read the note. Still, it will help to retain an improved version of the reminder to think about the diversity rules. The Standing Committee was worried about forcing parties to do unnecessary work in researching diversity jurisdiction lore, but most cases are simple and will not prod the parties into research they do not need.

Discussion began by considering whether this revised formulation of subparagraph (B) would allay the Standing Committee's concerns. It is more direct than "may be relevant to determining." It clearly identifies "time" as part of the diversity calculation, not the procedural matter of the time to make disclosure. But "the easier way" would be to delete subparagraph (B) entirely. "Advocacy would be required" to advance any likely version of subparagraph (B).

The next observation was that it is important to have a diversity disclosure rule. It is not as important to provide a reminder in rule text that the rules for determining complete diversity are not always simple. A rule shorn of subparagraph (B) will capture almost all cases. The same view was expressed by another participant. "Doing something is important. Subparagraph (B) is designed to pick up the rare and complicated cases." It should not be allowed to impede adoption of a disclosure rule that is needed because lawyers do miss the need to consider citizenships attributed to an LLC.

These initial observations were followed by the suggestion that whatever version emerges as the Committee's first choice, it will be important to present both alternatives to the Standing Committee. That is particularly so if the preferred version includes some version of subparagraph (B).

A new question was raised by asking whether the "or" between subparagraphs (A) and (B) should be "and." Disclosures should begin at the time of filing or removal. Subparagraph (B) addresses the possibility that an additional disclosure will be needed as an action progresses through intervention, other changes of parties, and the like. The style convention directs that "or" includes "and," but (B) seems likely to be always an addition, not an alternative. Other committee members supported "and." "or" may seem to send a signal that once a party has made a disclosure, the requirement is satisfied and need not be considered again. Disclosure is a continuing obligation because the rules that control subject-matter jurisdiction demand continuing inquiry. But "or" also was supported by the observation that new circumstances should not require a renewed disclosure of circumstances that have not changed since a first disclosure. For example, a plaintiff who has filed a diversity disclosure and later amends to join a new defendant should not have to file a second disclosure if its citizenships have not changed.

Concerns were expressed about the approach that would discard both subparagraphs (A) and (B). It could force more legal analysis by those who are uncertain about the rules for determining diversity jurisdiction. Retaining both subparagraphs will alert people to the nuances of subject-matter jurisdiction rules that allow no shortcuts. It is important to draft the best possible

version of subparagraph (B) and then undertake to persuade the Standing Committee to accept it. Other committee members agreed that "the more detail the better," and that this "is too important an issue" to avoid spelling it out in detail. At the same time, "it is imperative to have clarity."

This strong consensus of many committee members was found to support going back to the Standing Committee with some version of subparagraph (B). However (B) comes to be drafted, it will be only an incremental change from the version that raised doubts in the Standing Committee. But the care taken in discussing and revising the proposal justify taking it back to the Standing Committee.

Further discussion focused on revising subparagraph (B). "any other time that controls the determination of jurisdiction" was questioned: it is not time but the court that determines jurisdiction. "time of the citizenship that establishes" jurisdiction was suggested as an alternative. Or perhaps "that establishes whether there is jurisdiction.

Alternatives using "relevant" were brought back to the discussion. One formulation called for disclosure of citizenships attributed to a party "whenever relevant to determining the court's jurisdiction, including the time the action is filed in or removed to federal court." Why shy away from "relevant"? This formulation also addresses the "and - or" choice. Parties tend to shy away from revealing the owners of LLCs, and this imposes a clear continuing burden.

A judge suggested that the language should key to events that affect jurisdiction. Further disclosure is required if you create an event that affects jurisdiction. This language could do that:

> * * * must file a disclosure statement * * * when:
> (A) the action is filed in or removed to federal court, and
> (B) any subsequent event occurs that could affect the court's jurisdiction.

With brief further discussion, the Committee agreed unanimously on this version.

Presenting this version to the Standing Committee must take account of their concern with the "relevant to" version of subparagraph (B). They may have similar concerns with the new version, even though the focus on a "subsequent event" sends a clear signal that in most cases there will be no occasion to look beyond the time the action is filed in federal court or removed to it. It will be important to provide as an alternative, although without recommending it, the second-best approach that discards both subparagraphs (A) and (B).

It remains to be determined whether to report this proposal to the Standing Committee at its January meeting or to wait for its spring meeting. The choice will be made by the Committee Chair in consultation with the Standing Committee Chair.

Rule 12(a)

Rule 12(a) establishes the times for serving a responsive pleading. Paragraph 12(a)(1) begins by deferring to statutes that set different times: "Unless another time is specified by this rule or a federal statute * * *." This qualification does not appear in either of the next paragraphs, (2) and (3). It is clear, however, that there are federal statutes that set different times than paragraph (2) for some actions brought against the United States or its agencies or officers or employees sued in an official capacity. No statutes have yet been uncovered that set a different time than paragraph (3) for an action against a United States officer or employee sued in an individual capacity.

Although it might be argued that the provision in paragraph (1) that recognizes different statutory times carries over to paragraphs (2) and (3), that is not the way the rule is structured. Nor is it wise to rely on this argument. Reading Rule 12(a) in this way to achieve a sound result would pave the way for disregarding clear drafting in other rules.

It is easy to draft a correction. The provision for federal statutes could be moved into subdivision (a) so that it applies to all of paragraphs (1), (2), and (3):

(a) TIME TO SERVE A RESPONSIVE PLEADING. ~~(1)*In General.*~~ Unless another time is specified by ~~this rule or~~ a federal statute, the time for serving a responsive pleading is as follows:
(1) *In General.*
(A) a defendant must serve an answer * * *.

Discussion of this question at the April meeting came to a close balance. The present text is wrong at least as to paragraph (2). The Freedom of Information Act and Government in the Sunshine Act both establish a 30-day time to respond, not the general 60-day period set out in paragraph (2). There is no reason to supersede these statutes. It is better to make rule text as accurate as it can be made.

The question is somewhat different as to paragraph (3) because no statutes that set a different time have been found. But such statutes may exist now, or may be enacted in the future. Here too, there is no reason to supersede these statutes, nor to encounter whatever risks that might arise from the rule that a valid rule supersedes an earlier statute while a valid rule is superseded by

a later statute. Including paragraph (3) in the general provision will do no harm if there is not, and never will be, an inconsistent statute. And including it is desirable in the event of any inconsistent statute.

The counter consideration is the familiar question whether it is appropriate to address every identifiable rule mishap by corrective amendment. A continuous flow of minor or exotic amendments may seem a flood to bench and bar, and distract attention from more important amendments. This consideration conduces to proposing changes only when there is some evidence that a misadventure in rule text causes problems in the real world.

This topic was brought to the agenda by a lawyer who encountered difficulty in persuading a court clerk to issue a summons providing a 30-day response time in a Freedom of Information Act action. The clerk was ultimately persuaded. The Department of Justice said in April that it is familiar with the statutes, and honors them, but that it often asks for an extension, and particularly seeks an extension in actions that involve both FOIA claims and other claims that are not subject to a 30-day response time. From their perspective, paragraph (2) does not present a problem.

Discussion began with the observation that Rule 15(a)(3) also governs the time to respond to an amended pleading. But this does not seem to conflict with the federal statute question presented by Rule 12(a). Rule 15(a)(3) simply calls for a responsive pleading "within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." If more than 14 days remain in the time set by Rule 12(a), including its incorporation of different statutory times, Rule 15(a)(3) makes no difference. If fewer than 14 days remain, Rule 15(a)(3) extends the time.

The Department of Justice renewed the observations made at the April meeting. There is no need to fix this minor break in the rule text. There is a risk that if the change is made, a court might be misled as to its discretion to extend the time to respond to a FOIA claim in cases that combine FOIA claims with other claims that are subject to the 60-day response time. The Committee Note to an amended rule could say that the amendment merely fixes a technical problem and does not affect the court's discretion, but "we welcome the chance for a longer period in resource-constrained cases." Another committee member agreed with this view.

The contrary view was expressed. If there is a chance that this is tripping people up, why not fix it? It does seem a mistake in the rule text that deserves correction.

This view was questioned by suggesting that the problem described by the Department of Justice is a bigger one than the inconvenience described by the lawyer who brought this problem to us. It is nice to make the rules as perfect as can be, but "I don't like to create problems for the Department of Justice to fix what may be a rare problem for plaintiffs."

A proponent of amending Rule 12(a) suggested that the question is close. But the problem described by the Department of Justice does not seem real. The Department position was renewed in reply. "Inherently, it's a prediction. We have no experience with the proposed rule." But a number of career Department lawyers are concerned. "Hybrid" cases do arise with both a shorter statutory period and the longer Rule 12(a)(2) period. This is a "predictive point."

The proposed amendment failed of adoption by an equally divided vote of 6 committee members for, and 6 against. The proposal will be carried forward for further consideration at the March meeting.

CARES Act Subcommittee Report

Judge Jordan presented the report of the CARES Act Subcommittee that was appointed to take up the invitation in § 15002(b)(6) of the CARES Act to "consider rules amendments * * * that address emergency measures that may be taken by the Federal Courts when the President declares a national emergency * * *." He began by expressing admiration and thanks for the hard, constant, and imaginative work of Subcommittee members Boal, Lioi, and Sellers, and of the Administrative Office staff and the reporters. Judge Bates and Judge Campbell provided useful insights. Professor Capra was closely involved but was respectful of the Subcommittee's role in working through differences with the approaches taken by the parallel subcommittees for the Appellate, Bankruptcy, and Criminal Rules Committees.

The first question is whether we need a general emergency rules provision in the Civil Rules. The CARES Act directs us to consider rules amendments, but does not say that any must be proposed.

The time frame for this work is set for all advisory committees. Draft emergency rules are to be presented to the Standing Committee in January for general and comparative discussion. The goal is to have each advisory committee propose rules drafts for publication at the spring meeting of the Standing Committee. Subcommittee work will continue during the weeks that lead to the report to the January meeting, taking account of the progress made this fall by the other advisory committees and seeking to resolve differences in common draft provisions that seem

to involve more style than substance.

The argument for not proposing a general emergency rules provision is that the measures of flexibility and discretion deliberately and pervasively built into the Civil Rules have proved adequate to the challenges presented by the Covid-19 pandemic. Lawyers and courts, working together, have made use of remote means of communication to continue with effective pretrial work. Trials present a greater challenge, but the rules may well accommodate any practically workable approaches that may be adopted. It may suffice to identify a few Civil Rules provisions that present insurmountable obstacles and address them directly without framing a more general rule. This approach, however, will depend on continuing experience with responses to pandemic circumstances and on our ability to understand the lessons presented by experience.

At its most recent meeting, the Subcommittee reached a consensus of equipoise on the question whether a general emergency rule should be proposed, either along the lines of the current draft or in some other form.

Even if the conclusion is that it is better not to adopt a general emergency rule, it will remain important to craft the best general rule we can manage. Important advantages could be gained from publishing a general rule for comment next summer even with a recommendation that it not be adopted. Public comment may provide a broader base of experience that identifies problems that we have not yet considered, and also difficulties created by rules texts that seem to impede suitable responses to the problems.

Drafting a general emergency rule has proceeded through a series of stages. The first draft was very broad, looking for a declaration of emergency at a level higher than action by a single judge in a particular case, but recognizing great responsibilities for both court and parties. This approach was whittled back. The next steps presented alternatives. One version was to authorize departures from any rule, subject to a list of rules that could not be varied. The alternative version authorized departures only from a specific list of rules.

Those versions were succeeded by the draft Rule 87 in the agenda book. This draft authorizes only a small number of Emergency Rules and provides specific texts for them. An Emergency Rule would take the place of the general rule for the period covered by a declaration of a rules emergency. Only six Emergency Rules are provided, and two of them are presented in overstrike form with a suggestion that they should be considered but then dropped from the set. The three Emergency Rules for service of process begin with the full text of the present rule and add alternative means of service that are available by court order. Emergency Rule 6(b)(2) would allow the court to extend the time for making post-judgment

motions, but presents difficult issues of integration with Appellate Rule 4(a)(4) that will require close work with the Appellate Rules Committee. The remaining two address "open court" provisions in Rules 43(a) and 77(b), but ongoing experience with the Covid-19 pandemic suggests that the present rule texts have not impeded courts from responding with all appropriate accommodations.

This draft was informed by general experience of committee and subcommittee members, by reports from many sources that include court opinions, and by responses to a general survey published by the Administrative Office.

The subcommittees for other advisory committees are taking different approaches. The current Appellate Rule 2 draft is essentially wide open, authorizing departure from any Appellate Rule. The current draft Criminal Rule 62 is quite different, listing the only rules that can be modified, prescribing the greatest modifications that can be permitted, and allowing lesser modifications. It is "very careful, very locked down, very specific."

The report continued with the observation that there are good reasons why different sets of rules should take different approaches to an emergency rule. Common provisions are likely to emerge, for equally good reasons. But the Appellate Rules operate in a setting that may support broad freedom to adjust practice on a nearly case-by-case basis. The Criminal Rules, on the other hand, operate in a setting and internal tradition that impose grave restraints arising from constitution, statute, received practice, and the overwhelming importance of conviction for each defendant that comes before the court. The Bankruptcy Rules involve some functions that are nearly administrative, while other functions are full-blown adversary proceedings that frequently rely on the Civil Rules.

These differences among the contexts of the different sets of rules will be an important influence in shaping the elements of uniformity and divergence in the corresponding emergency rules.

Obviously common questions ask how to define an emergency and who is responsible for declaring an emergency. In the end it may seem that some variations are desirable, but the subcommittees have worked hard to converge on common provisions.

Definitions of an emergency began with the formula in the CARES Act invitation to rulemaking. An emergency would emerge when the President declares a national emergency under the National Emergencies Act. This formula was quickly discarded. One problem is that national emergencies are declared with some frequency, and some of them endure for many years. Most of them have no connection to circumstances that may interfere with judicial functions. This

definition of an emergency would create no effective constraint on the power to declare an emergency.

Another shortcoming of the national emergency approach is that it does not respond to the prospect that many emergencies may arise that severely impair court operations in a particular part of the country. Severe weather events, local epidemics, a courthouse bombing, civil unrest, disruptions of travel or electronic communications, and still other events are familiar.

Recognizing the need to adapt to local or regional emergencies might lead only to depending on emergency declarations by state or local officials or legislatures. But that course, in common with the national emergency approach, would leave courts at the mercy of the executive or perhaps legislative branches. It is better to rely on judicial authority to address judicial needs.

Different judicial authorities have been considered. Reliance might be placed on judges acting in individual cases; a district court acting as a court or through its chief judge; a circuit court acting as a court, through its chief judge, or through a circuit council; or the Judicial Conference of the United States. Draft Rule 87 and draft Criminal Rule 62 have settled on the Judicial Conference as the sole body with authority to declare an emergency and to establish its contours. The Bankruptcy Rules draft adds other actors, and the Appellate Rules draft does not involve the Judicial Conference except to authorize it to overrule a local circuit emergency declaration.

The definition of an emergency began by speaking of a "judicial emergency." That term, however, is used in other contexts that do not resemble the kinds of emergencies that may justify departures from general rules texts. The several committees have adopted instead the "rules emergency" term.

The rules emergency concept is functional. Draft Rule 87(a) reads:

> (a) RULES EMERGENCY. The Judicial Conference of the United States may declare a rules emergency when extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

This formula was accepted from a Criminal Rule 62 draft. Criminal Rule 62 goes on to add a further element:

> and (2) no feasible alternative measures would eliminate the impairment within a reasonable time.

The Criminal Rules Subcommittee report says clearly that this element refers only to alternative measures that are in compliance with the Criminal Rules. The Civil Rules Subcommittee believes that alternatives must be considered as an inherent part of determining whether the court can perform its functions in compliance with the rules. This added emphasis does not seem necessary — the Judicial Conference can be trusted to proceed carefully — and may be confusing because it seems to add something different but actually does not.

A declaration of a rules emergency must designate the court or courts affected by the emergency. This feature is common to all of the sets of rules, recognizing the prospect of local or regional or national emergencies. Rule 87(b)(2) allows a declaration to authorize only one of the Emergency Rules specifically defined in Rule 87(c). The declaration must be limited to a stated period of no more than 90 days. It "may be renewed through additional declarations * * * for successive periods of no more than 90 days * * * ." This renewal provision departs slightly from Criminal Rule 62(b)(3)(A), which allows the Judicial Conference to "issue additional declarations if emergency conditions change or persist." This variance is an example of the style issues that should be worked out among the subcommittees before committee reports are prepared for the January Standing Committee meeting. (The provisions of Criminal Rule 62(c) appear to authorize specific actions in the discretion of the court in a specific case. At least two paragraphs in Rule 62(d) require authorization by the chief judge of the district, or if the chief judge is not available the most senior active judge of the district or the chief judge or circuit justice of the circuit. These additional gatekeepers do not fit into the structure of the current Civil Rule 87 draft, which prescribes specific Emergency Rule texts that can be implemented in any case by order of a court that is included in the declaration of emergency.)

After this introduction, the first question was whether the three Emergency Rule 4 provisions were created in response to reports of real world difficulties in serving process. And have the other subcommittees considered similar problems?

Judge Jordan responded that the Rule 4 provisions, and also the Rule 6(b)(2) provision for extending the time for post-judgment motions, did not emerge from empirical concerns. Instead they emerged from a survey of all the rules that looked for absolute requirements or limits that cannot be applied flexibly or varied as a matter of discretion. Committee member Sellers drew up a long list of possible barriers in the rules, but for now it appears that few of them cannot be managed in ways that surmount or bypass the barriers.

Professor Capra added that the Evidence Rules Committee decided early on that there is no need for an emergency provision in the Evidence Rules. Civil Rule 43(a) and the corresponding Criminal Rule allow for remote testimony. The Evidence Rules support that approach. And there are no other Evidence Rules issues. The subcommittees for the other four advisory committees began with quite different approaches, influenced by the structure, character, and traditions of the different rules sets. But they have continually moved closer together. At present, the proposed revision of Appellate Rule 2 is quite open-ended. The Bankruptcy rule focuses on the opportunity to extend the time limits for acting under the rules. The Criminal Rules draft is developed in more detail than the others, looking to such matters as the number of alternate jurors, substitution of a summons for an arrest warrant, bail hearings, and the like. "It's a very careful rule." Some of the abundant differences are matters of style that will be resolved readily, at least for such simple matters as the rule caption.

Other differences may lie at the margin of substance and style — an example is that Criminal Rule 62(a) defines a rules emergency in the abstract, and then relies on Rule 62(b) to authorize a declaration of emergency. Civil Rule 87(a), on the other hand, combines these elements by providing that the Judicial Conference may declare a rules emergency "when" the elements of the definition are satisfied.

The subcommittees have discussed a length a provision for a "soft landing" when an emergency ends while an action begun under authority of an emergency departure from the general rule has not been completed. Civil Rule 87 may not need this provision, set out in the current draft as subdivision (d), if the only Emergency Rules that survive govern service of process. The provision may be more important if Emergency Rule 6(b)(2) is adopted in some form, addressing extension of the time for post-judgment motions and affecting the time to appeal, but the provision might be incorporated in the Emergency Rule text rather than carry forward as a separate subdivision.

The Bankruptcy Rule draft authorizes declaration of an emergency by the Judicial Conference, the chief judge of the circuit, or the chief bankruptcy judge. Whether or not the alternatives to the Judicial Conference make sense for Bankruptcy Rules, they do not seem necessary for the Civil Rules.

Discussion progressed to the question whether to propose any general emergency rule. It was noted that after considering the long list of rules that might be so inflexible as to create significant problems in a time of emergency, the Subcommittee concluded that almost all seem flexible enough, particularly when combined with the sweeping provisions for pretrial orders in Rule

16. But the Subcommittee surely does not have complete information about experience in practice around the country. Publishing a general rule proposal will be a good way to attract information about rules that in fact have presented worrisome problems.

This comment concluded by noting that if some version of Emergency Rule 6(b)(2) is adopted, it will be important to provide a means of protecting against the possibility that the end of the emergency might defeat both the right to prevail on the post-judgment motion and any opportunity to appeal.

The Committee was reminded that a decision to recommend against adoption of the best Rule 87 draft that can be crafted need not mean abandoning the effort to protect against the problems identified in the Emergency Rules spelled out in Rule 87(c). The Rule 4 alternatives easily could be achieved by adopting them as amendments of the corresponding present rules provisions, and doing so on the same time table as proposed for Rule 87. This possibility may indeed be a reason for recommending against adoption of Rule 87. The post-judgment motions provision of Rule 87(c)(4) would be more difficult to achieve as a stand-alone provision so long as it does not seem wise to add some flexibility outside of emergency circumstances. A revision limited to emergency circumstances would have to provide some definition of the qualifying circumstances, and if the word “emergency” is used there would be an obvious risk of confusion with any general emergency rule provision adopted in rules other than the Civil Rules.

Publication, even with a negative recommendation, was supported by pointing out that “the situation is still evolving.” Review of current experience seems to show that the Civil Rules are so flexible as to adapt well to a nationwide emergency. But it may be too early to rely on what we think we know about present experience. Much might be learned in the public comment process.

This view was supplemented by a report that one participant has sought out the experience of court clerks around the country. No problems with Rule 4 or 6(b)(2) have been reported, and the view is that the Civil Rules are working well.

Professor Capra reported that all of the other subcommittees are moving forward toward recommending publication of a general emergency rule, although that prospect is somewhat uncertain for the Appellate Rules Committee. That will likely become clear after their meeting next week.

Judge Jordan agreed that “there are excellent arguments for putting it out there.” The experience and reactions of practitioners can teach us. But so far, the Civil Rules seem to be working quite well. In response to a question, he agreed that state courts may provide valuable experience as well. The Subcommittee

has not had time for a systematic survey of state experience, but has considered the scraps of information that have become available. Justice Lee noted that Utah has not found a need to amend their civil rules, and added that good sources of information will be the National Center for State Courts and the Conference of Chief Justices. This discussion was extended, repeating the hope that publication will provide the benefit of wider comments that may spur the committee's imagination.

Some doubt was expressed. There could be some value in publishing a general emergency rule that the Committee recommends not be adopted. But we must be sure to reassure judges and lawyers that flexibility is available under the general rules as they are. We are doing well so far.

Attention turned to the fit of Rule 87(d) with the rest of the rule. It says that a "proceeding" not authorized by rule but commenced under an emergency rule may be completed under the emergency rule when compliance with the rule would be infeasible or work an injustice. Does service of process under any of the three Emergency Rules 4 amount to a "proceeding"? Perhaps "procedure" would be a better word. More generally, is this "soft landing" provision necessary? Other subcommittees have similar provisions, at least for the time being. But if Emergency Rule 6(b)(2) survives through Rule 87(c)(4), it may be the only rule that needs this survival provision. If so, subdivision (d) might be folded into draft Rule 87(c)(4). But additional emergency rules may be added to the list in the present draft. Subdivision (d) will remain as a separate provision for the time being.

Discussion of Emergency Rule 6(b)(2) turned to the problem of integration with Appellate Rule 4(a)(4)(A). What happens if a court acts under the emergency rule to extend the time to file a post-judgment motion? Does a motion filed under an extension qualify as a motion filed within the time allowed by Rules 50, 52, 59, or 60 for purposes of Rule 4(a)(4)(A)? It was recognized that this question must be addressed in tandem with the Appellate Rules Committee. The Appellate Rules Committee Reporter, Professor Hartnett, said that the question would be discussed at the upcoming meeting of that committee. The subcommittees will work together to ensure an appropriate integration of the rules.

A question was raised as to the fit of the three Emergency Rules that take the place of the corresponding general provisions in Rule 4 with the Bankruptcy Rules. Rule 4 applies to adversary proceedings. The tentative answer was that there should not be a problem. The Emergency rule takes the place of the general rule. It should be absorbed into bankruptcy practice, remembering that the additional means of service authorized by the Emergency Rules are available only "if ordered by the court."

The discussion of draft Rule 87 concluded with recognition that the subcommittee will continue to pursue further development in coordination with the other emergency rules subcommittees, including attempts to achieve still greater uniformity. At the same time, it was recognized that there may be advantages in presenting different approaches to the Standing Committee in January. Consideration of drafts that actually differ on some points may provide a stronger basis for deliberation than a more abstract description of drafting history and possible variations that remain worthy of consideration.

MDL Subcommittee Report

Judge Dow, chair of the MDL Subcommittee, delivered the Subcommittee Report.

Three issues remain on the Subcommittee agenda: "Early vetting"; adding new provisions to expand opportunities for interlocutory appeals; and adopting explicit rules provisions for judicial involvement in settlement, perhaps conjoined with provisions for appointing lead counsel that define lead counsel functions, responsibilities, and compensation.

Early "vetting" "Early vetting" has encompassed a variety of proposals that rest on the perception that MDL consolidations tend to attract a worrisome fraction of cases that would not be brought as stand-alone actions because there is no reasonable prospect of success. The means of addressing this concern have evolved continually in practice, largely as a result of cooperation among plaintiffs and defendants with approval and adoption by MDL courts. The means that have been adopted may indeed help to cull out cases that lack merit, but they serve other purposes and are not always used to achieve early dismissals of individual actions.

The major means of eliciting information about individual cases involved into a practice of requiring "plaintiff fact sheets." This practice was widely, almost universally, adopted in the MDLS that aggregated the greatest number of cases, particularly in mass tort actions growing out of pharmaceutical products and drugs. The form of the fact sheets was negotiated at length on a case-by-case basis. It commonly took months to settle on the form, and the form often called for a great deal of information. Defendant fact sheets evolved in parallel.

More recently, a new approach called an "initial census" has been tested. The initial census forms have tended to require less detail than plaintiff fact sheets. They may be used to manage cases by structuring initial disclosures, providing information that helps in creating a leadership structure, identifying different categories of claims, guiding first-wave discovery, and still more. This practice is evolving and can spread from the initial few MDLs

that have embraced it to others as it proves successful and as MDL practitioners carry it from one proceeding to another.

Judge Rosenberg described the initial census procedure she has adopted for the Zantac MDL. The consolidated actions were transferred to her in February, 2020. The first initial census order was entered on April 2. It provides for a 2-page initial census form, to be followed by a 4 -page "census-plus" form. All of the forms are uploaded to a registry operated by a third-party provider. The forms must be filed for all filed cases, and also for claims by all clients of any attorney who applies for a leadership position even though an action has not been filed. The 2-page forms identify the category of the claims – personal injury, consumer, medical monitoring. They identify the plaintiff, the kind of product each plaintiff took, what type of physical injury is alleged. The 4-page forms expand the information to identify what drug was used when, where it was purchased, and what documentation is available to support the allegations. Defendants simultaneously provide census data. When the data provided by the defendants matches with the information provided by a plaintiff in the registry, that helps. It also helps if, for example, the plaintiff alleges purchase of a product at a time when the product was not available. There are now more than 600 filed actions, but tens of thousands more claims are in the registry. It is much easier to manage the 600 actions than it would be to manage a proceeding that attracted actual filings of tens of thousands more cases. The registry provides another attraction for plaintiffs by tolling the statute of limitations.

The initial census process, aided by Professor Jaime Dodge as special master, is working well. It has been developed with the collaboration of counsel and many agreed orders. The census information "is a pillar of managing this MDL." Information about the types of claims helped in designating a leadership team that represents different claim types and provides a balance of expertise.

Judge Dow noted that other judges as well have reported positive experiences with initial census procedures. There is a real prospect that the work of the subcommittee through years of participating in many meetings with MDL lawyer and judges has helped focus attention and to promote progress in "early vetting" practices.

Judge Rosenberg added that both sides in the Zantac MDL wanted early vetting. There has been only one discovery dispute. The initial census and registry have helped. "There is so much voluntary exchange of information."

A committee member asked whether it would be useful to attempt to draft a court rule addressing initial census practices in MDL

proceedings, or whether it would be better to rely on judge training, manuals, JPML guidance, and other devices to encourage continued development? It was agreed that it is too early to make this choice. It is important that there be a robust forum for judges and practitioners to keep up with ongoing developments, with widespread sharing of information. The question whether a formal court rule would be helpful will remain on the agenda.

Interlocutory Appeals Judge Dow noted that the question whether greater opportunities for interlocutory appeals should be made available in MDL proceedings has occupied most of the Subcommittee's attention for the last year. The Subcommittee had heard a lot about the topic from those involved in mass tort and pharma MDLs, but not much from judges and lawyers involved in the wide variety of other MDLs. A day-long meeting to hear from those involved in these other types of MDLs was arranged by Professor Dodge and her Emory institute last June. It involved many lawyers the Subcommittee had not heard from earlier, and both more MDL judges and appellate judges.

A few of the judges thought it might be helpful to do "some tinkering at the margins" because the specific criteria for discretionary interlocutory appeals under 28 U.S.C. § 1292(b) may be too narrow to meet the needs of MDL proceedings. A larger group thought there is no need to change — § 1292(b), Rule 54(b) partial final judgments, and at times mandamus provide sufficient opportunities for review. Even Rule 23(f) may help at times, although it is limited to orders that grant or deny class-action certification. Still others thought that the proposed cure is worse than the disease. Interlocutory appeals impose often lengthy delays, reduce the opportunities for coordination with parallel state litigation as state courts become impatient with the delay, and confuse continuing proceedings in the MDL court.

After considering these arguments, the Subcommittee decided to forgo any effort to expand interlocutory appeal opportunities by an Enabling Act rule. Subcommittee members had disparate views at the outset, but converged on this outcome. If this recommendation is accepted, the proponents of expanded appeal opportunities will be wise to attempt maximum use of current appeal opportunities. If those efforts establish an empirical basis for new rules, the topic can be taken up again.

Discussion concluded with the observation of a subcommittee member that hard work had been done. "It was a comprehensive lot of work. We looked at all the issues."

Supervising Leadership and Reviewing Settlement The third subject that remains at the front of the Subcommittee agenda is framed by a very preliminary sketch of a rule that would spell out the authority routinely exercised by MDL courts in structuring

leadership responsibilities and compensation, and also address the authority exercised by some MDL courts in reviewing and commenting on settlement terms that are negotiated by lead counsel to be offered to plaintiffs who are not their clients. The Subcommittee is only beginning to consider this topic. The draft rule was created as a means of identifying issues and focusing discussion. There is no sense whatever whether study of these issues will lead to any proposal to recommend a new rule.

The extrinsic challenges to this undertaking are formidable. Almost no one among experienced MDL practitioners wants it, either those who typically represent plaintiffs or those who typically represent defendants. Most experienced MDL judges do not want it, and fear that any rule would impede the desirable evolution of practice that has emerged from continuing efforts of counsel, courts, and the JPML. The only support comes from a few MDL judges and many academics who believe there is a serious need to provide protections for individuals caught up in MDL proceedings that as a practical matter function in much the same ways as class actions without providing the protections that Rule 23 provides for class members. On their view, the theoretical distinction between a class judgment or settlement that binds all class members and MDL proceedings that require individual disposition or settlement of each individual action is a distinction without practical meaning.

Equally formidable intrinsic challenges face any attempt to draft a useful rule. Rule 23 provides a model for some of the questions, but by no means all. Current practices reveal a number of issues of professional responsibility that are in large part confided to state law and that require sensitive judgment. And apart from that, there is a risk of improper interference with attorney-client relationships. The task would be to frame a rule that does not stifle desirable practices but instead is authorizing and liberating. The Subcommittee has only begun to consider the challenges.

The Subcommittee is considering the possibility that, as with its past work, important information and insights can be gained from arranging another conference of judges and lawyers experienced with these issues.

A committee member agreed that it will be desirable to gather more information, and noted that “it is gentle to say that some attorney-client relationships in MDLs are more real than others. Some who nominally have a lawyer are not getting thoughtful advice.”

The discussion concluded with the Subcommittee’s agreement that it should arrange to gather more information. All committee members should help in identifying people who can provide a wide range of views and experience at a meeting.

Appeal Finality After Consolidation Subcommittee Report

Judge Rosenberg delivered the report of the Joint Civil-Appellate Subcommittee on Appeal Finality after Consolidation.

The Subcommittee was formed to consider the potential impact of the appeal finality ruling in *Hall v. Hall*, 138 S.Ct. 1118 (2018). The Court ruled that when originally independent actions are consolidated under Rule 42(a), complete disposition of all claims among all parties to what began as an independent action is a final judgment for purposes of appeal. The appeal must be timely taken or the opportunity for review is lost. This rule had been followed by some circuits, but a large majority of circuits followed one or another of three different approaches. The Court relied on a consolidation statute enacted in 1813 that, long before Rule 42 was adopted in 1938, established this rule as part of the definition of what "consolidation" is. At the same time, the Court noted that the determination whether this definition of finality causes problems is better made in the Rules Enabling process that in § 2072(c) establishes authority to adopt rules that define when a ruling is final for the purposes of appeal under § 1291.

The Subcommittee has engaged the Federal Judicial Center and Dr. Emery Lee to engage in docket research to identify the nature of current Rule 42 consolidation practices and to look for related appeal finality issues. The search included all civil actions filed in 2015, 2016, and 2017. Not all of those actions have concluded, but those years produced approximately equal numbers of actions that terminated before *Hall v. Hall* was decided and actions terminated after it was decided. That could provide a good basis for comparing the effects of the new rule with the effects of the prior rules.

Excluding MDL consolidations, the search found 20,730 originally independent actions that became consolidated into 5,953 "lead" actions. A sample of 400 lead actions was prepared that included 385 that were suitable for study. Forty-eight percent of the lead actions were resolved by settlement, and another nineteen percent were voluntarily dismissed. The dispositions of those that remained included nine in which an originally independent action was finally concluded before final disposition of the whole consolidated action. Appeals were taken in six of these. Study of these cases did not reveal any appeal problems arising from the new finality rule.

The Subcommittee met in August. It recognized that the absence of any identified appeal problems is not definitive. As a simple example, a party may have wished to appeal only to discover that appeal time had lapsed before the effects of the new rule were recognized. But it would be costly to expand the sample drawn from the 2015-2017 period, and still more costly to launch a study of

later years.

The Subcommittee has launched informal inquiries to see what can be learned from clerks' offices in a few circuits with representatives in the committee.

The rule in *Hall v. Hall* is clear. It should be easy to follow, at least when it becomes clear in district court proceedings that all elements of an originally independent action have been resolved before final resolution of other parts of the consolidation. But one difficulty may be that lawyers who have no regular appellate practice may not know of it, or fail to remember it in time. Other problems may be quite independent of appeal time problems, and almost impossible to observe. The need to take an immediate appeal may deprive the appellant of allies on appeal as to issues that affect other parties whose cases have not been completely resolved, interfere with efficient management of the parts that remain in the district court, and face the court of appeals with the prospect of two or even more appeals in the same case.

The Subcommittee will continue its work, recognizing that there is no immediate need to consider rules changes. If changes are undertaken, the most likely approach will consider both Rule 42(a) and Rule 54(b). It will work to ensure that the liaison from the Bankruptcy Rules Committee is kept in touch with this work, given the impact any rules amendments will have on bankruptcy practice.

Information Items

Judge Dow noted that the meeting was switching to consider information items. The information items include some familiar topics that might have advanced further had it not been for pandemic circumstances in general and the need to devote special efforts to the CARES Act emergency rule work.

Rule 4(c)(3)

Rule 4(c)(3) may be ambiguous on the question whether the plaintiff in an in forma pauperis or seaman's action must move for an order for service of process by the marshal or whether the court most make the order without a motion. This topic was added to the agenda on a suggestion in the January, 2019 Standing Committee meeting.

It is easy to draft around the ambiguity. The rule could clearly adopt one of at least three options: The plaintiff must move for and order; the court must make the order without a motion; or there is no need for an order — the marshal must make service whenever i.f.p. status is accorded or a seaman is a plaintiff.

Choice among the alternatives is not so easy. Making service is a burden on the Marshals Service, particularly in districts that include large sparsely populated areas. When counsel is appointed, it appears that counsel frequently prefer to make service. Efforts have been undertaken to learn more from the Marshals Service, but the current pandemic has impeded those efforts. Better information may yet be available

One additional reason to carry this subject forward is the work of the CARES Act Subcommittee. One of the possibilities being studied by the Subcommittee is a general revision of Rule 4 that would expand opportunities to make service by mail or commercial carrier. An amended rule could be drafted in a way that authorizes electronic service in circumstances that include sufficient assurances of actual receipt. If such rules come to be adopted, it may be possible for service to be made as a routine function of the clerk's office, acting under the authority of § 1915(d).

Judge Dow noted that the Northern District of Illinois has an informal arrangement with the United States Attorney to accept service in certain i.f.p. cases.

This topic will be carried forward.

Rule 17(d)

An outside proposal suggested that Rule 17(d) be amended to require using the official title rather than the name of a public official who sues, or is sued, in an official capacity:

> A public officer who sues or is sued in an official capacity ~~may~~ must be designated by official title rather than by name, but the court may order that the officer's name be added.

Two primary reasons were offered to support this proposal. The first is that it will avoid the need for an automatic substitution of the successor in office when the originally named officer leaves the office. The second is that retaining a single caption will make it easier to track the progress of a case by name without having to adjust for what may be a long chain of successive officers.

This proposal was discussed at the April meeting, leaving the matter uncertain. The advantages seem worthy. But there are potential disadvantages.

One range of difficulties arises from the uncertainty as to just when an "official title" represents an office that can be sued independently of the incumbent. Rule 17(d) applies to plaintiff and defendant officers, whether federal, state, or local. Many of them have titles. Whether the title represents something more than an

adjective for the job may be uncertain. An official might have the capacity to claim benefits for a public entity, or to take remedial action when ordered by the court, but not have a status that carries over to a successor. Allowing a plaintiff to choose between official title and name may avoid complicated disputes. In addition, special problems arise when a public officer is sued as a substitute for suing a state under the fiction of *Ex parte Young* that the action is not one against the state. The Committee Note to the 1961 amendments of Rule 25 suggests a confident view that these problems are not significant, but it may be better to avoid the arguments that might be made when suit is effectively brought against an office described by an officer's title.

The earlier discussion suggested that few practical problems arise from automatic substitution under Rule 25. The process is usually seamless. If so, there is little reason to revise a practice that has endured for many years.

Discussion began with comments for the Department of Justice opposing the proposal. "The real world is more complicated than a job title." Consider a range in one familiar setting: there may be an Attorney General who has been confirmed in office by the Senate. Or there may be an Acting Attorney General, also officially approved in that post. Or there may be inferior officials who perform the duties of those offices but are not entitled to be called "acting." "There is no off-the-shelf alternative."

A different suggestion was that substituting "must" may confuse unsophisticated litigants, particularly pro se plaintiffs, who believe that the rule not only describes naming practices but also requires the plaintiff to sue a defendant that the plaintiff otherwise would not choose to sue.

The question was put: do members of the committee believe that further efforts should be made to gather more information? And where might we look for it?

The answer was that there is little reason to look further. This topic will be removed from the agenda.

Rule 5(d)(3)(B)

Rule 5(d) was amended in 2018 to govern electronic filing. It distinguishes between parties that are represented by an attorney and unrepresented parties. The prospect that unrepresented parties should have reasonably free access to electronic filing was discussed at some length. It was recognized that when done properly, electronic filing is a benefit to the party that files, to all other parties, and to the court. But the committee — and other advisory committees that worked on parallel proposals at the same time — was concerned that unsophisticated pro se filers could

create significant problems. The outcome was to allow electronic filing only if allowed by court order or by local rule.

The Covid-19 pandemic created many circumstances that made physical filing still more difficult. The problems included the need to risk exposure to the virus in making a filing. Some courts responded by expanding the opportunities for electronic filing. The question is whether this experience provides reasons to reconsider Rule 5(d)(3).

Susan Soong surveyed the district court clerks within the 9th Circuit to gather their experiences. The common element was the belief that Rule 5(d)(3) is flexible enough to enable a district to establish the practices that best fit its circumstances. The Northern District of California has adopted a local rule that presumes electronic filing is permissible. Other courts rely instead on e-mail filing, a process that requires more work in the clerk's office and lacks the safeguards that protect direct electronic filing. In all, it seems desirable to take more time to gather information on experience around the country.

The Committee agreed to carry this topic forward on the agenda.

In Forma Pauperis Disclosures

Last April the Committee considered a lengthy set of proposals to establish uniform standards for in forma pauperis status and adopt other new measures. One part of the proposals challenged on several fronts the information required by common i.f.p. application forms, including the forms offered as models by the Administrative Office. The Committee concluded that these proposals should be removed from the agenda, as matters better studied in the first instance by the Administrative Office forms committee and perhaps the Committee on Court Administration and Case Management. The only qualification was that the Committee should continue to follow deliberations in the Appellate Rules Committee. Appellate Rules Form 4 calls for extensive disclosures and is being studied by the Appellate Rules Committee.

The topic has returned with a direct challenge to the many items of information that Appellate Form 4 requires be disclosed as to a party's spouse. The party must disclose such items as a spouse's income from diverse sources, gifts, alimony, child support, public assistance, and still others; the spouse's employment history; the spouse's cash and money in bank accounts or in "any other financial institution"; the spouse's other assets; and persons who owe money to the spouse and how much. The challenge asserts that requiring these disclosures violates the constitutional rights of the spouse and also the party.

No action is called for now. The topic will carry forward to consider the deliberations of the Appellate Rules Committee.

Rule 6(a)(4)(A): End of the Last Day

The several committees have a subcommittee that is studying the provisions that, like Rule 6(a)(4)(A), set the end of the last day for electronic filing "at midnight in the court's time zone."

The project was inspired by court rules in Delaware and in the District of Delaware that set earlier times. One possibility would be to set the time for electronic filing at the close of the clerk's physical office.

Further work by the subcommittee is on hold pending completion of an elaborate study undertaken by the Federal Judicial Center to learn a great deal about actual filing patterns. Among the questions are the frequency of last-day electronic filings after regular office hours, whether differences can be identified among the types of actions and firms that file after regular office hours, and what practices have developed with "drop boxes" outside clerks' offices. Attorneys' experiences and evaluations also are being sought.

Subcommittee work is expected to resume when the FJC provides enough information to support further deliberations.

Rule 9(b): Pleading Conditions of Mind

This topic came to the agenda as a suggestion by Dean Spencer, a Committee member, based on a law review article he wrote that proposes amending Rule 9(b)'s second sentence: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The amendment would change this to read: "may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred."

Dean Spencer provided an overview of the article, A. Benjamin Spencer, *Pleading Conditions of the Mind under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 Cardozo L. Rev. 2015 (2020). As the title suggests, the article addresses the interpretation of Rule 9(b) adopted in Ashcroft v. Iqbal, 556 U.S. 662, 6867-687 (2009). The plaintiff alleged discriminatory intent in placing him in administrative maximum security confinement, relying on the provision that intent can be alleged generally. The Court ruled that a simple allegation of discriminatory intent is a mere conclusion that fails under the pleading standards established by the decision for Rule 8(a)(2). "Generally" is used in Rule 9(b) only to distinguish allegations if intent from the first sentence: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

The Court's interpretation seems to defy the ordinary meaning of generally. It "is not defensible in language or history." But lower courts are implementing the Court's interpretation, many of them "with zeal." A plaintiff must allege facts from which malice, intent, knowledge, or another condition of mind can be inferred. The effect places undesirable obstacles in the way of many plaintiffs, who cannot plead sufficient facts without access to discovery.

The Court's interpretation also ignores the meaning described by the 1938 Committee Note. The Committee Note invokes a British statute. The statute in its own terms and in its consistent interpretation has allowed a simple allegation of intent or the like as a fact. The proposed revision of Rule 9(b) draws substantially from the language of the British statute.

Brief comments followed. The *Iqbal* standard has been found helpful in bankruptcy practice, which involves many attempts to spin nonpayment claims into fraud claims to avoid discharge.

Skepticism was expressed about the proposed language on the ground that it seems to fall below the general *Twombly-Iqbal* pleading standard. Perhaps new language should be found that establishes an "in-between" standard.

This item was added to the agenda to prepare the way for discussion and possible action at the spring meeting. The Committee agreed that it should be carried forward for close study.

Rule 26(b)(5)(A): Privilege Logs

Two outside suggestions, 20-CV-R, and 20-CV-DD which draws on the first, describe practical difficulties in compiling privilege logs and suggest that amendments are in order. The vast and continually growing expansion of electronic discovery has generated pressures that add great expense while yielding unsatisfactory logs that in turn generate unnecessary litigation.

Professor Marcus presented the topic. Rule 26(b)(5)(A) was adopted in 1993 to address the problem of over-reliance on general claims of privilege that did not even inform other parties whether anything was actually being withheld from discovery. The topic was considered in 2008, without finding any way to improve the rule text.

The central question is whether it is possible to do something that is more helpful than the present rule? No one wants to go back to practice as it was before 1993. Leading judges have observed that privilege logs are expensive but are largely worthless. The constant laments about cost, however, may be overblown. A party responding to a discovery request must search all the information

that is responsive and relevant. Then the information must be screened if anything is to be withheld as privileged or protected as work product. How much extra does it cost to compile a log of the items that have been determined to be privileged or protected?

Another element bears on the question whether an amendment should be proposed. As with so many other discovery issues, lawyers generally work out the problems. That may work better than anything that could be captured in rule text.

In short, three questions should be addressed: How big is the problem? Are people in fact working out the problems that do arise? Even if the problems are worked out, is there something to be learned by studying the process that can be captured in new rule text that reduces the number of problems and eases the way to resolving the problems that remain?

A judge started the conversation by observing that he does not see much of these problems, but important information is likely to be better known to litigators and magistrate judges.

A committee member said that privilege logs are a huge practical problem. With electronic discovery there are privilege logs with millions of lines. We may be able to do something that helps.

Another committee member agreed that this is a hot topic. Privilege disputes are a bane for plaintiffs, defendants, and judges. Back in 2009 there was a sudden enthusiasm for logging documents by categories, but the experiment failed in practice. More information was needed to evaluate the claims of privilege or protection than could be gleaned from categorical descriptions. “Where is this a problem? Where not?” Electronic discovery may facilitate review, but it is necessary to know what has been withheld in order to challenge the assertion of privilege or other protection. Thousands of log pages may reveal nothing. Courts do not want to do in camera reviews.

Two more member lawyers agreed that there are many concerns with privilege logs. Further study is indicated.

A judge said that a lot of time is spent with privilege logs. Some are useful. Some are not. They are time consuming. The question should be studied further.

Judge Dow closed the discussion by agreeing that further study will be done, and by thanking Lawyers for Civil Justice and Jonathan Redgrave for raising these matters for attention.

Rule 45: Nationwide Subpoenas

This question arises from federal statutes that authorize nationwide service of subpoenas. Among the statutes, it seems likely that more actions arise under the False Claims Act than any of the others.

Nationwide service seems designed to include nationwide compliance. A majority of the decisions agree. The False Claims Act provision was added in 1978 on a recommendation by the Department of Justice. The problem described by the Department was that a False Claims Act action often depends on the testimony of many witnesses located all around the country, outside the state where the court is located. They need to be brought to the trial.

The question is whether the 2013 amendments of Rule 45 inadvertently created an uncertainty as to enforcing these nationwide statutory subpoenas. One feature of the amendments was to eliminate the "3-ring circus" that required issuance of a discovery or trial subpoena from the court where the witness is to be served, even though the action is pending in a different federal court. Rule 45 now provides nationwide service of subpoenas issued by the court where the action is pending. The problem, however, arises from the provisions of Rule 45(c) that seem to limit the place of compliance far short of statutory nationwide compliance provisions. These provisions were carried forward from the earlier rule, with modest changes. Neither the former rule nor the current rule address compliance with statutory nationwide subpoenas.

There was no intent to supersede the statutes. Before 2013, former Rule 45(b)(2)(D) authorized service of a subpoena "at any place * * * that the court authorizes on motion and for good cause, if a federal statute so provides." It addressed only service, not the place for compliance. It was omitted because Rule 45(b)(2) now provides that "[a] subpoena may be served at any place within the United States." The new rule, indeed, does not carry forward the former provision that seemed to limit statutory authority by requiring a motion and good cause.

The question is whether Rule 45(c) should be amended to clarify a question that has never been directly addressed by the rule. No one has suggested that Rule 45(c) should limit the reach of statutes that provide for nationwide compliance. Need that be stated in explicit new rule text?

The Department of Justice stated that no problems have been encountered in False Claims Act case, and advised that there is no need to amend Rule 45.

?? Was anything decided?

Sealing Court Records

Professor Marcus introduced 20-CV-T, a proposal by Professor Eugene Volokh for a new Rule 5.3 to govern filing documents under seal. This proposal is joined by the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation. The draft rule that accompanies the proposal begins with a presumption that all documents filed in a case shall be open to the public. It adds "an especially strong presumption" as to several categories of filings, including those "that are relevant or material to judicial decisionmaking or prospective judicial decision1making."

The concern that underlies this proposal is that too many documents are sealed in federal courts, and that initially justified seals are maintained for too long after the reasons for sealing have vanished.

The proposal recognizes that all federal courts understand the common-law and First Amendment constraints that limit sealing practices. It notes that a large majority of federal courts have local district rules that address sealing. But it urges that mistakes are made, even with agreement on general principles.

One effect of a national rule would be to jeopardize all parts of current local rules that are not consistent with, or that duplicate, the national rule.

The proposed rule would allow any member of the public to move to unseal at any time. It provides that all sealed documents will be deemed unsealed 60 days after final disposition of a case, unless the seal is renewed. A motion to renew must be filed 30 days before the expected unsealing date. Several other demanding requirements are included. One requirement is that the court not rule on a motion to seal until at least 7 days after the motion is posted on the court's website "or on a centralized website maintained by several courts."

The question is whether this topic should be retained on the agenda for further work. The FJC did a detailed study of sealed dockets — a matter distinct from, but related to sealed documents — in 2007. The only problem it found was frequent failure to unseal warrants after the need for protection expired.

The first comment was that sealing comes up with actions to enforce arbitration awards. Confidentiality is one of the key reasons for resorting to arbitration. A general rule addressing sealing could have a real and undesirable impact on arbitration practices.

Another member noted that the 2007 FJC study resulted in a booklet on sealed cases. That is a different problem from sealed

documents within a case. One phenomenon is that discovery documents commonly are not filed when produced, but are filed later. If they were governed by a confidentiality order before filing,should there be a presumption that the protection carries over after filing? The District of Minnesota has a local rule. The rule works, but involves a lot of effort. The proposed rule "would drive a lot of parties out of court." It is useful to work through these problems at the district court level. And it should be remembered that often a document is filed by a party that does not have an interest in confidentiality, posing problems for another party or nonparty that does have an interest.

Another judge supported the proposal. "What we do is important to many people. We should be as transparent as possible." The public should know who the parties to an action are. It would be useful to explore a rule establishing a presumption of openness.

The Department of Justice understands the open government aspects of sealing. But account must be taken of the False Claims Act, which directs that a qui tam action be filed under seal. Any rule must be drafted to take statutory issues into account.

These problems arise as well at the appellate level. There are particular problems in complex cases where all parties share an interest in confidentiality. There may be difficulties, however, with "shifting burdens around."

The Appellate Rules Committee studied sealing a few years ago. It found considerable differences among the circuits. The Seventh Circuit has a strong policy of openness. Other circuits do not. And many circuits have strong views about their own approaches. In the end the Appellate Rules Committee decided that its Chair, Judge Sutton, should write a letter to the chief circuit judges describing three categories of approaches. Several circuits treat materials that were sealed below as presumptively sealed on appeal. The Seventh Circuit applies an opposite presumption, unsealing all materials in the appellate record unless a party requests omission of the material from the record as not germane to the appeal or moves the court of appeals to seal. The D.C. Circuit and the Federal Circuit require the parties to jointly identify parts of the record that need not be sealed on appeal, and to present that agreement to the court below.

Discussion concluded on the question whether there are divergences in district court practice that should be addressed by a new Civil Rule? Some help may be found in studying local district rules. Perhaps the Rules Law Clerk can be enlisted in this task.

Rule 15(a)(1)(B)

Rule 15(a)(1)(B) provides an illustration of a drafting mishap

that is easily fixed. The question whether to undertake the fix divides into two parts: How much real-world trouble is likely to be generated by the mishap? And what should be the threshold for adding yet another amendment to the steady flow of amendments that compete for the attention of bench and bar?

Rule 15(a)(1):

> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

The culprit is "within." It works well for (A) — the 21-day period begins with service of the pleading. But taken literally, it creates an odd gap that opens the period, closes it, and then reopens it. An amendment within 21 days after serving a pleading to which a responsive pleading is required is allowed by (A). But (B) starts a new period of 21 days after service of a responsive pleading or one of the enumerated Rule 12 motions. Service of the responsive pleading or motion may be made after 21 days from service of the original pleading, whether as a matter of laxity, party agreement, order, or a 60- or even 90-day period set by Rule 12(a). Counting 21 days from service of the responsive pleading or motion begins on service; anything before that is not "within" 21 days "after" service. The right to amend once as a matter of course, having expired, is revived. But in between, literal reading of the rule would require leave of court under Rule 15(a)(2).

The result mandated by literal reading makes no sense. The right to amend once as a matter of course should begin with serving the pleading and carry through uninterrupted until 21 days after service of the responsive pleading or Rule 12(b) motion. This reading makes so much sense that it must be asked whether anyone could be misled, unless it be for the purpose of pointless motion practice.

Alas, it appears that several courts have been forced to struggle with this question. How many litigants have wrestled with it, even if only to come to the inevitably correct conclusion, can only be guessed.

The cure is simple. "no later than" can be substituted for "within." That leaves no doubt.

The Committee agreed that the proposed amendment should be advanced with a recommendation to publish when the proposal can be

added to a package that includes other proposals. It is not so urgent as to be published alone without any companion proposals.

Rule 72(b)(1)

Rule 72(b)(1) provides that a magistrate judge must enter a recommended disposition of a pretrial matter covered by the rule, and that "[t]he clerk must promptly mail a copy to each party."

Mailing a copy is inefficient. Rule 77(d)(1) provides that immediately after entering an order or judgment, "the clerk must serve notice of the entry, as provided by Rule 5(b), on each party * * *." Criminal Rule 59(b)(1), which addresses a magistrate judge's recommendation for disposing of dispositive matters, is similar, directing the clerk to serve copies on all parties.

Rule 72(b)(1) somehow was overlooked when Rule 77(d)(1) was revised. This is another illustration of a rule that can readily be improved.

The Committee approved a proposal to amend Rule 72(b)(1), to be recommended for publication when it can be added to a package that includes other proposals. The amended rule would read:

> * * * The clerk must immediately serve a copy on each party as provided in Rule 5(b).

Mandatory Initial Discovery Pilot Projects

The mandatory initial discovery pilot projects in the District of Arizona and the Northern District of Illinois stopped assigning new cases to the pilot in May and June.

Dr. Lee provided a description of progress in the ongoing FJC project to evaluate the projects.

About 20% of the pilot project cases remain pending. The FJC will continue to track them.

The FJC surveys attorneys in pilot project cases after their cases conclude. The response rate in the most recent survey, which was completed during the Covid-19 pandemic, came gratifyingly close to the response rate in the last survey completed before the pandemic.

The preliminary results of the FJC work "are tricky, so do not make too much of them."

There can be disputes about the initial discovery disclosures. One way to identify them is by looking to the Rule 26(f) reports. "We aren't finding many." Other matters are described in the letter

in the agenda materials.

Judge Dow expressed pleasure that the Northern District of Illinois had participated in the project, but thought it wise to defer any comments until the FJC provides a final report.

The next meeting will be held, in person at a place yet to be determined, or by an online platform, during the week of March 22-26 next year.

Respectfully submitted

Edward H. Cooper
Reporter

TAB 6

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TAB 6A

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

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 4, 2020

I. Introduction

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The draft minutes from the meeting are attached to this report. There are no action items. The Committee's report presenting a draft emergency rule is included as an attachment to the joint report at Tab 2 of the agenda book. What remains for this report are the following information items:

- The Committee's plan to hold a virtual miniconference on several proposals to amend Rule 6 to allow for disclosure of materials of historical importance and to authorize delayed disclosure of grand jury subpoenas under certain circumstances;

- The Committee's decision not to move forward with a suggestion to authorize videoconferencing without the parties' consent in non-emergency circumstances;

- The Committee's decision not to move forward with a suggestion to adopt short deadlines for enforcing and challenging subpoenas and appealing from rulings; and

- The Committee's decision not to move forward with a suggestion to amend Criminal Rule 59(b)(1) or Civil Rule 72(b) to eliminate a difference in phrasing.

II. Rule 6 (The Grand Jury)

The Committee has received three formal suggestions that it consider amending Rule 6(e)'s provisions on grand jury secrecy.

The first two proposals—described in more detail in our June report—are from (1) Public Citizen Litigation Group and five associations of historians and archivists, and (2) the Reporters Committee for Freedom of the Press and 30 additional media organizations. These proposals seek an exception in Rule 6 to grand jury secrecy to allow disclosure of materials of historical importance or public interest, as well as a statement that nothing in Rule 6 limits whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances.

The Committee subsequently received a suggestion (20-CR-H) from the Department of Justice to authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

A subcommittee is reviewing the proposals, and it plans to hold a virtual miniconference in the spring to gather a wide range of perspectives. We intend to invite participants with first-hand experience, including not only historians, archivists, and journalists who wish to have access to grand jury materials, but also persons who can speak to the interests of victims, witnesses, and prosecutors in cases in which grand jury materials have been sought. The subcommittee will also invite participants who can speak to the Department of Justice's proposal that courts be given the authority to order that notification of subpoenas be delayed. These participants might include, for example, technology companies that favor providing immediate notice to their customers.

As noted, two of the proposals seek amendments that would address the courts' inherent authority to disclose grand jury materials. The Committee is closely following a case in the Supreme Court that presents the question whether the exceptions in Rule 6 are exclusive. The respondent in *Department of Justice v. House Judiciary Committee*, No. 19-1328 (*cert. granted*, July 2, 2020), has relied on the courts' inherent authority as an alternative ground for upholding the decision below. Following the election, on November 20, 2020, the Court granted the respondent's motion to remove the case from the Court's December argument calendar.[1]

III. Items Removed from the Committee's Agenda

The Committee decided not to move forward with a suggestion (20-CR-G) to authorize videoconferencing during certain procedures without the parties' consent in non-emergency circumstances. In recent years the Committee has received several similar proposals to expand the

[1] The motion noted that after a new Congress is convened and Joseph Biden inaugurated as president, the newly constituted House Judiciary Committee will have to determine whether it wishes to continue pursuing the application for the grand jury materials that gave rise to this case.

use of videoconferencing. Each time the Committee has reaffirmed the importance of in-person proceedings, even in cases in which the parties consent to virtual proceedings. Accordingly, there was no interest in further consideration of this issue at the present time.

The Committee decided not to move forward with a suggestion (19-CR-E) that it tighten the procedures for enforcing or challenging congressional subpoenas by imposing very short deadlines for replies, arguments, and decisions. Rules establishing deadlines for judicial action have been generally disfavored. And in this case it was unclear whether the suggestion (which was also addressed to the Civil and Appellate Rules Committees) fell within the jurisdiction of the Criminal Rules Committee. No member supported further consideration.

Finally, the Committee removed from its agenda a suggestion (20-CR-F) addressed to both the Civil and Criminal Rules Committees drawing attention to a difference in the wording of the provisions requiring magistrate judges to mail or serve copies of their reports and recommendations. Because the suggestion stated that the phrasing of the Criminal Rule was preferable, there was no need for further consideration by the Criminal Rules Committee.

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TAB 6B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
November 2, 2020

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("Committee") met by videoconference on November 2, 2020. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge James C. Dever
Professor Roger A. Fairfax, Jr.
Judge Gary S. Feinerman
Judge Michael J. Garcia
James N. Hatten, Esq.
Lisa Hay, Esq.
Judge Lewis A. Kaplan
Judge Bruce McGiverin
Judge Jacqueline H. Nguyen
Brian C. Rabbitt, Esq.[1]
Catherine Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge John D. Bates, Chair, Standing Committee
Judge Jesse Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Counsel, Rules Committee Staff
Brittany Bunting, Administrative Analyst, Rules Committee Staff
Kevin Crenny, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was also in attendance. The following persons attended as observers:

Amy Brogioli, from the American Association for Justice
Alex Dahl, from the Lawyers for Civil Justice

[1] Mr. Rabbitt and Mr. Wroblewski represented the Department of Justice.

Patrick Egan, from the American College of Trial Lawyers
Peter Goldberger, from the National Association of Criminal Defense Lawyers
John Hawkinson, a freelance journalist who expressed interest in Rule 16
Sai, a pro se litigant
Laura M. Wait, Assistant General Counsel, D.C. Courts
Aaron Wolf, Fellow, Federal Judicial Center

Opening Business

Judge Kethledge observed that it was the first Criminal Rules Committee meeting for Lisa Hay, Federal Public Defender for the District of Oregon, and Judge John D. Bates, who succeeded Judge Campbell as chair of the Standing Committee. After all members introduced themselves, Judge Kethledge said that it was the last meeting for Judge Feinerman (whose term had been extended until the end of the year), and he thanked Judge Feinerman for his service. Finally, Judge Kethledge announced that Judge Dever's term had been extended, allowing him to continue as chair of the Emergency Rule Subcommittee.

Review and Approval of Minutes

A motion was made, seconded, and passed to approve the minutes of the Committee's May meeting as presented at Tab 1B in the agenda book.

Report of the Rules Committee Staff

Ms. Womeldorf reported on the June meeting of the Standing Committee, the September session of the Judicial Conference, and the rules amendments adopted by the Supreme Court and transmitted to Congress on April 27, 2020. She referred members to Tab 1C of the agenda book, which included draft minutes of the Standing Committee meeting and the Standing Committee's report to the Judicial Conference, as well as a chart showing proposed amendments at each stage of the Rules Enabling Act process. Ms. Womeldorf also reported that no comments have yet been submitted on the proposed amendment to Rule 16 (Discovery and Inspection) published for public comment in August. The comment period closes on February 16, 2021.

Ms. Wilson provided a legislative update, drawing the Committee's attention to the chart beginning on page 109 of the agenda book. She noted that the Due Process Protections Act (S. 1380) was signed into law on October 21, 2020. The Act directly amended Rule 5 (Initial Appearance) by adding a requirement that trial judges "[i]n all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present," issue an oral and written order: (1) confirming the prosecutor's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; and (2) notifying the prosecution of the possible consequences of violating the order. The amended rule further requires that each judicial council promulgate a model order for use by judges.

Ms. Wilson reminded the Committee that Judge Campbell and Judge Kethledge sent a letter to the House Judiciary Committee in May expressing the Rules Committees' opposition to

amending a rule outside the Rules Enabling Act process. The letter also detailed the Committee's extensive study of this issue in recent years. There was no response to the letter, and the legislation passed. Upon enactment, the Director of the Administrative Office sent a memorandum to all federal judges notifying them that they must immediately comply with the new requirements, and that judicial councils must draft and promulgate a model order implementing this change as soon as practicable. The AO will collect any such orders and make them available on the JNet. Judge Furman registered his disappointment that judges were not provided with advance notice of the legislation so that courts could have been more prepared for the new requirements. Ms. Wilson agreed that advance notice should have been provided and indicated that internal procedures within the AO will be reviewed so this does not happen again.

Report of the Emergency Rule Subcommittee (Draft New Rule 62)

Judge Kethledge asked Judge Dever to present the draft of new Rule 62. Judge Dever began by summarizing the work of the Emergency Rule Subcommittee and the reporters throughout the summer and fall. The subcommittee held a day-long miniconference, and its members participated in many conference calls for the working groups as well as multiple subcommittee calls. In addition, there has been a significant amount of communication with the subcommittees formed by the Appellate, Bankruptcy, and Civil Rules Committees to also consider possible rules for emergency situations. Professor Capra, who had been charged by the Standing Committee with coordinating the emergency rules, summarized the work of the other Advisory Committees and their subcommittees.

Judge Dever began by describing the foundational principles that guided the subcommittee. First, the Criminal Rules were drafted with care and have stood the test of time through numerous national and local emergencies. Second, we should not lightly discard any of the Criminal Rules even in an emergency given that they protect significant constitutional rights. Third, the subcommittee approached the project by working from the bottom up in order to identify and evaluate rules that the current emergency affected and to consider other potential emergencies.

Judge Dever proposed that the Committee proceed section-by-section through the draft rule, and he invited comments about the relevant portions of the draft note as well as the rule. He said that up to this point the subcommittee had been focused on revising the text, rather than the committee note, to which it will turn next, using the input from this meeting.

Before the discussion got underway, a member of the subcommittee expressed his general support for the emergency rule and explained that unfortunately he would be unable to participate in the remainder of the meeting because of a medical procedure.[2]

Beginning the analysis, Judge Dever explained that subdivision (a) sets out the conditions for a "rules emergency," distinguishing it from other more general uses of the term emergency.

[2] The member's comment at this point in the meeting on a portion of the note is included below where the Committee discussed the relevant portion of the rule and note.

Subdivision (a) defines the kinds of conditions that must be present, and it identifies the Judicial Conference as the body charged with determining whether those conditions exist. It requires two findings. First, there must be "extraordinary circumstances relating to public health, or safety, or affecting physical access to a court that substantially impair the court's ability to perform its functions in compliance with the rules." And second, there must be "no feasible alternative measures" that would eliminate the impairment within a reasonable time.

Professor Beale noted that (a)(1)'s definition of the emergency circumstances had been accepted by the Civil and Bankruptcy Rules Committees (though the provisions of the draft Appellate Rule were much more general), but the other committees had declined to adopt a requirement that the Judicial Conference also find there is "no feasible alternative." The Civil and Bankruptcy Rules Committees thought this second finding was unnecessary and potentially burdensome. Our subcommittee disagreed, and it thought this separate finding was very important. The emergency rules are exceptions to the time tested and carefully drafted provisions of the Criminal Rules, many of which protect constitutional and statutory rights. Substituting the less protective provisions in parts (c) and (d) during emergencies should be a last resort. If there are other means of responding to emergency conditions—such as moving proceedings to another district under 28 U.S.C. § 141—the emergency rules should not be invoked. There is an important difference between the emergency rules being considered by the Bankruptcy and Civil Rules Committees, which concern, for example, extensions of filing deadlines and service rules, and the provisions included in our emergency rule. Because of the constitutional and statutory underpinnings of the Criminal Rules and the significant differences between the proposed emergency rules being considered by the other advisory committees, uniformity on this point may not be necessary or desirable.

There was also some disagreement among the advisory committees about the role of the Judicial Conference. Although the Bankruptcy and Civil Rules Committees agreed that the Judicial Conference should be authorized to declare a rules emergency, Bankruptcy's draft rule also authorizes the chief judge of the relevant circuit or the chief bankruptcy judge of the relevant district to declare a rules emergency. This reflected that committee's concern that the Judicial Conference may not respond quickly to more localized emergencies. Our subcommittee thought that the Judicial Conference would be able to gather the necessary information and respond expeditiously to emergencies.

A member who had served on the subcommittee stated that she had dissented from the subcommittee's conclusion that an emergency rule was needed and that the Judicial Conference was the appropriate body to declare rules emergencies. The member opposed the promulgation of an emergency rule because it would, inevitably, normalize less-protective procedures. But if there is to be an emergency rule, Congress, not the courts, should decide that there is an emergency warranting a suspension of normal procedures. This would parallel the Suspension Clause for habeas corpus. The member also noted that the CARES Act directed the Judicial Conference and the Supreme Court to consider emergency rules that would be triggered by a presidential declaration, not by a declaration of the Judicial Conference. The member stated that

she had expressed her position more fully in a letter to the subcommittee that had not been included in the agenda book. At the chair's direction, staff circulated the letter electronically during the meeting, so that to the full Committee could have the benefit of the points made. The online agenda book has been updated to include it.

Several members responded. One expressed interest in the argument that it would be better not to propose an emergency rule, as well as some concerns about the role of the Judicial Conference. She asked whether the Judicial Conference's decisional process would involve consulting with Criminal Justice Act panels for their views. Would the Judicial Conference prioritize criminal cases in an emergency?

Other members thought an emergency rule was needed, and they expressed support for subdivision (a). One stated that while mindful of these valid concerns he was persuaded by the experience during the COVID-19 pandemic that an emergency rule of some kind is needed. In his view, this draft gets the balance right. Another agreed that we need to have an emergency rule, and he favored including (a)(2). Because declaring an emergency should by design be hard to do, he favored making the Judicial Conference the decider. But he did ask whether it would always act quickly.

Several members commented on (a)(2). Although most members agreed with the subcommittee on the importance of including this provision, one member thought that it was unwieldy and confusing. That member also noted that whether there is a "feasible alternative" is a local question. Another suggested that it might be better to place it in subdivision (b).

Judge Dever observed that despite the devastation wrought by the hurricanes in Puerto Rico and Hurricane Katrina, the tools available to the district courts—including the movement of proceedings to other districts under § 141—permitted the courts to function effectively in compliance with the Rules of Criminal Procedure.

Noting the Department of Justice had not had time to formulate its position during the subcommittee deliberations, Judge Dever asked Mr. Rabbitt and Mr. Wroblewski for the Department's views. They responded that the Department was broadly supportive of the need for an emergency rule. It also agreed with the subcommittee's rationale on the need for (a)(2), despite the fact that it might create disuniformity.

There was additional discussion about the role of the Judicial Conference. The Standing Committee's liaison raised a concern about sole reliance on the Judicial Conference to declare a rules emergency. What would happen, for example, if the Judicial Conference were unable to act? Or if its members were unable to communicate with one another, or with the affected courts? Could the Chief Justice declare an emergency for a limited time under such circumstances? That suggested another question: does the Judicial Conference have a quorum requirement?

Professor Coquillette, who served for decades as the Reporter to the Standing Committee, stated that the Judicial Conference has been nimble and responsive, and it can act quickly

through its Executive Committee. Professor Beale noted that some of the questions being raised would be common to all of the advisory committees, and there was general agreement that some topics may be referred to the Rules Law Clerk for research, including the statutory framework of various actors and whether Rules Enabling Act delegates roles to other players.

Judge Bates asked, regarding (a)(2), whether there were any other "feasible alternatives" other than those mentioned in the reporters' memo (delaying proceedings if the emergency will not last long or moving proceedings to another district under 28 U.S.C. § 141)? Could the concept of declaring an emergency only when there is no feasible alternative be addressed in the note, rather than the text? He observed that this rule is being drafted for the use of just one decisionmaker—the Judicial Conference—and that this decisionmaker would understand what's implicit in (a)(1).

Judge Kethledge responded that determining whether there is an impairment and determining how such an impairment might be remedied are two different issues. It is important to separate these issues in (a)(1) and (2), requiring consideration of the second issue in (a)(2). He also pointed out that the emergency rule might later be interpreted by multiple decision makers if there were challenges to the use of the emergency procedures. However, since many of the draft provisions require the consent of the defendant, he agreed that such challenges might be rare.

A motion was made to approve subdivision (a) as set out in the agenda book. The motion passed with two "no" votes. One of these members stated that she voted this way because of the reliance on the Judicial Conference to make the declaration, not because of concerns about (a)(2).

Following a break for lunch, Judge Dever began the discussion of subdivision (b), governing the contents of emergency declarations by the Judicial Conference, as well as additional declarations and termination, particularly with respect to proceedings that may have begun under the emergency rule. He thanked the reporters for their excellent memo, and asked if they had any comments before opening discussion.

Professor Beale noted that (b)(2), lines 16-17—which states that a court may not exercise authority under subdivisions (c) and (d) unless an emergency declaration by the Judicial Conference includes that court—is not included in the rules drafted by the other advisory committees. The other committees thought this point was implicit because (b)(1) requires the declaration to identify the court or courts affected. Our draft (b)(2) makes explicit what some people think is implicit. It prevents any possible interpretation that a court not included in an emergency declaration could say "we have these emergency circumstances and we can go ahead and employ these procedures." She asked for discussion of this provision, because the other advisory committees have not been persuaded that (b)(2) should be included.

Judge Dever then asked each Committee member to state his or her views on subdivisions (b) and (e), which describes the effect of a termination under (b). Several members

stated that they agreed with (b) in its entirety. Others raised questions or issues concerning particular aspects of the draft.

One member expressed a concern about (e), which allows a particular proceeding begun under the authority of (c) and (d) to continue after the emergency declaration terminates. How would this affect constitutional rights, such as the right to a public trial? If there is no longer an emergency, shouldn't the defendant automatically have the right to an in-person courtroom setting where the public has full access, as opposed as to whatever arrangement was in place during the emergency? He understood that for efficiency purposes it may make sense to allow a particular proceeding to continue as if an emergency were still in effect, but he wondered if that might open up certain proceedings to challenge. Once you have declared that the emergency is over, any burden on rights—like the right to a public trial—may need to give way.

Professor Beale pointed out that subdivision (e) only allows the proceeding to continue with the emergency procedures if the court finds that it would be infeasible or work an injustice not to continue under the emergency procedure. In the member's public trial scenario, what if seating in the courtroom had been limited and the public had been provided alternative access under (c)(1), watching a live broadcast in an adjacent courtroom? This limited access could only be continued if the court found that it would be "infeasible or work an injustice" to provide normal public access to remainder of the trial. She explained that the subcommittee drafted (e) to respond to something like a multi-day hearing being conducted by videoconference, when the emergency declaration was terminated in the middle of the hearing. The goal was to avoid having to start the hearing over to do it in person if it would not be feasible to bring far-flung participants into the courtroom on short notice to complete the hearing. The member's concern is that continuing such a procedure might violate a constitutional right. Since the draft rule requires the defendant's consent to most of the procedures, she asked, might that take care of the problem?

The member was not sure what the impact would be of any prior consent to an alternative procedure or proceeding and the emergency state. He suggested that the subcommittee might consider these issues, and said he would be happy to contribute to that effort, including reading an article that had been mentioned earlier. Professor Beale agreed to continue this discussion with the member after the meeting to determine whether there were any scenarios that might raise a constitutional concern.

Another member stated that he had no concern about (b), though he noted the interplay between (a)(2) and (b)(1)(B), which allows the Judicial Conference to restrict the emergency authority otherwise available under (c) and (d). He emphasized the need to be very careful in relaxing the Criminal Rules, and the possibility that there might be an emergency that would require some of the emergency authority, but not all of the procedures. The member thought it was hard to separate this question completely from the no feasible alternative enquiry under (a)(2). When the Judicial Conference is looking at the question whether to authorize certain procedures under (c) or (d) but not others, would that have been a preliminary decision made under (a)(2)? Noting he understood the example in the note concerning the unavailability of

electronic communication, the member thought that it still might be useful to give a little more thought to this interplay with (a)(2).

The Standing Committee's liaison raised two issues concerning (b)(3). First, with regard to additional declarations, he thought it was critical to state the determination that emergency conditions change or persist must meet the same criteria as (a). Second, because the emergency procedures should be reserved for absolutely necessary circumstances, shouldn't the rule require, not merely permit, termination of the declaration upon a finding that the triggering conditions no longer exist? The draft is permissive, but not mandatory. He was inclined to state that if the Judicial Conference finds that the triggering conditions are no longer in effect, it must terminate these emergency rules and go back to the standard procedures.

Professor Capra raised two additional issues concerning subdivision (b) based on the drafts from the other Advisory Committees. First, (b)(1)(A) requires the Judicial Conference to identify the "the court or courts affected." The Bankruptcy Rules Committee's draft rule says the court or "locations" affected. In a pandemic perhaps we are concerned with locations as opposed to specific courts. And in the Civil Rules Committee's draft rule, renewals of emergency declarations are limited to the same 90-day period as initial declarations. The 90-day limit is not in the draft of new Rule 62.

Professor Beale stated that the draft assumed all emergency declarations are subject to the same limitations. So 90 days would be the limitation. If that is not going to be clear we could state it again, but it's an additional "declaration," a term defined by the rule. It's not called a renewal, and it's not somehow a different thing from the declarations in (a).

Professor Capra responded that may be implicit, but the Civil Rules Committee has made it explicit. It states a renewal must be for 90 days or less.

The Standing Committee's liaison recognized this may be implicit. But no matter what, the conditions of subdivision (a) would have to be met. We don't want to suggest in any way, shape, or form that an additional declaration could be made if circumstances change and it's no longer the circumstances that satisfy (a). He thought perhaps the problem would be solved if, as he had suggested, (b)(3)(B) were revised to make it mandatory to terminate the emergency authority if those conditions are no longer met. Then obviously you can't change or extend.

Professor Beale suggested subparagraph (b)(3)(A), at line 20 in the draft, could be revised to read "additional declarations under (a)." That would make it absolutely clear that you have to go through all the requirements in (a). We could also add the period up to 90 days here, if we wanted to do so. Professor Capra responded that he did not think adding a reference to (a) would necessarily include the 90-day limitation, which is in (b), not (a).

With regard to the suggestion that the rule provide that the Judicial Conference "must" terminate an emergency declaration, Professor Beale explained that earlier drafts had separate

sections for additional declarations and early terminations. The style consultants merged these sections for our rule (but apparently not for the other rules), and we don't really know why. With separate sections, you could easily have "may" for additional declarations and "must" for early terminations.

Judge Dever responded to Professor Capra's comment about the "location" language that the Bankruptcy Rules Committee introduced. What is a location? What would adding that word do beyond the reference to a "court"? Is it surplusage? He was not aware of the use of that term elsewhere in the Criminal Rules. Professor Beale commented that there are divisions in some courts, but the Bankruptcy rule does not use that language. Judge Dever agreed about divisions, but reiterated that the term location was unfamiliar. Hearing no support for the inclusion of the term "location," Professor Capra said he would report that reaction to the Bankruptcy Rules Committee. Professor Beale noted that an upcoming call among all of the reporters would provide an opportunity to relay the Committee's reaction and ask whether location is a term that is understood under the Bankruptcy Rules.

Judge Dever summed up the discussion about the Standing Committee's liaison's suggestion, which was to modify line 20 to read "may issue additional declarations under (a) if emergency conditions change or persist, and on line 21 revise to state "must terminate a declaration" if emergency conditions no longer exist. "May" would be deleted from line 19.

Judge Dever asked Judge Bates for his views. Judge Bates agreed with the need to ensure that an additional declaration cannot be issued unless the extraordinary circumstances in subdivision (a) are met. With regard to (b)(2), the need for this provision in the Criminal Rules has to be balanced against the need for uniformity with the other emergency rules. He could not say what the outcome of that should be or will be. He was not sure that without (b)(2) the limitation was just implicit. Subparagraph (b)(1)(A) says the declaration has to identify the court affected. That's pretty explicit in saying that another court cannot exercise this authority. So he was not sure that there was sufficient uncertainty to require (b)(2). That would be a discussion in terms of uniformity.

Judge Kethledge responded that he had been the proponent of (b)(2). He had been concerned that if a court read (c) and (d) in isolation, it could be confused and think that it could employ these procedures if the findings required by (c) and (d) had been made. Subdivisions (c) and (d) require the chief district judge or district judge to make a series of findings. He thought perhaps we need to make clear that if you're not in a district identified in a Judicial Conference declaration, even if your chief judge makes those findings, you can't employ the procedures in (c) and (d). But he wanted to be uniform where possible, and after hearing everyone he was persuaded that (b)(2) was not necessary.

Professor King suggested that it might be a good idea to move the material in the note describing what (b)(2) says up to the section on (b)(1)(A) to make this point clear. Judge Kethledge and Judge Dever agreed.

Judge Kethledge acknowledged the excellent suggestions the Standing Committee's liaison made concerning lines 19-21. He thought they were points well taken. Unless someone thought differently, he saw no need to vote on them at this time and said the subcommittee would revise accordingly.

No member asked to be recognized at that point to speak to subdivisions (b) or (e) including the suggestions regarding lines 19-21, the deletion of (b)(2) for uniformity with the other advisory committees, and relocating the note discussion that accompanied (b)(2) to the portion of the note accompanying paragraph (b)(1)(A).

Judge Bates observed that when (a) and (b) talk about the court or these courts, they are referring to an entire district. But (c) uses the term court to refer to an individual judge for the most part, referring generally to case-by-case presiding judge specific findings. So the use of the court there is different than the use of the court in (a) and (b). He was not sure whether that was something that that should be clarified somewhere. Judge Dever thanked Judge Bates for that observation.

Judge Dever asked if there was anything further on (b) and (e)? Hearing nothing, he said we would make those revisions with respect to (b). At that point, a member raised one additional point regarding (b), suggesting language to clarify (b)(1)(B) to read "any restrictions on the authority granted in (c) and (d) to modify these rules." Judge Dever and the reporters agreed this was a helpful change. Professor Capra said he thought it was an excellent change, which he would take to the Bankruptcy Rules Committee because of the desire for uniformity.

Professor Capra related a possible complication affecting (e), which allows the court to complete a proceeding begun under the emergency rules that depart from "these rules" if complying with "these rules" would be infeasible to work an injustice. But once the emergency rule is adopted, it would be included in "these rules." Professor Beale responded that the same problem is present in line 6, which defines an emergency when specified extraordinary circumstances "substantially impair the court's ability to perform its functions in compliance with these rules." Professor Capra said he would continue to work on the question of internal consistency, working with the style consultants and the reporters.

Judge Dever asked for further comments or suggestions about (b) and (e), recognizing Mr. Rabbitt to provide the Department of Justice's views. Mr. Rabbitt responded that the Department had no comments on subdivision (b) that had not already been noted. It supported (b) in its current form and had no issue with the proposed deletion of (b)(2).

Judge Dever then moved on to the discussion of (c), which deals with the authority to employ certain procedures that depart from the Criminal Rules after a declaration. He explained that (c) was developed after the subcommittee's comprehensive review of all of the rules, its miniconference, and responses from all the chief judges, who had solicited comments from their

judges. He acknowledged the tremendous contribution of the participants in the miniconference, who are listed on page 122 of the agenda book.

Judge Dever added that some subcommittee members had volunteered to get additional information about the need for (c)(3), which would authorize the court to issue a summons, rather than an arrest warrant, under certain circumstances. The current rules give the Department of Justice the authority to determine whether the court issues a summons or a warrant. In an emergency, perhaps public health related concerns might warrant at least allowing a judge to make that decision, with the ability of the government to demonstrate good cause for issuing a warrant instead of a summons.

A subcommittee member said she had circulated the proposal to magistrate judges she knew as well as some district court judges to find out what they thought. She talked with judges in Oregon, the Western District of Washington, the Northern District of California, and Massachusetts, and was expecting some additional comments as well. The response from those judges was unanimous support for this rule. Many of them stated they wished they had had this authority during the current pandemic. She understood one judge had been issuing both a summons and a warrant sometimes. The rule requires the judge to issue a warrant, but issuing a summons too allowed the marshals to decide which one to use, taking the decision away from the Department of Justice. Although not necessarily within the rule, that was how one judge decided to handle this problem of sometimes bringing potentially ill people into the courtroom.

The member described one example from Michigan where five people were arrested together, one of whom became ill. Because they had been shackled together and held for two days in a detention center awaiting a hearing, all five as well as the marshals had to be quarantined. It was later determined that all five were actually releasable, and need not have been in custody. This example disturbed the magistrate judge, who would have preferred to have issued a summons if the defendants were likely to have shown up if served by a summons. That would have avoided a situation where the other defendants and deputy U.S. marshals were exposed. She heard many other examples. She acknowledged that it does take some effort to consider whether a warrant or summons is needed in a case. And as we know, an arrest can be a dangerous moment for both the defendant and for the deputy U.S. marshals. An arrest is a pretty serious thing. It is humiliating, uncomfortable, time-consuming, and disruptive, and it may result in the loss of property and sometimes pets or children are left unattended. The U.S. Attorney's office already considers whether a warrant or a summons should issue. When there's an emergency, this rule asks that they present that information to the magistrate judge, who can take public health or safety risks into consideration and suggest a summons.

The judges she consulted thought that if a judge questioned whether there should be a warrant or summons in a particular case, the U.S Attorney's Office would be able to answer orally or in a short memo. The presumption would still be a warrant if the U.S. Attorney sought one, but the court could ask follow-up questions. The court wouldn't need to have all the

information available to the grand jury about probable cause, because it's not a probable cause question. It's a question about whether this person is at flight risk or a danger. So in the majority of cases involving a crime of violence or someone who is considered to be dangerous, a warrant likely would be the right call. But when the crime itself is not ordinarily considered violent, the magistrate might question whether there's any further risk to bringing the defendant into the courthouse and should we consider summons. The U.S. Attorney would likely have that information and be able to answer.

The judges the member consulted were very much in favor of it, but she acknowledged it would be necessary to work out the details of exactly how it would be implemented. She stressed that these rules are just for emergencies, not to be used all the time. But this would be one more way to allow the court to control its docket and keep some of the safety risks out of the courthouse. This could also apply in non-pandemic emergencies, such as an earthquake that cut off one part of a district or made it dangerous for the marshals to enter a district to make arrests. They might want to ask, does this person live in that district, do we need to do this arrest now or could we do a summons? But of course the pandemic is the primary concern right now. In summary, this is a pretty limited proposal. It allows the Department to show good cause for a warrant, but the judge could ask about a summons and would have the authority to issue a summons rather than a warrant if the Department doesn't show good cause.

Another subcommittee member said he had reached out to the Rules Committee of the Federal Magistrate Judges Association (FMJA) and had held a Zoom videoconference meeting with members of that committee. The member shared the working draft of the note addressing (c)(2) and got the informal comments of those who responded and participated, which he stressed were not the official views of the FMJA. There was a difference of opinion. There was general agreement with the laudable purpose of the proposal as cogently expressed in the draft note for this paragraph. But the majority of those who participated, by perhaps a ratio of 2 to 1, thought that (c)(2) is not advisable or needed. First, during the pandemic this group's experience was that AUSAs are considering the situation, including the health and safety of the marshals, the people they arrest, and court personnel. The majority group had not seen any abuse of this power by the Department of Justice. Second, there was a real concern about whether magistrate judges have sufficient information to decide whether a summons should issue. When an indictment is returned, the magistrate judge does not really know anything about the case. It might be a little different if it's a criminal complaint, where there might be an affidavit and a magistrate judge might know a little bit more. But the prosecutors know a lot more about the situation than the magistrate judges. The member himself did not know how he would make initial determination about health and safety concerns for a particular case and a particular defendant. The government would have to provide that information up front. And the final point from what the member called the majority group was that when issues do arise there are pretty easy ways to handle the situation. The magistrate judge simply talks to the agent or the AUSA and says, "don't you think summons might be better idea here?"

What the member called the minority position from the FMJA judges raised many of the same points made by the previous member. The minority thought that magistrate judges would use this power extremely sparingly, but it might be useful when a particular U.S. Attorney or a particular U.S. Attorney's Office did not seem to appreciate the health or safety risks in a situation. These judges did not think it would require the government to make an overly burdensome showing. Once the magistrate judge has said, "Look, we need a summons," the government could include the argument there is good cause for an arrest warrant in the main response at the return of an indictment or in its response to questions that a magistrate judge might pose. Or this information could be just simply a paragraph in an affidavit of a criminal complaint or in some written filing, saying why in this particular situation they need a warrant. The judges did not think a full-blown hearing on that issue would be needed.

A third subcommittee member reported that she had also circulated the draft summons provision among district court judges and magistrate judges. She got feedback that was somewhat supportive, but most of the judges felt that they wouldn't be in a position to have sufficient information to evaluate the public risk. As to the example of the five defendants arrested together in Michigan, she stated that no one would have been in a position to evaluate the risk if one defendant was carrying the virus but not yet showing symptoms. Although the judges to whom this member spoke with were willing to think about the proposal, they were unsure how effectively the case would be made to them that there was a risk of harming defendants, harming marshals, and so forth, so that they could effectively evaluate it.

Judge Dever asked for the views of the Department of Justice. Mr. Rabbitt said that the Department had circulated the proposal within the Criminal Division and the U.S. Attorney community, and it raised some significant questions and concerns. These concerns echoed those from the FMJA judges about who is in the best position to assess the danger and flight risk posed by a particular defendant. That concern is particularly acute in a case proceeding under Rule 9, where there isn't the same paperwork that accompanies a complaint and you are proceeding from an indictment. The feedback that the Department got internally was that it was better positioned to make that evaluation, and questioned how well positioned the bench would be to make that determination in the first instance based on the information available to them. Mr. Rabbitt also mentioned the self-regulatory aspect of this for the Department of Justice, which has no desire to take people into custody unnecessarily in emergency circumstances. The Department tries to be judicious because of the danger that's presented to the government's own personnel and the burdens put on the Department, the Bureau of Prisons, and the U.S. Marshals Service in terms of housing those people. He drew attention to the Attorney General's memorandum from early in the pandemic that directed U.S. Attorneys and prosecutors across the country to be judicious in terms of detention positions. Based on all of that, the Department's preference would be to keep the decision with the Department. Mr. Rabbitt asked Mr. Wroblewski to comment as well.

Mr. Wroblewski said that most of the concerns raised within the Department when they first circulated this proposal were quite practical. Other members had talked about the question of who is actually in best position to be able to weigh all of the risks. Mr. Wroblewski noted that

although the rule focuses on the public health or safety risks, as the Committee was aware, many factors go into the decision whether to issue a summons or a warrant. In most situations the magistrate judge will not have sufficient information to weigh all of those factors and to make a judgment. Moreover, it is not obvious at this stage that we're talking about an adversarial proceeding. Of course, if someone is arrested and they're brought in within hours, or certainly within a day or two, they will be brought before a judge in a more adversarial proceeding. So, as a practical matter, this is a relatively small period of time. In the case of the Michigan example, if the Department had known that one of the defendants was sick, obviously the marshals don't want to get sick, they don't want to get everybody else sick, and precautions could have been taken. But as just mentioned, that wasn't known to everybody at the time. So again, Mr. Wroblewski thought it was mostly the practical concerns of weighing all the information. And in this pandemic, there have been efforts to use pretrial detention in a much more careful way. That was laid out in the Attorney General's memo, which is public.

The member who had described the Michigan example asked to say a little more about it. First, she corrected herself to say the example occurred in Massachusetts, not Michigan. Although they didn't know the person was infected by COVID-19 when they made the arrest, they did determine afterwards that all five who were arrested were eminently releasable, and maybe didn't need to be subjected to that danger. There are known risks from COVID-19. We know that if you put strangers together in close quarters, shackled together for a long period, you could be exposing them, when we are supposed to observe social distancing. Even without knowing that one person was infected, it was questionable to arrest all five. When there is a known public health and safety condition requiring social distancing, there is a heightened urgency to look at whether people should be arrested. She appreciated that the proposed summons authority might be used sparingly in many districts, where people are making reasonable accommodations, and that the Department of Justice had instructed that. But since the U.S. Attorneys have been instructed by the Attorney General to make this assessment anyway, it's not too much to ask in an emergency that the government explain the assessment to the magistrate judge if the judge has a question.

The member who solicited the information from the FMJA added one more point. The magistrate judges do know the crimes with which individuals who would be arrested or summoned are being charged, and that is an important piece of information. If the charge is social security fraud, or something like that, and the magistrate judge sees the government is seeking an arrest warrant during a pandemic, he might want to ask why a summons would not be sufficient. But if it is a hundred-person drug case, which is common in Puerto Rico, he would not have any information about these individuals other than the changes. He would not have very much information about them.

Judge Dever added that the summons proposal was unusual in one respect, because this issue was not raised by the participants at the miniconference or when the subcommittee solicited input from the chief judges. Unlike the other provisions in new Rule 62, the summons proposal percolated up from within the subcommittee itself, and he complimented the members who had

gathered additional information and presented the arguments very cogently and persuasively on each side.

Turning to the bench trial provision in (c)(4), Judge Dever asked the representatives from the Department whether they had any additional information or comments. Mr. Wroblewski said that the Department had little additional information. As he stated on the subcommittee call, the issue had come up in a handful of situations where judges have wanted to proceed by bench trial, but the Department did not consent. He thought the case from Eastern District of New York, which had been in the press recently, had been resolved, and the litigation or the threat of litigation ended. A number of U.S. Attorneys have offered bench trials to any defendant who wants one, but have gotten very few takers.

Judge Dever asked to hear from the other members of the Committee, and he expressed particular interest in the views of members from different districts in which the stakeholders, as part of this pandemic process were getting together and talking about issues like pretrial detention and working these things out while recognizing that the Department of Justice has the authority under the way the rule was drafted. Hearing no comments from the subcommittee or reporters, Judge Dever asked other members for their views on (c).

A member began with (c)(3) regarding the summons. He had the same thoughts about institutional competence previously mentioned, which is the government, the FBI, ATF, or whoever it is will have a much better sense of the safety concerns with arrest or lockup than that the judge will. Although ordinarily the member did not do this work himself, there was about a two-month period early in the pandemic where the magistrate judges were not coming into his building and the member and three other district judges were handling all the arrests. Thinking back, the member thought perhaps he could have made reasonably intelligent "balls and strikes" calls on summons versus warrants on his own accord, but he was not sure. Following up on the earlier comment about incentives, the member thought the people going out to make arrests have an incentive to be as safe as possible. If there are concerns like COVID-19, it seems they would be the first ones to say maybe we ought not do an arrest here. Maybe we ought to do a summons. So he tended to agree that (c)(3) is not needed. But if it were retained, he would delete the word "public" on line 34, so that the provision would be broad enough to encompass a concern about the safety of particular arresting officers or people working the lockup, court clerks and the like.

Turning to (c)(4), the member supported it as written. He agreed with the Rules Law Clerk's memo on page 155 of the agenda book, which concludes that the government does not have a constitutional right to a jury trial. He understood that at least some U.S. Attorney's Offices might have reticence about proceeding to a bench trial at least in some situations. He had heard from his colleagues there were situations where the defendant consented and the government did not, and patterns emerged when the government consented and when it did not, at least in his district, He thought on balance that the defendant's interest—particularly the defendants who are in pretrial detention—should prevail in situations where it is not possible to impanel a jury. It's a particularly acute problem for defendants in those districts that aren't

holding criminal jury trials. His district held no criminal jury trials until the beginning of August. They did criminal jury trials in person August through October, and he held a jury trial in a two-defendant armed robbery case. But with the spike in cases, his chief judge just shut down criminal jury trials again, and he thought it likely the same was true in many districts around the country. If the defendant is willing to do a bench, you don't have to bring 35 or 40 people to the courthouse. It's much safer to do a bench trial. In his district they are currently allowed to do bench trials if a defendant wants to do it and the court thinks it's appropriate. He thought on balance that ought to be allowed even if the government does not consent. He did note one concern. When either defendants or defense counsel express a desire for quick jury trial, and he must tell them that's not possible, it is tempting to say "but if only you would consent to a bench trial we can get you in next week or in two weeks." He has been careful not to do that, to avoid putting any kind of pressure on a criminal defendant to waive the jury trial right. He raised this as something that might be added to the committee note to remind judges that they ought not to do that, unless the point is so obvious that it wouldn't be necessary.

The member supported (c)(1), and asked whether the note could provide some examples of alternative access. Given the concern that was laid out in the reporters' memo that we don't know what technology will be available in the future, it would not be definitive or exclusive. But in cases done by video or by phone his court allows any member of the public to dial in and listen. They had not yet figured out a way to get the public into the video, but if there is a video hearing, members of the public can access the audio. The note might also mention the use of an overflow courtroom as another possible example. In his jury trial, socially distancing the jury took up half of the courtroom, and in the remaining area they allowed only two or three people per bench. The demand for seats exceeded the supply, so they set up an overflow courtroom where there was contemporaneous a video transmission of the trial. Finally, he was aware that the subcommittee decided against including a requirement that the alternate public access be contemporaneous. Without knowing what the subcommittee's rationale was, the member was mildly in favor of having a requirement at least when reasonably feasible that the transmission be contemporaneous.

Finally, on (c)(2), the member raised a drafting issue. This provision applies if the rules require a defendant's signature, written consent, or written waiver. That's three things. But (c)(2) refers to only one of them: it says when emergency conditions limit the defendant's ability to sign, defense counsel may sign for the defendant. What about defense counsel's ability endorse a written consent or a written waiver on the defendant's behalf? Should (c)(2) mention this as well?

Judge Dever responded that the subcommittee had an extensive discussion about whether the alternative public access must be contemporaneous in (c)(1). And it did discuss different alternative measures to provide public access, including some that member had just raised. Judge Dever said he had used an overflow courtroom, and during jury selection where we couldn't have public in the courtroom with the jury. He acknowledged the suggestion that we add examples to the note. He then invited the remaining members to comment on subdivision (c).

The next member to speak had comments about several of the provisions in (c).

On (c)(1), he agreed that it would be helpful to lay out a non-exhaustive list of examples in the note of ways in which a reasonable access could be granted.

On (c)(2), the language refers to the emergency "conditions limit[ing] a defendant's ability to sign." In the member's experience often (particularly for detained defendants) their ability to sign is limited by many factors even in ordinary circumstances. So he wondered if the focus of (c)(2) is that the emergency conditions are making it *infeasible* for the defendant to sign, just to distinguish from what is typically the case.

The member thought particularly for detained defendants there had been a rich discussion on (c)(3), including the argument around incentives, which the member found compelling. But he observed that we all have COVID-19 on the mind right now, and this rule would apply much more broadly. Not everybody appreciates the same baseline health risks in a given situation. That may in some ways undercut the argument that the government already has an incentive to use a summons to avoid health risks. If you don't believe that violating social distancing, not wearing a mask, etc. will jeopardize your health, then the incentive argument is not as powerful as it would be if there was complete agreement about the relevant health risks. Despite not having any particular expertise and perhaps no particular insight as to the health risks in a particular situation, the court at least has the ability to get at the issue, whether it's through a hearing or asking the government to make a showing. And that showing could go to the question of the risk, or for instance, coming back to COVID-19 situation, whether the detention center has adequate PPE available for detainees. The court could also consider the seriousness of the charge and perhaps even the likelihood that someone would be released if in fact they were brought in.

The member added that there seemed to be two typos in the note. On line 190, it should read "alternate" instead of "alternative." On line 198, that should be a reference to Rule 24(c)(4). And more substantively on that point, the committee note says that the court should consider permitting each party to have additional peremptory challenges, consistent with Rule 24(c)(4). The member thought there was a compelling explanation of that decision in the in the memo, and some of that discussion may need to be included in the committee note. It is not obvious why a court wouldn't follow the same pattern that is set forth in Rule 24(c)(4) if it is adding alternate jurors over and above the threshold of six. It would be useful to include an explanation in the note.

The next member's comments focused exclusively on (c)(3) and (4). Noting there had already been an extensive discussion of (3), he commented that he had serious reservations along the lines of what's been expressed so far to changing the approach in magistrates' courts to this extent. There are ways for the government to address these concerns, such as negotiating surrender in appropriate cases. He thought it would be very difficult to consider releasability at the stage when an arrest warrant or summons is served. In most cases, the arguments on pretrial

release are made later, after you have a report and you go into court in in front of the judge with more information other than just the charges. In most cases, common sense and supervision by the magistrate judge could work out any problems. So he would be very hesitant to include (c)(3), and he was not sure how much of an effect it would really have on detention before trial.

On the bench trial provision, the member was not sure there was a need for what seemed to be a very big shift in approach, notwithstanding the case from the Eastern District of New York. Is it sufficiently serious to justify making a finding on the record that unless the government has consented to a bench trial, we're going to be violating the defendant's right? That would be on the record as a finding, and then what happens if you cannot have the bench trial for some reason? Looking at the history and the materials that were provided—which were excellent—it seems a big change for a problem that doesn't seem to have arisen all that much. He thought it was not apt to compare it to *Batson* violations, where government conduct forfeits its ability to exercise a peremptory challenge. The right is the right to have that trial jury. He did not know if the Supreme Court would have some issues with that. But he acknowledged that he had not experienced the trial courtroom in this pandemic as others had, and he deferred to their experience. But the proposal concerned him.

Another member stated that she shared many of the concerns about issuing a summons. For the reasons the Department of Justice representatives and another member had articulated, it seemed unnecessary. We're talking about a situation where an emergency has been declared and already it's a limited duration that's been declared by the Judicial Conference as extraordinary. So she thought that under those circumstances, the stakeholders involved, including the agents, the U.S. Marshals Service, and the Department of Justice, would be very sensitive to having arrest warrants when a summons would do under circumstances that really impact all of the stakeholders' health and safety. So the system already has its own checks and balances, Requiring the judges to make the same sort of findings and balancing as the judge would do during an initial appearance—assessing flight risk and safety to the community in terms of the offense and the criminal history of the defendant—versus public health and safety concerns can be very complex. The member thought it did not seem practical or necessary to do that up front at the time of the issuance of a warrant or summons. So the proposed rule did give her pause, but the member thought that if the rule were to be implemented, the Department's response would be to do some sort of written presentation demonstrating good cause for a warrant. That would essentially go through the factors they would present to the judge at an initial detention hearing. So the rule could work if implemented, but she did not think was necessary.

The member also agreed with the previous speaker that the government declining to consent to bench trials is not a huge problem. Although some examples were cited in the agenda book, in the member's experience the Department does not often oppose a defendant's waiver of a jury trial. So the member was not sure (c)(4) was needed, but she felt less strongly on that point than on the summons issue.

Regarding (c)(2), the member wondered why it was necessary to provide for defense counsel signing for the defendant and the judge sign for pro se defendants when you're already

going to secure the consent of the litigant on the record. You are talking about a situation where the rules required the defendant's signature. If such a defendant consents on the record, because his signature is difficult to obtain, would that be sufficient? So there's an extra step here of actually affirmatively having somebody sign on behalf of the defendant and having the judge sign on behalf of the per se defendant. Having not attended the miniconference or heard the subcommittee discussion, the member felt she did not have enough background to understand the thinking about requiring that extra step, requiring more paperwork. Why isn't the consent on the record good enough?

On the last point, Judge Dever said that the subcommittee discussed situations where the defense lawyer has been unable to gain access to the defendant, even though the proceeding has taken place virtually and the defendant isn't there with the counsel in the courtroom. Many hypotheticals were discussed, particularly among our defense practitioners and the magistrate judges about having that ability. And he agreed there was a proof-related component if someone consents on the record and there's also a signature requirement. Then there's that extra piece of evidence to the extent someone later says, "I didn't really consent, or the judge misunderstood me" or something, which it raises issues again. There may need to be an evidentiary hearing.

Professor King agreed. This was suggested by defense attorneys at the miniconference, and they explained this is what they had seen judges do to satisfy the requirement of the rule that there be a defendant signature. And we didn't have any pushback in the subcommittee from the judges that this would be burdensome or unnecessary. So that's why it's drafted this way.

Professor Beale added that to the subcommittee was also following a local rule provided by one of the members. She thought if the rule now generally requires something be in writing, it will be useful to have the thing in writing. The rest of the provision put extra checks in. So there has to be the attestation of the lawyer that the lawyer was allowed to sign, which we understand is going on now as we learned at the miniconference and from members in various districts. And then subcommittee members raised the question of pro se defendants, where there are no lawyers to sign for them. At that point that we put in the judge. And then a member said it should be on the record that the defendant consented to the judge signing it on the record. So the proposed rule did develop step by step. She thought it was workable. What she heard the member suggest is perhaps we could pare it back. Although perhaps it does not have to be this way, she thought it would work and it apparently is working this way in some districts.

The next member said she would take the provisions in (c) in order one-by-one. On (c)(1), she thought it would be useful to mention in the note, either here or in the later provisions regarding sentencing, the need to take into consideration the victim's rights to be present and speak and so forth. The public right of access is very, very important, but for sentencing, there are specific requirements for victim participation.

On (c)(2) (signing or consenting for a defendant), the member shared that in her district, defense counsel can't get into the jails to get their clients' signatures. Counsel are lucky if they can talk to them on the telephone privately, and even luckier if they can talk to them by

videoconference. And most of the judges in the district have required that any motion for proceeding by videoconference includes the written consent of the defendant in making that motion. So without the ability to get to the client for a signature, the defense motion does not satisfy that requirement. The member assumed that (c)(2) means that the defendant consents on record either subsequent to the writing or contemporaneous with the proceeding. She asked if there needs to be some clarity as to when the defendant consents. Is it okay if the defendant does so subsequently on record or during the proceeding?

Judge Dever responded that the member's experience sounded similar to what we heard in the miniconference: there would be an explanation to the defendant about proceeding by videoconference, and then a confirmation of that consent on the record, with the lawyers explaining that they cannot not get into the jail to get the defendant's signature and cannot supply a written consent. The participants wanted to see a rule that expressly let them sign for the defendant saying that we talked with him and he consented.

Turning to (c)(3), the member favored keeping the draft provision on summons intact. There are no two sides when there is an indictment, but there are already conditions that affect public health and safety or access. The member endorsed a default that the magistrate judge must issue summonses unless the government has evidence that a warrant is needed in that particular case. Far too many people are being detained, and the pretrial detention periods are longer than ever with this pandemic. The member had a client who has spent two months shuffled by the U.S. Marshals Service from Ohio and is now in Utah, with three other facilities in between, and a lockdown after each transfer. She noted there had been uniform policies requiring AUSAs to move for detention, even when they don't think detention is needed. It would not be unreasonable to have the default of a summons, because the government can always present evidence that the defendant is a danger, or a flight risk, and someone who should be detained pretrial.

Regarding (c)(5), the member asked whether the government must still make the motion under Rule 35. Judge Dever confirmed that the amendment would not change that. It only eliminates Rule 45's carveout that prohibits extensions of time for Rule 35 motions, allowing the general good cause analysis in Rule 45 to apply. The subcommittee recognized how much work Rule 45(b)(1) was doing, but there was a carveout for Rule 35. The miniconference participants and subcommittee members thought this would be needed because there may be reasons that the emergency conditions would supply good cause for extending the time for Rule 35 motions.

The Standing Committee's liaison stated he did not favor (c)(3) because these problems are better worked out by stakeholders than by rule, and he agreed with an earlier speaker that arrests by warrant or surrender by summons present a separate issue from pretrial detention. Those two issues should not be conflated. On the bench trial, he agreed with prior speakers that this provision may not be necessary. If there is a genuine danger that the constitutional rights of the defendant may be violated, the government is likely to consent to a bench trial because any conviction would be jeopardized by the violation. And in an emergency, the speedy trial test is sufficiently flexible. It is not clear that in a genuine emergency you would ever get to the point

where defendants' constitutional speedy trial rights have been violated. So this is almost a null set, and he would omit that provision.

He was concerned, however, about the term "preclude" in the provision on public access. "Preclude" is too restrictive. He shared the other member's concern about victims. Even resumed in-person proceedings cannot accommodate everyone and some consider it too risky to come.

On the signature provision in (c)(2), he agreed some provision is necessary, but asked why not allow the judge to sign on the defendant's behalf in all cases if consent is on the record and the defendant has had a chance to consult with counsel? That has been the practice in the Southern District of New York under a standing order. He thought this was better than the proposal, because if he'd been required to have something written and signed by the defense lawyer, he would not have been able to proceed. He did not know why judges shouldn't have that authority, and he expressed concern that the rule could be read to exclude standing orders like the one in his own district.

Professor Beale responded that the subcommittee thought it made sense to have the lawyer do it, and they didn't really discuss or hear that it might be a problem to have the lawyer do it. There was no opposition to having the judge do it when the lawyer couldn't. Instead the concern was that the lawyer couldn't get to the client, and ought to have the ability to sign for the client.

Judge Dever added that there was a concern that the judge might get in between that relationship, and that having the lawyer sign was better than allowing the judge to say "you consent—don't you—and I'm going to sign for you"?

Judge Kethledge said that although there are reasonable arguments on both sides of (c)(3) and (4), there was not much of an empirical basis for the need for them. We didn't hear about either of these issues at the miniconference, and he agreed with the members who had expressed concern about them. With regard to (c)(3), Congress rejected a proposed rule allowing the court to issue a summons in the mid-1970s. We don't know why they did that and whether that opposition would carry forward. As to (c)(4), he agreed with the comment that it could be a null set of cases that would satisfy the triggering conditions for it. And we would be somewhat answering the question the Court posed in dicta in the *Singer* case where it said essentially, "Though we are upholding the requirement of government consent, we are not saying there could never be a case where the government need not consent." We are getting ahead of the Court and saying we have found such a case. He expressed concern when the emergency rule goes up to the Supreme Court, they might reject it on the grounds that we should not get ahead of the Court's precedent.

Judge Bates said he agreed there are some concerns about (c)(3), but he wanted to pose a different question. The draft Civil Rule is specific in setting out the substitute rule in an emergency. The appellate rule approach is to extend a general authority to suspend rules. Proposed (c)(1) says the court "must" take certain actions, but the rest of the provisions say the court "may." It says an individual judge "may," giving the discretion and authority to decide

whether to depart from the rules. Have you discussed that not all judges would do it, leading to disuniformity in a single district? One judge might say in all my cases I'm going to change the time for Rule 35(a) motions to 45 days, another might do that on a case-by-case basis, and another judge might give everyone 15 more days. This is also possible with (c)(1) and (4), if not court-wide, there may be judge by judge differences. Has the subcommittee discussed that possibility?

Judge Dever stated that there has been a recognition that the judge would have the authority to decide.

Professor King said that the idea was to encourage to the extent possible the least departure from the rules. Judge Bates's question may assume that there could be a rule that would cover all the different circumstances that occur in different cases. But the subcommittee thought the judge had to have the discretion to try to comply before departing. That becomes clearer with the videoconferencing provisions. If the chief judge makes a finding that there is difficulty in providing in-person plea and sentencing proceedings in the district, that does not mean that every judge is required to start doing pleas and sentencing by videoconference. A judge may think with the number of people involved in a particular proceeding, we can do it in person in my courtroom. The premise is that we want to encourage judges to try to comply. Another issue that came up is that the rule does not forbid district or division orders. Local orders are fine, except when the rule requires a case-by-case specific finding of need, as with the videoconferencing. Local orders are still allowed under the rule to provide that uniformity if that's desired. It's a balance of these ideas: let's not require uniformity if we don't have to and we can't anticipate all of the circumstances in every case, and we only going to require case-by-case findings for these serious intrusions on the right to presence.

Professor Beale commented that there are "mays" and "musts" in this rule. The "must" in (c)(1) requires each judge to give alternative access, but there was a lot of discussion about not saying exactly what judges had to do. But the rule does state an obligation, putting front and center the First and Sixth amendment requirements of public access. On the use of the word "preclude" in (c)(1), the subcommittee was concerned that if you get to the point where there is no public access, then the court must make alternative provisions. But the subcommittee did not want to override accommodations such as overflow courtrooms and extra seating, though a local rule to take care of this is also possible. And (c)(6) puts Rule 35 into the case-by-case finding under Rule 45, which allows extensions of time depending on the circumstances. So it depends on what provision you are looking at. Some of them clearly are intended to be case-by-case. Similarly, with alternate jurors there was no desire to have a strict rule that applied whenever there was an emergency. The subcommittee thought judges would be able to determine how long a particular case was going to run, how high the local infection rates were, and determine the likelihood of losing so many jurors that it would be necessary to add some alternates.

Judge Bates commented that it looked like paragraphs (2), (3), (4), and (5) would all be case-by-case. There couldn't be a general rule, because it depends on the defendant's consent or

the defendant's constitutional rights, or the issuance of a warrant in a specific case. So you could have court-wide determinations with respect to (c)(1) and (6). If so, do you want to say that?

The reporters responded. Professor Beale said the subcommittee intended to have a case-by-case assessment of public access as well, for example, how many people can we fit into a certain courtroom. Professor King clarified that court-wide orders could standardize what factors to consider or which conditions would be sufficient. But it would still be up to the individual judge to apply. She asked if Judge Bates was concerned that it should not be. Judge Bates responded he was not sure, and was just trying to find out if the subcommittee had talked about it.

Judge Kethledge said the subcommittee had discussed it. For example, in pleas and sentencing, all face the same conditions, but some judges choose to hold pleas and sentencing in person and others don't. The subcommittee's thought was if there are judges who believe they can follow the standard Criminal Rules, we ought to let them do that. If there are other judges who don't think they can, we'll let them opt out under certain circumstances. He did not know how you could do a court-wide determination with the bench trial; this is a case-by-case determination. Yes, we did contemplate variation within a district, variation in favor of greater compliance rather than less. Professor Beale agreed, and added that one judge may be high risk and may not be able to come in and do a proceeding in person, but other judges could do so.

Professor Capra said he would like to take this back to uniformity among the rules. It is true that the Bankruptcy and Civil Rules Committees' draft rules do not have these case-by-case approaches, but that's because the issues they are dealing with are completely different than the issues that the Criminal Rules are dealing with. The Bankruptcy Rules are dealing with definite timelines that get extended, and the Civil Rules are dealing with issues of service. There is no need for any exercise of discretion: you just change the rule if there is an emergency. It is inherent in the nature of what is being addressed here that you are going to have a case-by-case approach. It does result in dis-uniformity at the ground level, but not in the rules structure that we are trying to get to.

A member returned to the summons provision, responding to the statement that there was a slim evidentiary basis. That is true, but we didn't have a U.S. marshal at the miniconference, and she did not think that we raised this question with the participants. There is some evidence from the informal comments of the FMJA magistrate judges who also thought this would be useful and not overly burdensome. If we are trying to create a rule that will help the court during an emergency, we shouldn't rely on the fact that in some areas everything is working well, and the government is already doing this and making a determination for summons instead of warrant. The experience in Oregon is different, and the member had heard from other magistrate judges who said it is different in their districts, too. The marshal was not happy with some of the people he was asked to arrest and had questioned why not a summons. We have more than anecdotal evidence that there are times when the U.S. Attorney's Office may not make the calculus in the same way that other players would. It makes sense to give the magistrate judge more gatekeeping authority in the time of an emergency, and to say, "let's ask again whether a

warrant is needed or whether a summons might work instead." It really would help to protect the safety of the individuals involved, and those in the courthouse, to do that. She agreed with the comments that we should remove the word "public" from (c)(3). If others continue to think (c)(3) is unnecessary, she hoped we could retain it in the proposal and gather more information during the public comment period from those that would be affected by it. We have enough information that some judges think this would be useful, and if what we are hearing is true that U.S. Attorneys are already doing this, we would only be asking them to make that internal consideration of what they are already doing available to the magistrate judge to reassure them that the calculus has been correctly made.

The member also agreed with most of the points that had been made about the other provisions. She would use the word "contemporaneous" in (c)(1): public access should be contemporaneous.

Mr. Wroblewski commented on several issues. On uniformity, he said that the subcommittee had been trying to use these extraordinary rules to the least extent possible, narrowing these provisions as much as possible, and with an assumption that they would apply on a case-by-case basis. The Department initially opposed the (c)(4) provision on bench trials, because it was written quite broadly, suggesting that a bench trial could held without the government's consent based on a finding that the interests of justice warranted it. The subcommittee narrowed (c)(4) down to apply only when a defendant's constitutional rights would be violated, and that's why it has become in some ways unnecessary. The subcommittee also agreed to note language referencing some of the issues Judge Kethledge mentioned.

Mr. Wroblewski expressed some concern about (c)(6), especially after Judge Bates mentioned the possibility of a district-wide order, because Rule 35(a) is only meant to address technical errors that need to be corrected. It is not meant to revisit sentences. The Department suggested some additional note language there. He asked for a vote on (c)(3) and (c)(4) and offered to make a motion to delete them at the appropriate time. And the Department had the additional language it would like to add to the note on (c)(6) to narrow it and assure that the normal Rule 35 criteria would also be applied in an emergency setting. The reporters confirmed the Department's proposed note language was the language included in brackets on lines 205-07 on page 147 of the agenda book.

The Department's motion to delete paragraph (c)(3) was seconded. After asking if there was further discussion, Judge Kethledge took a roll call vote, which was six in favor to four opposed. He stated that if he had voted, he would have voted in favor of the motion, which would have made the vote seven to four.

The Justice Department's motion to delete (c)(4) was seconded. In further discussion, a member agreed it may not be common for a defendant to want a bench trial and the government to refuse consent when it is not possible to empanel a jury for an extended period of time. But in his courthouse, at least anecdotally, certain judges are on a "no fly list" from our U.S. Attorney's Office in terms of consenting to a bench trial. If a defendant whose case is assigned to one of

those judges is detained and wants a trial because it is the only way to get out, that defendant can't get a trial and is basically stuck in a netherworld. The defendant has a Sixth Amendment speedy trial right, but Rule 23(a)(1) requires trial by jury unless the government consents. It would be beneficial to make it clear in the rules that in this circumstance the judge may allow a bench trial without any interference from Rule 23. The member added that he completely understood and had sympathy for the arguments going in the other direction.

Judge Kethledge took a roll call vote on the motion. There were three votes in favor of the motion to delete paragraph (c)(4), and eight opposed.

The Department's third motion concerned the note language on lines 205-207, page 147 of the agenda book, regarding Rule 35. No one objected to or spoke to that addition. Judge Kethledge commented the note was not final at this point and could be revised. Members would have a later opportunity to discuss it further.

Turning to subdivision (d) (on video and teleconferencing), Judge Dever explained that the subcommittee heard a lot about the CARES Act from participants at the miniconference, from subcommittee members, and from input from the chief judges. But we also took seriously the idea that we were not bound to what was in the CARES Act, which had been very quickly drafted. We tried to structure the proposed rule to recognize what the rules already said about videoconferencing with the defendant's consent.

At the miniconference, two overarching themes emerged regarding videoconferencing and teleconferencing. The first was a uniform and consistent recognition of how critical it was for the defense attorney to have access to communicate contemporaneously with his or her client. This wasn't happening in some instances, particularly early in the pandemic, and the rules really needed to address that issue. The second was the issue of the defendant's consent, which also is related: how can the defendant knowingly and voluntarily consent without having had the ability to communicate confidentially with defense counsel? We heard that from just about everybody at the miniconference. So we tried to structure (d) by first recognizing the rules that already permitted videoconferencing with consent, and then address it for certain proceedings at which the defendant has the right to be present. He said that the reporters had prepared materials for the subcommittee identifying all proceedings that are required to take place in open court, and all proceedings at which a defendant has a right to be present, other than a Rule 11 or sentencing hearing. We adopted tiered findings (also found in the CARES Act), where the chief judge makes a finding before the individual judges in particular cases.

Judge Dever drew the Committee's attention to lines 52-54 and lines 61-63, which provide for substitutes if the chief judge is unavailable. He informed the Committee that these alternatives can be omitted. Professor Capra informed us that 28 U.S.C. § 136(e) already provides for the necessary succession, and Judge Dever, Judge Kethledge, and the reporters have agreed with Professor Capra that we don't need this list in the rule. It would be sufficient to add a reference to that statute in the note explaining what would happen if the chief judge is unable to act. This is not yet in the current draft.

Consent and consultation requirements are included in each provision.

And for pleas and sentencing, under (d)(2)(A) and (B), you have to go through successive gates. This Committee has always resisted doing pleas and sentencing by videoconferencing. The subcommittee heard at the miniconference from many folks about cases where because defendants anticipated a Rule 11(c) plea, or a time served sentence, they wanted to get to the sentencing and get the plea done. So we allow them to request in writing. There is a further finding about the interests of justice by the judge.

Paragraph (d)(3) governs teleconferencing. This is a last resort, and we heard that that part of the CARES Act has been important in the pandemic. So if all of the other requirements for videoconferencing were met, but videoconferencing cannot be provided within a reasonable time, and if the defendant has been able to consult confidentially with counsel before consenting, then teleconferencing would be permissible. It is a tougher standard in the proposed rule than in the CARES Act, and that was by design.

Professor King added that the agenda book included a comparison chart, and the subcommittee's decisions were made with the knowledge that some trial judges around the country wish to expand the use of video and teleconferencing in criminal proceedings both during emergency and outside of emergencies. So the subcommittee was aware of the desire of certain trial judges to use this technology more easily than the rule allows. All of these decisions were deliberate. Professor Beale noted that the Committee would see, later on in the Agenda, that a trial judge has requested that videoconferencing should be more widely available—without the defendant's consent—in non-emergency situations. This current of opinion, which keeps coming up to the Committee, is exemplified by that request.

A member said that she thought our miniconference process was effective. We spent a lot of time on this section, and took care to protect the constitutional rights of the defendant. Also the other important rights we heard about in the miniconference are protected here, including the integrity and solemnity of the judicial system, and not using video or teleconferencing when someone could appear in the courtroom. Even if an arraignment may not seem as important as a plea or sentencing, that's a time when a family can see their loved one who has been arrested in court, know that they're not harmed, and is being treated as a real person. The judge can assess a person to see that they are not being coerced or that they have a mental health or a physical issue you might not see on a video.

Even though we can use Zoom today and see pretty well, it doesn't replace being in person in the courtroom. She said the subcommittee heard many examples of that, and she wanted to share that with members who didn't get to hear that from the miniconference speakers. Some talked about how odd it is to be in a proceeding where the defendant is participating through an interpreter. If you are on a videoconference you never hear the defendant's voice because the interpreter speaks on the video and the defendant is muted. But in the courtroom, you would still hear the defendant's voice, speaking the words, and the interpreter would speak afterwards. So there are times when the video does dehumanize the defendant somewhat. The

compromise that we came up with in this rule addresses the need to use video in an emergency, but maintains the defendant's consent, so that we know that if they are giving up those important rights, it is because they've weighed those risks and the defendant himself has made that choice.

Judge Dever pointed out the note language page 49, lines 278-80, had been raised by a member who had to leave the meeting early. We had extensive discussions that the rule does not authorize a trial by videoconference. But we also wanted to recognize that our Committee in the early 2000s proposed a change to Rule 26 that would have permitted live two-way video testimony when a witness is unavailable to testify in court, and the Supreme Court rejected that rule. The member had stated his opposition to the part of the note that describes what the rule does not address. He suggested that on lines 278-80 on page 149, that the Committee strike the sentence, or use "trial participants other than the defendant."

A member commented that the requirement that the defendant have an adequate opportunity to confidentially consult with counsel is very important. Sometimes it is hard to do that. The court may need to take a break and have them call on a separate line and then reconvene. But it is very important, especially because it is so hard to get into detention facilities. On (d)(2)(a) and (d)(3)(a)—"may preclude" versus "substantially impair"—the member was indifferent, but would take out the word "may," because it gives too much wiggle room to allow for videoconferencing when it isn't necessary. (At that point, Judge Dever commented that the member who had left early had also been in favor of the "substantially impair" language.) The member liked the requirement in (d)(3)(B) that the defendant has to make the request in writing. This provides an extra layer of protection that the defendant's arm is not being twisted and that it is truly the defendant's choice. As for (d)(3)(D) (any further delay would cause serious harm to the interests of justice), the note gives some examples. The member suggested adding another example—allowing the defendant to be designated to a more appropriate facility. He had had a number of cases where a defendant was facing a long sentence, and it wasn't going to be time served. But the defense requested video sentencing to get out of the detention facility and go to whatever facilities defendants are designated to after sentencing. So he asked the subcommittee to consider adding that to the note if they agreed that is a good reason to have a video sentencing. That would signal it is an appropriate consideration.

The member was very uncomfortable with teleconferencing for pleas and sentences. It is bad enough if you are not in the room with the person, but at least with a video the judge can see the body language, the facial expression, and at least some of the things that can be important in deciding whether to accept a plea, or what sentence to impose. He knew there are situations where it is sentencing by phone or nothing, and he had not faced that, perhaps because of the AV capability of all the jails in his area, capability that may not be available in other districts. With that in mind, he suggested changing (d)(4)(B) to require the defendant request teleconferencing in writing just like videoconferencing, to make sure the defendant is really on board with it.

The next member stated he too preferred the "substantially impair" language, and would also favor a request in writing for teleconferencing. He wondered about the interplay with the difficulty of getting a signature, and expressed concern about the judge leaning on the defendant

to consent. Judge Dever responded the subcommittee was concerned about the judge looking at the defendant and saying, "you consent, don't you, we're going to do this today." The subcommittee had an extensive discussion.

Another member agreed with that point and on the "substantially impairs" language and said it looks great.

The next member commended the subcommittee for doing such a fantastic job on this provision. She strongly favored "substantially impairs" over "may preclude." She did not think that the conditions have to completely preclude access. She was troubled by teleconferencing, noting videoconferencing is readily available. iPhone FaceTime is far preferable to not seeing the defendant at all. She hesitated to have that provision in there, and asked if we could give some thought to including the same limitation on teleconferencing that is in (c)(3), a finding of serious harm. Otherwise it is best to delay the proceeding until it can be done in person.

Judge Kethledge responded that he shared the aversion to teleconferencing. He emphasized that the provision allowing teleconferencing applies only if videoconferencing is already authorized under the rule. So the district court must have already made that finding.

The member asked for clarification: is this a fallback situation for somewhere out in the boondocks where they can't find a phone with video? Judge Dever responded that the situation we heard about at the miniconference and from the subcommittee members was that a video sentencing is going on, and just before the judge announces the sentence, the video feed goes out. The defendant doesn't want to go back to the lockup and wait another month to finish the sentencing. There was a uniform view that teleconferencing is an absolute last resort. As to why we didn't have the request in writing, the defendant has already requested videoconferencing in writing, but in the middle of the proceeding it fails. We had a robust discussion about that because so many people have had that experience. With that explanation, the member said she was in total agreement with the proposal.

The next member to speak said she liked this provision. The whole emergency rule addresses a situation where your client has no access to a jury trial, is detained, and has few choices. Local county facilities may not be able to provide videoconferencing for hearings. Initially they were unable to do so, but they have played a lot of catch up. Most have video now, but it has been generally on a court format that defense counsel may not be able to use. The member felt we are clawing back what protections we can. Few defense attorneys would recommend that their clients agree to a guilty plea by telephone or videoconference, or that they be sentenced by teleconference or videoconference, but that's what the clients now desire to better their position overall. They give up important protections. She liked the process here that ensures the consent of the client. It is not just the defendant's lawyer saying it, but the judge hears it and preferably sees it. The member also liked the suggestion that the note broaden the reasons. For example, many clients are in detention facilities where they can't receive credit for drug treatment or education training and credits, and that's another reason they want to be in a different facility. Many of those programs have been suspended during COVID-19, and are

completely unavailable where folks are in lockdown 24/7. So she would like to see the note expanded.

The Standing Committee's liaison said that this provision is elegant and an improvement on the CARES Act architecture. He strongly endorsed the "substantially impair" language rather than "may preclude." Right now we can have in person proceedings, but if the "may preclude" language were in force, the fact that some judges do hold in person hearings could mean that no judges could proceed remotely. And we have rightly concluded that judges should still have that flexibility. There are cases in which lawyers are high risk and don't want to appear, or where defendant emphatically doesn't want to come to court. "Substantially impair" gives a little bit more flexibility. He also endorsed the suggestion to expand the reasons in the interest of justice. Early in the pandemic, judges in his court restricted this to the examples in the current note. But as time has gone by, they have taken a broader view and felt it is important to the system to get people moving and designated.

Though he was not sure it would be wrong, he said that the rule would change the law in the Second Circuit, which currently permits the defendant to waive physical presence at sentencing and consent to proceed by video without doing this in writing. The case is *United States v. Salim*, 690 F.3d 115 (2d Cir. 2012), where the court found error under Rule 43, but indicated that the defendant could agree to appear by video remotely, or agree not to appear at all under Rule 43. He was not sure that's the way to go, so was not averse to abrogating that by this rule. But he thought the rule would effectively do that.

Finally, he had a slightly contrary view on teleconferencing provision. He was not in favor of telephone hearings, and thought they should be absolutely last resort, as in the scenarios described where in the middle of a proceeding, we lose the video and have to resort to the telephone. He agreed that in 2020 one would think that our video platform abilities would be better than they have been, but in the Southern District of New York he had found them to be pretty awful, particularly with respect to detained defendants. Because of the restrictions on BOP facilities, they have struggled with it. And the video options—particularly if you allow public and victim access—are not as easy as you would think and not as easy as this meeting has been. Often telephone ends up being a far better option. For the CARES Act provisions, we recommended and inserted the phrase "reasonably available," and he thought that is better than the current language. Because on the ground, we have a complicated protocol for scheduling videoconference hearings, especially with detained defendants, limited windows to do that. If you have to wait two weeks, can you say video "cannot be provided"? He did not know, and was not sure it should be that restrictive. Something like "videoconferencing is not reasonably available" leaves more flexibility and would be appropriate.

Lastly, for routine conferences or where the defendant's presence is waived, it was not clear to him why we would preclude a judge from holding a teleconference. Not sentencing not pleas, not arraignments, but scheduling type things, something that would fall outside Rule 43 where defendant is not required to be there. It has been a very welcome thing to be able to do those over the telephone over the last 8 months.

Mr. Wroblewski responded that it was his impression—and we discussed this in the subcommittee—that any proceedings at which when the defendant does not have a right to be present can go ahead with by video or teleconference without these findings, which are required only for the proceedings at which the defendant has a right to be present. In regular calls with the Judicial Conference's Criminal Law Committee the biggest issue for seven months has been the availability of audio and video for defendants to communicate with counsel and for court proceedings. In many cases around the country, unfortunately there is a queue, and limited capability, and all the parties want to move forward with teleconferencing in many circumstances.

Judge Dever responded that line 51 limits the provisions governing videoconferencing to those where the defendant has the right to be present. The Standing Committee's liaison commented that it does not necessarily follow from that language that in a proceeding where the defendant has no right to be present that videoconferencing and teleconferencing are permissible. Professor Beale responded that such proceedings are not regulated at all by this rule, nor are those proceedings regulated in non-emergency cases. Professor King added that lines 221-26 of the note make it clear that none of this applies to those.

The liaison said that we could say something more: that the rule doesn't speak to it, doesn't prohibit and shouldn't be read to exclude these options. Judge Dever thought the Committee could probably add some language to the note along those lines.

Judge Bates commented that the addition on line 60 of (2)(B) as well as (2)(A) would need to be added to committee note. Also in the note regarding (3)(C) one of the examples is a guilty plea under Rule 11(c)(1)(C) (line 309). He asked whether it is the Committee's intent to say categorically all Rule 11(c)(1)(C) pleas fall into this? He wondered whether that would be true, yet as written the note seems to say that.

Judge Bates also had two structural questions. As Judge Kethledge pointed out, it says when videoconferencing is authorized, those would already be satisfied. Doesn't that make the provisions about consulting and consent redundant? Why do you need to repeat them? They would have already been found. His other structural question related to (d)(2)(A) and (3)(A). What is the difference between them? And why does one read "in the district" and the other "in that district"?

Judge Kethledge noted that a court's ability to hold those different proceedings may vary.

Professor King explained that the subcommittee thought there should be distinction between plea and sentencing proceedings, and other in-person proceedings at which the defendant is required to be, or has the right to be present. It would be sufficient for the chief judge to make the necessary findings for all other in-person proceedings at which the defendant is required to be, or has the right to be present. Because pleas and sentencings should only be held by videoconferencing as a last resort, the draft requires not only the chief judge's finding that emergency conditions will substantially impair the ability to hold plea and sentencing

proceedings in person in the district, but also an additional finding by the court in a particular case that further delay would impair the interests of justice.

Professor King then turned to a structural question: why does the draft rule concerning teleconferencing repeat the idea of opportunity to confidentially consult with counsel and also to consent? (see lines 56-58 and 65-66). She noted there had been discussion within the subcommittee about the practical aspects of using telephone instead of video. When proceedings are conducted by videoconferencing, defendants often consult privately with counsel on a separate telephone line. But when the video goes down and the only telephone line available to the defendant for consultation is the line used for teleconferencing, it will be necessary to take other steps to provide the opportunity for confidential consultation with counsel. To make sure that would happen, the subcommittee wanted the court to make the additional finding on lines 65-66. The subcommittee recognized that a defendant who consents to videoconference may not consent to teleconference. The defendant may draw the line at video conferencing, thinking "I'll do this if I can see the judge and he can see me, but I'm not going to do it on a cell phone."

Professor King also responded to a question about line 309 of the committee note, which gives Rule 11(c)(1)(C) pleas as an example of the kinds of situations in which the court might find the proceeding could not be delayed without serious harm to the interests of justice. She agreed with a member's comment that not all Rule 11(c)(1)(C) pleas should qualify, noting that line 307 requires the court to make findings "in that particular case" that the preceding cannot be further delayed. But to make that even clearer, the note could be revised to say something like "examples include some guilty pleas under Rule 11(c)(1)(C)." She also thanked the member for pointing out that we will need to change the note to correspond to any changes in the text.

Judge Dever agreed with the observation that not all Rule 11(c)(1)(C) cases would satisfy the requirements of Rule 62(d)(3). For example, if the judge defers the decision whether to accept a Rule 11(c)(1)(C) plea and at the sentencing hearing says "I've read the PSR and I'm not going to accept it," a defendant who had agreed to it up to that point might say "No, I'm not consenting, I'm withdrawing now." So that suggested change is important.

In response to Judge Bates's question about the slight difference in wording between lines 53 ("in the district") and line 64 ("in that district"), Professor King said she did not recall the reason for any difference. The reporters and the subcommittee can look at that again, and it's also a matter for style (which had reviewed the current draft).

A member comparing paragraphs (d)(3), governing videoconferencing, and (d)(4), governing teleconferencing, was concerned that it looks like there's a lesser burden to ask for a telephone conference than there is for a videoconference. Subparagraph (3)(B) says the defendant has to request in writing that the proceeding to be conducted by videoconference. Should teleconferencing also require the defendant's consent to be in writing? Paragraph (4) also repeats paragraph (3)'s requirement for confidential consultation with counsel. If we are incorporating (3)(A), (B), and (C) into (4), but mentioning only (A) and (B)—and not referring

to (C)—this could suggest that (C) ("serious harm to the interests of by justice") is not necessary for plea and sentencing by telephone.

Professor Beale responded that an earlier draft included an explicit statement in paragraph (4) incorporating (3)(A) and (B), but the subcommittee and reporters were persuaded to delete it because it was redundant. The concern is that people will not appreciate the step-by-step structure, which requires that cases under (4) must satisfy all of the requirements of (3) as well as those of (4).

Judge Dever drew attention to lines 312-14 of the committee note on page 150, which states four prerequisites for the use of telephone conferencing, the first of which is that all of the requirements of (3) have been met.

Professors Beale and King remarked that readers had consistently been uncertain about the relationship between the requirements in (3) and (4).

A member suggested clarifying (4) by starting with the phrase "If the requirements for videoconferencing have been met." That would make it clearer those are prerequisites. You first have to meet the requirements for videoconferencing under this rule, before turning to the additional requirements for teleconferencing.

The member also responded to earlier suggestions that the defendant's request for teleconferencing should be in writing. She agreed that it is usually desirable to have defense requests in writing, but the subcommittee focused on the problems that would create in a common scenario (for example, when in the middle of a videoconference, the technology fails and it is necessary to switch to the telephone). The judge then asks whether the defendant (who is on the telephone line), wants to go ahead and whether the defendant wants to talk to talk defense counsel. At that point, the client will sometimes say "I'd rather just go on by phone at this point" when it's close to the end of the proceeding, and they are confident they know where it is going. In that scenario, there wouldn't be time to get written consent. If the rule did require a writing, the lawyer would hand write out "I consent to continue by teleconference" sign on behalf of the client, and file it. But the writing probably wouldn't add much, given the timing and the fact that the defendant would be speaking to the court also. So she did not know that we want to require the request to be in writing.

Finally, the member responded to the concerns about the note. With regard to the reference to Rule 11(c)(1)(C) pleas, she suggested the note might say "examples may include Rule 11(c)(1)(C) pleas" so that way it's not required. To address the possibility that some defendants might want to be sentenced quickly to get out of their district or out of their facility, the note might add "if a plea or sentencing might result in "transfer to a facility preferred by the defense."

Judge Dever thanked this member, and others, for their suggestions, and he invited members to send other suggestions to him or to the reporters, drawing on their experiences, especially recent experiences. He then asked Judge Kethledge for his thoughts.

Judge Kethledge responded that the discussion indicates the need to revise (d)(4) to indicate more clearly that the videoconferencing requirements must be met to allow teleconferencing. He complimented the member who proposed specific language for helpful "on the fly" language suggestions, noting that her suggestion of language for the first line of (d)(4) was very promising.

Professor Beale commented that the Committee could approve the draft with the understanding that additional work is going to be done before it goes into Standing Committee's agenda book. As we did with Rule 16, Judge Kethledge can note that we have not had final approval of some changes in the text and note language.

Judge Dever asked if there was any further discussion on subdivision (d), and a member who had inquired about requiring consent to teleconferencing to be in writing said he now understood why the subcommittee had not required that.

After consulting the reporters, Judge Kethledge said he would like to have a vote on whether the Committee currently approves of the language as revised by our discussion. A motion to approve the language as revised by the discussion was made, seconded, and passed unanimously on a roll call vote.

Concluding that the vote just taken covered all remaining portions of the draft rule, Judge Kethledge reiterated his thanks to Judge Dever, the reporters, and the subcommittee, noting they had spent a great many hours getting to this point. He stated there was still more work to do, and that the Committee will make this the best rule we possibly can for the consideration of the Standing Committee.

Report of the Rule 6 Subcommittee

The next agenda item was Rule 6 (The Grand Jury). The Rule 6 Subcommittee, chaired by Judge Garcia, is considering suggestions to amend the rule to allow greater disclosure of grand jury material under various circumstances. Judge Kethledge called on Judge Garcia to report on developments since our last meeting and what the next steps to be.

Noting that the agenda book included a reporters' update, Judge Garcia thanked the subcommittee for its work so far. In addition to the two suggestions discussed briefly at the spring meeting, we now have an additional proposal from the Department of Justice to authorize delayed notification of grand jury subpoenas in certain circumstances (Suggestion 20-CR-H, on page 169 of the agenda book). We all know how important grand jury secrecy is for a number of different crucial reasons, witness protection, protecting the grand jury from tampering, and protecting targets who may be cleared in the grand jury and would not want the stigmatization that would go with a leak of the grand jury investigation. He said that the subcommittee members bring a terrifically helpful background and experience to examining those issues and this perspective rule changes. We had two calls, we walked through the different aspects of the various proposals and the nuances of those, also the broader issue which Judge Kethledge talked about during the last meeting regarding the district courts' inherent authority. This interesting

and complex issue was mentioned at the Standing Committee's June meeting, as noted in the draft minutes of that meeting included in the agenda book. The Supreme Court has a case on its docket in which it may or may not address some of those inherent authority issues.

The subcommittee has decided to have a mini conference in the early spring, and it is working with the reporters to identify various participants to supplement that viewpoint and the materials that we have already received. He thought that would be very helpful. We want to ensure that this is a very deliberative process given the importance of these issues to all involved. We have begun the process of reaching out and identifying potential speakers for the mini conference. He welcomed any ideas or thoughts from members, and invited them to contact him or the reporters.

Judge Kethledge asked if members had any questions or comments, and a member who is new to the Committee expressed an interest in serving on the Rule 6 Subcommittee. She noted that the Department of Justice proposal discussed the Stored Communications Act. Whether subpoenas under the SCA should be revealed to the people whose cellphone or whose email is being reviewed by the government is a very hot topic in the defense community. The member expressed the hope that the miniconference would include defense practitioners. Judge Kethledge responded that the member would be appointed to the Rule 6 Subcommittee.

Judge Bates asked the Justice Department to clarify the proposal that its memo said it could support. Does the proposal apply to all archival grand jury records, or only a more limited set of archival grand jury records that have exceptional historical importance? Would the archivists determine what constitutes archival grand jury records, and the court determine the exceptional historical importance? Does the Department want the court to make a determination, beyond the fact that they are archival grand jury records, that they have some exceptional historical importance?

Mr. Wroblewski responded that was not the Department's intent in developing the draft that it put forward. As he thought he had explained when a prior proposal came before the Committee, not all grand jury proceedings are archived with the National Archives. The determination of which get archived permanently and which actually get destroyed has to do with their historical significance as determined by a set of processes and standards that are laid out by the National Archives. The Department's intent to piggyback on that determination of what is of historical significance. So no, it's not the intent to require the court to make that determination.

Judge Bates said that answered his question, but if that is the Department's intent it does not seem to be reflected in the language, which has a court finding of exceptional historical importance. He thought the answer Mr. Wroblewski gave would seem to require a revision of that language. Professor Beale commented that the subcommittee had not yet considered this language.

Other New Suggestions

Judge Kethledge then called on the reporters to summarize the remaining suggestions.

Professor Beale presented Suggestion 19-CR-E, the suggestion dealing with imposing time limits in cases enforcing or challenging subpoenas and appealing from rulings, on page 179 of the agenda book. She said that the reporters had intended to include this in the spring agenda book, but had not done so. Because of this delay, we know how the other subcommittees have handled the suggestion. The Civil and Appellate Rules Committees have removed the suggestion from their agendas, and we suggest that this Committee do the same. The Appellate Rules Committee treated it as a consent item, thinking as you can see that the timelines are extremely short it seems to be really about challenging congressional subpoenas. Indeed, she noted that the suggestion doesn't really seem to have anything to do with this Committee's work. But even if it fell within the Committee's responsibilities, she doubted that the Committee would move forward with a proposal that imposed specific, and very short, time periods. She said that suggestions to impose specific timelines on judges generally have been rejected. The Committee discussed that, for example, in connection with habeas rulings, and decided not to take that type of approach.

Accordingly, the reporters recommended removing the suggestion from the Committee's agenda. Judge Kethledge called for any comments or any concern about not taking this suggestion further. Hearing none, he stated that the Committee would adopt the reporters' recommendation and not take this any further. It would be removed from our agenda.

Professor Beale explained Suggestion 20-CR-F, on page 185 of the agenda book, from Magistrate Judge Barksdale. Judge Barksdale wrote to draw the Civil and Criminal Rules 'Committees' attention to a slight difference in the language about prompt mailing as opposed to immediately serving. The reporters recommended not pursuing this suggestion and removing it from the Committee's agenda. Since Judge Barksdale seemed to like our language better than the language of the Civil Rule, there would be no reason for us to act. And if there is some merit to her suggestion, the disparity falls outside of our jurisdiction because the Civil Rules Committee would have to make the change.

Hearing no concerns or comments regarding that recommendation or the suggestion itself, Judge Kethledge stated we will remove that suggestion from our agenda and follow up accordingly with Judge Barksdale.

Professor Beale then drew the Committee's attention to Suggestion 20-CR-G, on page 191 of the agenda book, from Judge Thomas Parker. He proposed that the rules be amended to authorize videoconferencing for a variety of proceedings on a regular basis, not just in the case of a national emergency. He identified initial appearances, arraignments, detention hearings, and change of plea proceedings. Many state courts use technology for those kinds of proceedings, and it is more efficient. He also recommended that this be done without requiring the consent or approval of either party, though he does recommend that there be certain procedural safeguards such as the availability of private conferencing for the defendant and counsel. Professor Beale

explained the question was whether to table the proposal until completion of the emergency rules, or to remove it from the agenda now. She related that the Committee had considered similar proposals in recent years and refused to extend the availability of videoconferencing in non-emergency circumstances. So unless there was new interest in pursuing this suggestion, the reporters thought it would be better to remove it from the agenda now.

Judge Kethledge responded that the subcommittee and Committee have spent an extraordinary amount of time considering this issue from the opposite point of view: trying to preserve the current in-person procedures. Given the Committee's approval of the draft language that it just discussed, it would make no sense to move ahead with a proposal that we allow videoconferencing for these kinds of proceedings. Hearing no objection, he stated that the proposal would be removed from the Committee's agenda.

Judge Kethledge asked the staff to remind the Committee of the date of its next meeting, which is scheduled for May 11, 2021 in Washington, DC. He then thanked everyone on the Committee as well as our other participants in this meeting for the amount of time and thought that they put into the very important issues we discussed today.

The meeting was adjourned.

TAB 7

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TAB 7A

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: December 1, 2020

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met virtually on November 13, 2020. The Committee discussed ongoing projects involving possible amendments to Rules 106, 615, and 702. It also discussed the question whether an emergency rule was necessary in the Federal Rules of Evidence.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee is considering whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements. Currently, the courts are divided on both questions; and particularly with respect to oral statements, many courts allow them to complete under the authority of Rule 611(a), and sometimes the common law.

After much discussion and consideration, the Committee at its next meeting will be considering, for approval for public comment, an amendment to Rule 106 that would: 1) allow the completing statement to be admissible over a hearsay objection; and 2) cover oral as well as written statements. The overriding goal of the amendment is to cover questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to have a single rule to govern admissibility. What has been particularly confusing to courts and practitioners is that Rule 106 has been considered a "partial codification" of the common law --- meaning that the parties must be aware that common law may still be invoked. One goal of the amendment is to displace the common law --- as it has been displaced by all the other Federal Rules of Evidence.

The Committee has tentatively rejected a proposed amendment that would provide that the completing statement is admissible only for the non-hearsay purpose of providing context to the initially proffered statement. Admission for context only would result in difficult limiting instructions and would give an unfair advantage to the party that admitted the misleading portion of the statement that the excluded portion is needed to correct.

The Committee plans to consider and vote on the proposed amendment to Rule 106, for release for public comment, at its Spring 2021meeting.

B. Possible Amendment to Rule 615

The Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Committee has tentatively agreed on an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself is necessary. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increased possibility of witness access to information about testimony through news, social media, YouTube or daily transcripts.

At its November meeting, the Committee, in a nonbinding vote, unanimously voted in favor of an amendment that would limit an exclusion order to just that --- exclusion of witnesses from the courtroom --- but would further provide that the court has discretion to issue a further order to "to prohibit excluded witnesses from obtaining or being provided with trial testimony."

The Committee has also considered whether any amendment to Rule 615 should address whether trial counsel can be prohibited from preparing prospective witnesses with trial testimony. The Committee tentatively resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

Finally, the Committee favored a minor amendment to Rule 615(b), which currently provides that an entity that is a party is entitled to designate "an officer or employee" to be exempt from exclusion. There is some dispute in the courts on whether the entity-party is limited to one such exemption or is entitled to more than one. The amendment would clarify that the exemption is limited to one officer or employee. If the party seeks exemption for more than one, the party is required to establish that these additional witnesses are "essential to presenting the party's claim or defense" under Rule 615(c).

The Committee plans to consider and vote on the proposed amendment to Rule 615, for release for public comment, at its Spring, 2021 meeting.

C. Possible Amendment to Rule 702

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its Symposium on forensics and *Daubert* held at Boston College School of Law in October, 2017. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1. It would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) It would not be advisable to publish a "best practices manual" for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.

At its November meeting, the Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. In a provisional vote, a majority of the members decided that the amendment was not necessary, because Rule 702(d) already requires that the expert's opinion be a reliable application of a reliable methodology. If an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d). The Committee was also concerned about the possible unintended consequences of adding an overstatement provision that would be applied to all experts, not just forensic experts. The Committee, however, unanimously favored a slight change to existing Rule 702(d) that would emphasize that the court must focus on the opinion and conclude that it actually proceeds from a reliable application of the methodology. The change, if finally approved, would amend Rule 702(d) to require the court to find that "the testimony is limited to a reliable application of the principles and methods to the facts of the case."

Finally, the Committee is considering how to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) --- that the expert has

relied on sufficient facts or data and has reliably applied a reliable methodology --- are questions of weight and not admissibility. These statements can be read to misstate Rule 702, because all its admissibility requirements must be met by a preponderance of the evidence. The Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence.

Initially, the Committee was reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. But at the November meeting, there was general agreement that adding the preponderance of the evidence standard to the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts. While it is true that the Rule 104(a) preponderance of the evidence standard applies to Rule 702 as well as other rules, it is in the area of expert testimony that many courts are ignoring that standard. Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence. Consequently, the Committee favors an amendment to explicitly add the preponderance of the evidence standard to Rule 702. A final vote on the proposal, for release for public comment, will be taken at the Spring, 2021 meeting.

D. The Need for an Emergency Rule in the Evidence Rules

In accordance with the CARES Act, the Committee has considered whether an emergency rule should be added to the Federal Rules of Evidence. The Committee has decided that no such rule is necessary. The Committee reasoned that the Evidence Rules are eminently flexible and grant significant discretion to the trial court --- most notably in Rule 611(a) --- to handle any issue about the form or presentation of evidence that might be affected by an emergency. There is no requirement in the Evidence Rules that would be difficult or impossible to meet in an emergency. For example, there is nothing in any Evidence Rule that requires testimony to be made physically in court. Moreover, the rules are written to allow electronic information to be introduced in lieu of hardcopy.

Given the flexibility in the Evidence Rules, and the discretion provided to trial judges over the form and presentation of evidence, the Committee determined that adding a rule to cover emergencies would do more harm than good. At best it would be superfluous, but at worst it could be considered as a determination by the drafters that the Evidence Rules are not as flexible as they actually are. Consequently, the Committee has not drafted an emergency rule that would be added to the Federal Rules of Evidence.

E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration --- as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall, 2020 Meeting

The draft of the minutes of the Committee's Fall, 2020 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules
Minutes of the Meeting of November 13, 2020
Via Microsoft Teams

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 13, 2020 via Microsoft Teams.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly Dick
Hon. Thomas D. Schroeder
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Hon. Richard Donoghue, Esq., Principal Associate Deputy Attorney General, Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Elizabeth Shapiro, Department of Justice
Ted Hunt, Esq., Department of Justice
Andrew Goldsmith, Esq., Department of Justice
Timothy Lau, Esq., Federal Judicial Center
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Bridget Healy, Esq., Rules Committee Staff
Brittany Bunting, Administrative Analyst, Rules Committee Staff

Members of the public attending were:

Brian J. Kargus, OTJAG Criminal Law Division
Sri Kuehnlenz, Esq., American College of Trial Lawyers
Mark S. Cohen, Esq., American College of Trial Lawyers
Amy Brogioli, American Association for Justice
Abigail Dodd, Shell Oil Company
Alex Dahl, Lawyers for Civil Justice
Caitlin Gullickson, CLS Strategies
Sam Taylor, CLS Strategies
Julia Sutherland, CLS Strategies

John G. McCarthy, Federal Bar Association
Susan Steinman, American Association for Justice
Alex Biedermann, Associate Professor University of Lausanne
Lee Mickus, Esq., Evans Fears & Schuttert LLP
John Hawkinson, Freelance Journalist
Jakub Madej
Leah Lorber, GSK
Aaron Wolf, FJC AAAS Fellow
Kathleen Foley, FJC Fellow
Habib Nasrullah, Esq., Wheeler Trigg O'Donnell LLP
Gabby Gannon, Student, University at Buffalo
Heather Abraham, Student, University at Buffalo

I. Opening Business

The new Chair of the Evidence Advisory Committee, the Honorable Patrick J. Schiltz, opened the meeting by welcoming everyone and introducing himself. All Committee members and liaisons introduced themselves as well. The Chair then acknowledged and thanked the previous Committee Chair, the Honorable Debra A. Livingston, for her service on the Committee, noting that her new role as Chief Judge of the Second Circuit Court of Appeals had prevented her from continuing as Chair. The Chair then read a letter to the Committee from Judge Livingston in which she thanked committee members for their thorough, thoughtful, and collegial exchange. She gave special thanks to Judge Schroeder for chairing a subcommittee on FRE 702 and to Dan Capra for his excellent stewardship as Reporter. She closed by noting her pride in the important rulemaking work accomplished during her tenure as a committee member and as Chair.

Professor Capra then gave a special thanks and farewell to Judge Tom Marten, who is concluding his service as a member of the Committee. Professor Capra noted Judge Marten's profound contributions to the work of the Committee and the wealth of information and effort he provided during his tenure. Judge Marten thanked the Reporter for his kind words, and stated that he was grateful to have worked with a group of such brilliant people. Judge Marten noted the extraordinary thought and effort that goes into the rulemaking process, with attention given to every single word considered.

The Chair advised the Committee that two new members would be joining the Committee for the next meeting: Judge Richard J. Sullivan of the Second Circuit Court of Appeals and Arun Subramanian, Esq. of Susman Godfrey L.L.P.

II. Approval of Minutes

Due to the covid-19 pandemic during the spring of 2020, the Advisory Committee on Evidence Rules did not hold a spring meeting. Therefore, the Chair moved approval of the Minutes of the Advisory Committee meeting from the Fall of 2019. The Minutes of the Fall 2019 meeting were approved by acclamation.

III. Report on June 2020 Standing Committee Meeting

The Reporter gave a report on the June 2020 meeting of the Standing Committee. He reminded the Committee that the Evidence Advisory Committee presented no action items at the June meeting. The Reporter and Judge Livingston informed the Standing Committee on the Committee's continuing work on Rules 106, 615, and 702. They also reported on the potential need for an "emergency" evidence rule pursuant to the CARES Act that would enable the suspension of certain evidence rules during an emergency (such as the covid-19 pandemic). Based upon their careful research and review, they reported that there was no need for an emergency evidence rule. The Reporter noted that he had included a memorandum regarding the emergency rule issue in the Agenda materials and that the Committee would be given an opportunity to provide input on the issue later in the meeting.

IV. Potential Amendment to FRE 702

The Chair opened the substantive agenda with a discussion of FRE 702. He noted that the Committee had been considering two potential amendments to FRE 702 for the past few years: 1) an amendment that would clarify the application of the FRE 104(a) preponderance standard of admissibility to FRE 702 inquiries and 2) an amendment that would prevent an expert from "overstating" her conclusions. The Chair proposed to discuss each potential amendment in turn, noting that no votes would be taken at the meeting. He explained that the goal of the discussion would be to narrow amendment alternatives and to have a proposal that could be voted upon at the Spring 2021 meeting.

A. Amending FRE 702 to Clarify the Application of FRE 104(a)

The Reporter reminded the Committee that the FRE 104(a) issue came to the Committee's attention through a law review article by David Bernstein & Eric Lasker. The Reporter's research --- as well as research provided by a number of parties who had submitted comments to the Committee --- reveal a number of federal cases in which judges did not apply the preponderance standard of admissibility to the requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury. In other cases, the Reporter noted wayward language by federal courts suggesting that FRE 702 inquiries were ones of weight, even where the judge appeared to apply the appropriate FRE 104(a) standard. The Reporter noted that based on the discussion at previous meetings, all Committee members were in agreement that the FRE 104(a) preponderance standard applies to a trial judge's admissibility findings under FRE 702, and that courts should state that they are applying that standard.

The Committee has been considering an amendment to FRE 702 to expressly provide that the trial judge must find the requirements of the Rule satisfied by a preponderance of the evidence. The Reporter noted that one concern about such an amendment might be that FRE 104(a) already applies to FRE 702 under existing rules. Indeed, he noted that express preponderance language likely would have been rejected in 2000 when Rule 702 was amended to reflect the *Daubert* opinion *because* the preponderance standard was already baked into the existing Rule. Twenty

years later -- when it is clear that federal judges are not uniformly finding and following the preponderance standard -- the justification for a clarifying amendment exists. He emphasized that the FRE 104(a) standard is not expressly stated in FRE 702. Litigants and judges need to look to a footnote in *Daubert* providing that FRE 104(a) governs Rule 702 determinations and then to FRE 104(a) (which does not actually explicitly set out a preponderance of the evidence standard) and then to the Supreme Court's decision in *Bourjaily* (which interprets Rule 104(a) as requiring a preponderance) to learn that such findings are to be made by the trial judge by a preponderance of the evidence. The Reporter explained that this circuitous route to the preponderance standard is a subtle one that has been missed by many courts and that an amendment to Rule 702 could improve decisionmaking by expressly stating the applicable standard of proof. He further noted that the *Daubert* opinion included some language about "shaky" expert testimony being a question for the jury, further exacerbating confusion.

Should the Committee favor an amendment, the Reporter noted that the next issue to be discussed is the placement of the preponderance requirement. There are two possibilities. First, it could be added to the opening paragraph of the Rule, and the expert qualification requirement could be moved out of the opening paragraph to the end of the Rule in a new subsection (e). The Reporter explained that a draft of this potential amendment could be found on page 154 of the Agenda materials. The principal benefit of this approach is that the preponderance standard would expressly cover *all* Rule 702 requirements, including the expert's qualifications. The downside of that approach is that it would significantly disrupt the structure of the existing Rule and would place an expert's qualifications (typically the first question) as the last requirement. The second approach would add preponderance of the evidence language to the Rule 702 introductory paragraph after the existing and well-known language regarding an expert's qualifications. This would clarify its application to the Rule 702(b)-(d) requirements, which many courts are currently missing. Although the new language would not specifically apply to the finding of an expert's qualification, Rule 104(a) still governs that determination and courts uniformly understand that the issue of an expert's qualifications is for the judge and not the jury. Any potential negative inference that might be drawn could be addressed in a Committee note. The Reporter alerted the Committee that this second drafting option appeared on page 152 of the Agenda. He explained that it would be helpful to get the Committee's thoughts on whether to propose a 104(a) amendment and, if so, which draft is preferred.

Committee members expressed substantial support for a preponderance amendment. All agreed that the existing circuitous path through *Daubert*, Rule 104(a), and *Bourjaily* to get to the preponderance standard for Rule 702 was challenging for lawyers and judges. Committee members opined that a trial judge ought to be able to open the Federal Rules of Evidence and understand the rule to be applied from the text. One Committee member observed that the federal cases and comments from members of the public had revealed a pervasive problem with courts discussing expert admissibility requirements as matters of weight. Another Committee member agreed that trial courts can be tempted to kick difficult Rule 702 questions to the jury. Committee members noted that courts routinely conduct a preponderance of the evidence inquiry with respect to admissibility requirements in other evidence rules, but that such a methodical analysis is rare in applying Rule 702. Committee members expressed confidence that adding an express preponderance requirement to the language of Rule 702 would provide a clear signal to judges that would improve consideration of expert opinion testimony. Another Committee member noted that

more methodical consideration of Rule 702 by trial judges would aid courts reviewing the admissibility of expert testimony on appeal.

With respect to the form of a potential amendment to Rule 702, Committee members were in agreement that the draft amendment on page 152 of the Agenda that would add the preponderance requirement after the existing language regarding an expert's qualifications would be superior, because it would address the problem found in the cases and yet would retain the existing structure of Rule 702. The Department of Justice agreed that a preponderance amendment would be a helpful clarification to the Rule and expressed support for the draft amendment on page 152. The Department suggested that it may favor some modifications to the proposed Advisory Committee note and reiterated its strong opposition to any amendment to Rule 702 to regulate overstatement of expert testimony. The Federal Public Defender also expressed support for an amendment to add a preponderance standard as reflected in the draft on page 152 of the Agenda, noting that such an amendment would make it clear that the trial judge is supposed to act as the gatekeeper with respect to expert opinion testimony.

One Committee member inquired whether adding a preponderance standard would impose an obligation upon a trial judge to police Rule 702 requirements *sua sponte*. The Reporter explained that the amendment would not impose such an obligation – as with other rules, a trial judge operating under an amended Rule 702 could act *sua sponte* if she so chose, but would not need to act without objection. The Chair agreed with the Reporter's interpretation of the potential amended language. The Federal Defender inquired about whether a preponderance amendment would affect a litigant's ability to attempt to elicit a new expert opinion during cross examination and whether the court would have to pause the trial to conduct a preponderance inquiry anew. The Reporter explained that the amendment would not affect the procedure trial judges already follow when this happens at trial. The Chair noted that this issue is unlikely to arise in civil cases due to pretrial discovery obligations and the exclusion of undisclosed opinions. If it comes up in the criminal arena where there are currently fewer discovery obligations, the trial judge has to have a recess or hearing to resolve *Daubert* questions. An amendment to add a preponderance requirement would not alter that process.

The Chair rounded out the discussion, thanking the Committee for its thoughtful comments and noting his desire to have the Committee focus on the preponderance issue closely, because prior discussions had focused largely on the issue of overstatement. He described his initial disinclination to amend Rule 702 to add an express preponderance requirement. He confessed trepidation about sending an unusual amendment clarifying an existing rule to the Supreme Court and expressed sympathy for complaints about constant amendments to the Federal Rules. But the Chair explained despite initial reservations, he had come to favor the proposal. Although appellate cases may distort the degree of a problem at the trial level, the Chair stated that Circuit court language at odds with the language of Rule 702 presents a serious concern. He further noted being struck by Judge Campbell's comment at a prior meeting that attorneys and trial judges often do not discuss Rule 702 issues in Rule 104(a) preponderance terms. Because the Rule lacks an express reference to the preponderance standard, the Chair observed that the Rules may indeed be a part of the problem. He further stated that unintended consequences seemed unlikely for an amendment adding an express preponderance standard to the Rule.

Hearing unanimous approval from the Committee to move forward with a preponderance amendment akin to the one on page 152 of the Agenda materials, the Chair asked the Reporter to prepare that draft for the spring meeting, along with a draft Advisory Committee note. The Chair explained that the Committee could discuss the details of the note at the spring meeting, but emphasized that an Advisory Committee note would need to state that a preponderance amendment in the text of Rule 702 was not intended to create a negative inference about applying the standard to other rules.

Judge Bates commented that the Standing Committee shared the Chair's reluctance to advance unnecessary amendments, but opined that a preponderance amendment sounded like a needed clarification that would aid practice. Accordingly, Judge Bates anticipated no resistance from the Standing Committee to such a proposal.

The Reporter notified the Committee that some federal courts have also added an intensifier to the Rule 702(a) requirement that an expert's opinion "will help" the trier of fact. These courts have required that an expert's opinion will "appreciably help." The Reporter explained that this misstatement of the Rule 702 standard by some courts did not by itself justify an amendment to the Rule, but noted that he had included language in brackets in the draft Advisory Committee note to the proposed preponderance amendment to emphasize that expert opinion testimony need only "help" and need not "appreciably help" under Rule 702. The Chair asked the Reporter to leave that bracketed language in the draft note to be taken up and considered by the Advisory Committee at its spring meeting.

B. Regulating Overstatement of Expert Opinions

The Chair then turned the Committee's discussion to a potential amendment to Rule 702 that would prevent an expert from "overstating" the conclusions that may reasonably be drawn from a reliable application of the expert's principles and methods. The Chair noted that the overstatement proposal originated from concerns regarding forensic testimony in criminal cases. Because the Department of Justice had filed a letter with the Committee opposing an overstatement amendment (which was submitted too late for inclusion in the agenda book), the Chair first recognized the Department of Justice to describe its opposition.

Elizabeth Shapiro summarized the Department's objections to an overstatement amendment. She argued that the PCAST Report, which launched the Committee's review of Rule 702, was obsolete already due to the rapidly evolving nature of forensic examination. She highlighted the Department of Justice's work developing uniform language governing the testimony of forensic experts in numerous disciplines to control the risk of overstatement. She opined that the DOJ's uniform language was a healthier and more nimble response to concerns about forensic testimony than a rule change. She also noted that national organizations with expertise in forensics have been examining and adopting the Department's uniform language. She described recent opinions by district courts in the District of Columbia and the Western District of Oklahoma referencing the Department's uniform language in ruling on *Daubert* motions. Finally, she opined that the Committee should not propose an amendment to Rule 702 to regulate expert overstatement because the existing requirements of the Rule already permit such regulation, and

that such an amendment could be thought to be an excuse for a lengthy Advisory Committee note on forensic evidence --- that would be obsolete before it could take effect.

Ted Hunt, the Department's expert on forensic testimony, next argued that existing Rule 702 is being applied effectively by federal courts to police forensic testimony, and that no rule change should be made. He described tremendous change in the forensics community since 2009. In particular, he noted studies completed since the PCAST Report revealing false positive error rates of less than 1% in forensic disciplines such as fingerprint identification and ballistics. He noted that even these low rates of error failed to account for the fact that a second reviewing examiner required by protocols in forensic laboratories would catch even these few errors (though he did not mention whether those second reviewers knew the results of the original test). He emphasized that pattern comparison testimony is a skill-based, experience-based method and that courts are appropriately treating it as such. He acknowledged the difficulty in extrapolating error rates to all forensic examiners in all disciplines, making the identification of general error rates challenging. Still, he highlighted the Department's work in developing and publishing uniform language for 16 forensic disciplines. This language prohibits overstatement by experts and eliminates problematic legacy language (such as "zero error rate" or "infallible"). He emphasized that concessions of fallibility are now routinely made by forensic experts. He suggested that the federal caselaw may not have entirely caught up with this rapid progress, but that courts were starting to reference and utilize the uniform language appropriately. In sum, he opined that existing Rule 702 is working optimally with respect to forensic testimony and should not be amended.

One Committee member asked whether the uniform language adopted by the Department applies to forensic examiners from state laboratories who testify in federal cases. The Department acknowledged that the uniform language is not binding on state witnesses, but described movement in national organizations to adopt the Department's uniform language, leading to the hope that state and local labs will not make claims at odds with that uniform language going forward.

Next, the Federal Defender voiced her strong support for an overstatement amendment to Rule 702. She reminded the Committee that erroneous forensic testimony could lead and has led to false convictions. She called attention to the voluminous digest of federal cases collected by the Reporter in the Agenda materials, illustrating the many times that forensic (and other) experts had been permitted to make clear overstatements about the conclusions that may reliably be drawn from their methods. She acknowledged the Department's frustration with the PCAST Report but pointed out that the Department may make the same arguments it is making about the reliability of its forensic testimony in court before a trial judge to overcome an objection based upon overstatement. She further noted that forensic testimony in state courts is particularly problematic and that even perfect adherence by the Department to its uniform language would be inadequate to fix the problem in state courts --- a problem that might be solved by the promulgation of a federal model. She noted the importance of adding a specific prohibition on overstatement to Rule 702 to alert courts to focus on that point. An amendment to Rule 702 would prevent the issue of overstatement from being ignored or overlooked and would signal to courts that they have a gatekeeping responsibility with respect to an expert's ultimate conclusions on the stand. In sum, she opined that an amendment would not prevent the government from presenting and defending reliable forensic testimony, but would prevent egregious overstatements by testifying experts.

The Chair asked the Federal Defender whether the problem with overstated expert testimony was really a "Rules" problem or whether it represents more of a lawyering problem. He expressed skepticism that trial judges don't realize they have power to regulate expert conclusions and suggested that an amendment to Rule 702 will not solve the problem if defense lawyers fail to challenge expert testimony and bring concerns to the attention of the trial judge. The Federal Defender responded that a Rule change would put everyone – trial judges and defense attorneys alike – on notice that expert testimony overpromising on conclusions that can be drawn from a forensic examination should be challenged and regulated. She stated that nothing in the current Rule signals the need for an inquiry into the form or extent of the expert's conclusions and urged the need for an amendment to make such an inquiry express and mandatory.

Rich Donoghue, Principal Associate Attorney General for the Department of Justice, argued that a problem with forensic expert testimony, if any, was more of a lawyering issue and not so widespread as to warrant an amendment. Elizabeth Shapiro argued that an amendment to the Federal Rules of Evidence would not fix a problem largely existing in state courts, and that national forensic organizations were working to resolve issues at both the federal and state level. Judge Kuhl noted that California courts do not use *Daubert* but that it has nonetheless had a significant effect on state court handling of expert testimony. She suggested that an amendment to Federal Rule of Evidence 702 would be looked to in the state courts. The Reporter agreed, explaining that the Federal Rules are a model for state evidence rules and are even adopted automatically in some states.

The Federal Defender suggested that the issue was a simple and clear cost/benefit analysis. She urged that the benefit of an amendment would be to protect people from going to prison unnecessarily by signaling an important inquiry into forensic testimony, and that the only cost associated with the amendment might be to require prosecutors to do the work of defending their forensic experts in the face of an objection armed with the arguments and information that the Department has presented to the Committee. She suggested that human liberty balanced against additional work for prosecutors was a clear "no-brainer."

Judge Schroeder, Chair of the Subcommittee on Rule 702, agreed that the problems with forensic testimony are greatest in state courts, but emphasized that state courts aren't the exclusive source of problematic testimony. He commended the Department for its work on uniform language, but opined that such language ought to apply to a state forensic examiner presented as a witness by a federal prosecutor. Lastly, he noted that the problem of "overstatement" is a multifaceted one that can mean different things. An expert's conclusion of a "match" might be an overstatement of her conclusion, whereas a statement about her degree of confidence in a conclusion might be a slightly different problem. The overarching concern is to prevent a witness, once qualified as an expert, from having free reign to testify to anything. He inquired as to how the Committee could draft an amendment to Rule 702 to capture the multifaceted issue of overstatement without exceeding the problem and causing unintended consequences.

Ted Hunt responded that forensic experts do not testify to a "match" in court. The modern approach is to admit fallibility as is done in the Department's uniform language. He opined that dated cases are problematic and that there has been a paradigm shift to more tempered and qualified

forensic testimony. He challenged the assumption that a forensic expert's "identification" is an overstatement. According to Mr. Hunt, "source identifications" can be done with a high degree of reliability, according to the forensic literature. He further opined that jurors largely *undervalue* forensic evidence due to high profile exonerations and advocacy, and that good lawyering can and does address any issues that exist.

The Chair asked the Reporter about his case digest, inquiring how often courts allow overstatement because courts think they lack authority to regulate it and how often they allow overstatement due to lawyering oversights. The Reporter responded that the federal cases overwhelmingly rely upon precedent to admit forensic testimony in a particular discipline. For example, federal courts admit ballistics opinions because ballistics opinions have always been allowed in prior cases. The Chair suggested that federal courts do not state that they lack authority to regulate a conclusion per Rule 702. The Reporter replied that the issue of regulating an expert's conclusions is much like the preponderance issue discussed earlier – even if Rule 702 already authorizes it, that authority is embedded and hidden in the Rule and it is overlooked by courts.

The Chair then turned to the many drafting alternatives of an overstatement amendment presented for the Committee's review and suggested that the draft on page 142 of the Agenda book --- modifying existing subsection (d) slightly to provide that an expert's opinion should be "limited to" or should "reflect" a reliable application of the principles and methods to the facts of the case--- could resolve any issues without adding a new subsection (e) regulating "overstatement" per se. The Chair asked the Department of Justice what harm could be done by adopting such a minimalist change to subsection (d) (assuming an accompanying Advisory Committee note that would not seek to provide guidelines on forensic testimony). Elizabeth Shapiro responded that the draft change to subsection (d) would rearrange words as a "Trojan horse" to justify an expansive Committee note on forensic evidence, which would be inappropriate. The Chair reiterated that any concerns about the language of the Committee note could be addressed later, and that the question was whether the minor, clarifying changes to subsection (d) in keeping with the proposal on page 142 of the Agenda would cause particular harms or unintended consequences. The Reporter noted that the slight change to subsection (d) would not be simply rearranging words as a "Trojan horse" – instead, the modification would be one of emphasis designed to focus the judge on the expert's conclusions --- in keeping with the Supreme Court's decision in *Joiner*.

Betsy Shapiro expressed concern that a slight change in emphasis in the text would signal some change to courts, but not exactly what degree of change is intended. The Federal Defender disagreed, arguing that there could be no negative consequence to alerting the trial judge to focus on the expert's reported conclusions to ensure that they are not exaggerated. She emphasized that overstated expert opinions can be devastating to a criminal defendant and disagreed with the Department's earlier suggestion that jurors undervalue forensic testimony. Instead, she noted longstanding studies from the Innocence Project and others showing that jurors assume the trial judge approves of things an expert is permitted to testify to.

Judge Kuhl, who originally suggested a change to subsection (d) (instead of the addition of a new subsection (e) on overstatement) explained that she proposed a minimalist change to the requirements already in the Rule to shift the emphasis slightly without creating the unintended consequences that might exist with an entirely new subsection. The Reporter noted that the cases

reveal a lack of focus on whether an expert's particular trial testimony is allowable once the decision is made that his testimony is generally admissible under Rule 702, and that the amendment to subsection (d) could help to rectify that problem.

The Chair once again asked the Department of Justice what harm there could be in a focus-clarifying amendment to subsection (d) if it were accompanied by a scaled-down Advisory Committee note. Rich Donoghue suggested that the Department was concerned about any amendment and the signal that would send. Nonetheless, he stated that the Department did not object to the proposal to amend the language of subsection (d) to clarify that courts must regulate the expert's conclusion as well as the methodology. He concluded that the proposed language in (d) could be useful to courts and litigants. He explained that the content of any Advisory Committee note would be of much greater concern to the Department. The Chair then asked the Reporter to prepare a working draft amendment to Rule 702 for the spring meeting that combines the addition of a preponderance standard with an amendment to subsection (d) akin to the draft on page 142 of the Agenda, with a scaled down draft Committee note explaining the emphasis on an expert's testimonial conclusions, with a reference to concerns about conclusions by forensic experts.

Another Committee member asked the Reporter about the effect of prior amendments designed to clarify existing requirements. In particular, he queried whether such modest amendments were effective in combatting prior inaccurate precedent. The Reporter acknowledged that some federal courts getting Rule 702 wrong were relying on pre-*Daubert* precedent that should be superseded. He noted that clarifying amendments are often important in toning up a provision that is operating sub-optimally, and that they have usually worked.

Another Committee member opined that a modest amendment to subsection (d) of Rule 702 would not go far enough in correcting the problem with existing federal precedent. She suggested that such a minimalist approach would not get to the heart of the issue -- that trial judges may not know they have the authority to police an expert's expressed conclusions. She opined that trial judges should be able to open the Federal Rules of Evidence on the bench during trial and have the Rules expressly direct them where to focus. She suggested that an amendment adding a new subsection (e) to Rule 702 that tells a trial judge to regulate "overstatement" would be far more effective. The Reporter noted his agreement that a subsection (e) amendment would be more effective. Still he acknowledged that optimal amendments, like recent proposals to amend Rule 404(b) significantly, may not garner enough support to get passed. In the case of Rule 404(b), an amended notice provision was a fallback compromise. The question with respect to Rule 702 is whether there is support for a new subsection (e) and, if not, whether a modified subsection (d) is a helpful fallback alternative.

The Chair then took a non-binding, informal straw poll to see which approach to amending Rule 702 to address the issue of overstatement Committee members would favor. The Chair noted three options: 1) no amendment directed to overstatement; 2) the modest modification to the language of subsection (d); or 3) the more substantial addition of a new subsection (e). One Committee member expressed a desire to hear from the Department of Justice with respect to the addition of a new subsection (e). The Chair stated that the Department clearly prefers no amendment to Rule 702 to address overstatement, draws a red line at an amendment that would

add express "overstatement" regulation in a new subsection (e), and could live with the modest modification to subsection (d) depending on the content of the accompanying Committee note. The Department agreed with the Chair's characterization of its views.

One Committee member stated definite support for an amendment to subsection (d) and confessed to being "on the fence" about the addition of a subsection (e). That Committee member expressed an inclination to support (e) as well due to the problems in the existing Rule 702 precedent, but expressed concerns about adding a subsection (e) on overstatement to civil cases.

Another Committee member expressed clear support for a new subsection (e), but stated support for a modification to (d) as a compromise, if necessary. Another Committee member agreed with those preferences and priorities. The Federal Defender agreed with the position that a new (e) is critical to address the testimony that comes out of an expert's mouth on the stand, but noted that modifications to subsection (d) would be better than nothing.

Another Committee member stated a preference for the modification to subsection (d) only, expressing doubt that a new subsection (e) would fix the problems that do exist in the precedent and concerns about drafting in a manner that would avoid unintended consequences. That Committee member noted pending amendments to criminal discovery requirements in Fed. R. Crim Proc. 16 that will give more notice to criminal defendants about expert testimony and will allow them to challenge and exclude undisclosed testimony. Another Committee member stated opposition to the addition of a new subsection (e), arguing that it would represent too dramatic a change and that it was not needed to address what is essentially a lawyering issue in light of evolving forensic standards. This Committee member was also concerned about adding complexity to already extensive *Daubert* proceedings in civil cases, but had no objection to the language proposed to alter existing subsection (d). The Committee member confessed to being somewhere between "doing nothing" and modifying subsection (d) depending on the content of an accompanying Committee note.

The Chair rounded out the straw poll by expressing agreement with those Committee members who opposed a new subsection (e), articulating concerns that it was too substantial a change that could have unintended collateral effects. He suggested that the real problem in the expert testimony arena is not caused by Rule 702 and may not be solved by an amendment to Rule 702. He opined that the new criminal discovery rules would help fix problems with expert testimony, as would the Department of Justice's efforts to craft uniform testimonial language. In closing, the Chair said he would not vote for (e), could support (d), but could live with doing nothing with respect to overstatement.

Judge Bates commended the Reporter and the Committee for a very thoughtful dialogue and encouraged them to present all sides of the issue and the conflicting opinions of Committee members to the Standing Committee to obtain useful input. Judge Bates also inquired about the effect of a modification to subsection (d) to focus on the expert's actual "opinion" on expert testimony *not* in the form of opinion. The Reporter explained that Rule 702 allows an expert to testify in the form of an opinion "or otherwise" to allow for expert testimony on background information, such as the operation of a human heart. He explained that Rule 702(d) was always focused on opinion testimony more than such background testimony. Still, he noted that an

amendment to subsection (d) might focus on an expert's "testimony" rather than an expert's "opinion" to clearly accommodate expert testimony not in the form of an opinion.

In closing, the Chair asked the Reporter to prepare two draft alternatives of Rule 702 for the Committee's consideration at its spring meeting:

1) A draft including preponderance language in the opening paragraph of Rule 702 and a slightly modified subsection (d). This draft should be accompanied by a "skinny" Advisory Committee note that includes some brief reference to forensic evidence and the PCAST Report in brackets.

2) A draft including preponderance language in the opening paragraph of Rule 702 and a new subsection (e) regulating overstatement. This draft should be accompanied by a more comprehensive Advisory Committee note.

The Chair asked whether the incoming Committee members could listen to the discussion of Rule 702 from today's meeting before the Spring meeting. Both the Administrative Office and the Reporter promised to have new Committee members apprised of preceding discussions.

V. Proposed Amendment to Federal Rule of Evidence 106

The Reporter reminded the Committee that a potential amendment to Rule 106, the rule of completeness, had been before the Committee for several years. He noted that the Rule permits a party to insist upon the presentation of a remainder of a written or recorded statement if its opponent has presented a part of that statement in a fashion that has unfairly distorted its true meaning. The Reporter emphasized that the narrowly applied fairness trigger for the Rule was not being changed by any of the amendment proposals before the Committee. Instead, two potential amendments were being considered.

First, the Committee has been exploring an amendment that would permit a completing remainder to be admitted "over a hearsay objection." The Reporter noted that the Committee had wrestled with the purpose for which such a remainder might be admitted over a hearsay objection – either for its truth or for the limited non-hearsay purpose of providing context. The Reporter noted problems with an amendment limiting the use of a completing remainder to non-hearsay context alone, due to the need for confusing limiting instructions, and suggested the possibility of allowing the trial judge to decide on a case-by-case basis the purpose for which the remainder may be used once it is admitted to complete. Second, the Reporter reminded the Committee that it has been exploring an amendment that would extend completion rights in Rule 106 to oral unrecorded statements, which are not currently covered by the text of Rule 106. He explained that many circuits currently admit oral statements when necessary to prevent unfair distortion, but that they do so under a confusing combination of residual common law evidence principles and the broad power of the trial court to control the mode and order of interrogation under Rule 611(a). He further noted that a few circuits appear to reject completion of oral statements altogether, simply because they are omitted from Rule 106's coverage. He explained that it could be helpful to bring oral statements under the Rule 106 umbrella, so that all aspects of completeness are covered in one place. And it would also be very useful to provide in a Committee note that there is no more

common law of completion, once a comprehensive Rule 106 has been adopted. The Reporter noted that the Agenda materials contained several draft proposals for amending Rule 106 and solicited Committee input as to its Rule 106 preferences, explaining that the goal of the discussion was to narrow the drafting alternatives for consideration at the spring meeting.

One Committee member expressed support for an amendment that would allow a completing remainder over a hearsay objection and that would add oral statements akin to the one on page 588 of the Agenda materials. The Committee member opined that the trial judge should decide on a case-by-case basis whether to admit the remainder for its truth or for context only and that an amendment should not limit the use to non-hearsay context. The Chair also expressed support for the amendment proposal on page 588 of the Agenda, explaining that some evidence rules are *in limine* rules, while some are "on the fly" rules that come up in the heat of trial. He noted that Rule 106 is an "on the fly" rule that often comes up in the heat of trial action, and that trial judges do not have time to research the common law or Rule 611(a). He stated that it is very unusual for a Federal Rule of Evidence not to supersede the common law and that he would favor a Committee note expressly providing that the common law is superseded by the amendment. The Chair expressed support for the inclusion of oral statements, seeing no conceptual distinction between oral and recorded statements and the need for completion. He acknowledged disagreement that a remainder would have to be admitted for its truth to repair distortion but thinks the draft amendment elegantly elides the purpose for which a remainder is admitted by providing only that it is admissible "over a hearsay objection." Such an amendment would take no position on the use to which a completing remainder could be put.

Justice Bassett agreed that the amendment covering both oral statements and allowing remainders over a hearsay objection would be optimal. He noted that New Hampshire had long allowed oral statements to be completed and had recently amended its evidence rule to reflect that practice. He reported no problems with the amendment of the New Hampshire rule to replace the common law and supported a similar amendment for Federal Rule 106. Judge Kuhl noted that California does not distinguish between recorded and oral statements for purposes of completion, and similarly has experienced no difficulties with oral statements. She also opined that the fairness concerns addressed by Rule 106 overcome any hearsay concerns about the remainder, and that the trial judge should have discretion to admit the remainder with or without a limiting instruction.

The Department of Justice expressed opposition to the draft proposal on page 588 of the Agenda materials, arguing that completion was not as rarely applied as suggested in the appellate opinions. The Department suggested that prosecutors are routinely interrupted at trial with requests to complete, particularly when playing a recording. The Department suggested that trial judges do not apply the Rule 106 standard narrowly and are inclined to allow completion liberally to avoid an appellate issue. The Department expressed a preference for an amendment to Rule 106 that would allow remainders only for their non-hearsay value in providing context and that would continue to omit oral statements. The Department emphasized that the Advisory Committee that originally drafted Rule 106 in 1973 omitted oral statements purposely and that including them now would make Rule 106 more susceptible to abuse by criminal defendants trying to admit unreliable exculpatory statements. The Chair noted that the Department's criticisms of Rule 106 were of the "fairness" trigger for applying it, and no change to that standard is under consideration. He further noted that opposition to oral statements is misplaced, because most federal courts *already allow*

completion with oral statements -- they just do it under a confusing combination of common law and Rule 611(a). Another Committee member similarly inquired of the Department how adding oral statements to Rule 106 would "open Pandora's box" if most courts already admit them. The Reporter noted that a few federal courts end their analysis with Rule 106 and do *not* admit oral statements, probably because counsel does not think of Rule 611(a) or common law. So the current state of affairs regarding oral statements creates a conflict in the courts and results in a trap for the unwary.

Another Committee member disagreed with the draft Committee note suggesting that a completing remainder should be admitted for its truth and suggested that an amendment would undermine the hearsay rule if unreliable oral statements could be admitted for their truth. The Chair agreed that a completing remainder need not necessarily be true to complete, but expressed concern about a context-only amendment, because that would require a limiting instruction impossible for jurors to follow. Another Department of Justice representative contended if Rule 106 is amended, criminal defendants would be limited only by their imagination in crafting exculpatory oral statements, and that a recording requirement would at least limit defendants to requesting additional portions of an authenticated recording to be played in court. The Reporter noted that there is no difference between oral statements admitted to complete and all the other oral, unrecorded statements found admissible under the evidence rules. He queried why a government witness is permitted in the first place to testify about an unrecorded oral statement allegedly made by a defendant given the concern expressed about manufactured oral statements. He reiterated that most circuits already permit completion with oral statements, so an amendment confirming that existing practice would not open the floodgates to new evidence. Another Committee member opined that anxiety about adding oral statements to Rule 106 was overblown and larger in anticipation than in reality. That Committee member suggested that oral statements were very rare in criminal cases and that most statements were recorded, and that an amended Rule 106 should cover both recorded and unrecorded statements.

Rich Donoghue expressed fear that including oral statements in the Rule would create a "wild west" approach to completion and that trial judges would be even more inclined to allow completion with unreliable oral statements by defendants after seeing an expansive amendment to Rule 106. The Chair again expressed confusion about the Department's opposition to adding oral statements given that most circuits already allow completion of unfairly presented oral statements. He queried why the Department would oppose a uniform rule on point. Mr. Donoghue responded that adding oral statements to Rule 106 would suggest an expansive approach to the Rule. The Reporter commented that leaving oral statements out of the Rule would simply take advantage of litigants who don't know about the common law and Rule 611(a), and would treat litigants differently depending on the quality and experience of counsel. He further reiterated that most courts already allow completion with oral statements and that there is no "wild west" culture in completion practice. The Reporter also addressed expressed concerns about the reliability of a completing remainder allowed in for its truth. He explained that completion is allowed to level the playing field after an unfair partial presentation of a statement and that reliability is a red herring. He observed that party opponent statements of defendants, which are the most common targets of completion, are not admitted because they are reliable --- so why should the completion have to be reliable?

The Chair closed the discussion of Rule 106 by asking for an informal, non-binding straw vote about an amendment to Rule 106 to help narrow alternatives to be discussed at the spring meeting. The Chair noted four alternatives: 1) no amendment to Rule 106; 2) an amendment to allow completion over a hearsay objection only (leaving out oral statements); 3) an amendment to add oral statements only (leaving out the hearsay fix); and (4) an amendment that adds oral statements and allows completion over a hearsay objection.

Five Committee members and the Chair expressed a preference for the fourth option that would add oral statements and allow completion over a hearsay objection. One Committee member expressed a preference for an amendment that would add oral statements and admit completing statements for their non-hearsay context only. The Department of Justice voiced opposition to any amendment.

The Chair asked the Reporter to prepare a draft amendment that would add oral statements and allow completion over a hearsay objection for the spring meeting.

VI. Federal Rule of Evidence 615 and Witness Sequestration

The Reporter reminded the Committee that it had been discussing potential amendments to Rule 615 governing witness sequestration to clarify the scope of a district court's Rule 615 order. He explained that it is very clear that a district court may extend sequestration protections beyond the courtroom, but that the circuits are split on the manner in which a trial judge must extend protection. Some circuits hold that a trial judge's order of sequestration per Rule 615 *automatically* extends beyond the courtroom and prevents sequestered witnesses from obtaining or being provided trial testimony. These courts find that Rule 615 orders must extend outside the courtroom to provide the protection against testimonial tailoring the Rule is designed to provide --- if witnesses can simply step outside the courtroom doors and share their testimony with prospective witnesses, Rule 615 provides little meaningful protection. Other circuits hold that a Rule 615 order operates only to physically exclude testifying witnesses from the courtroom, and that a trial judge must enter a further order if there is an intent to prevent access by excluded witnesses to trial testimony. According to these circuits, a Rule 615 order can do no more than exclude witnesses physically because that is all the plain language of the Rule provides. Further, these circuits highlight problems of notice if a terse Rule 615 order is automatically extended beyond the courtroom doors, leaving witnesses and litigants subject to sanction for extra-tribunal conduct not expressly prohibited by the court's sequestration order. The question for the Committee is how to amend Rule 615 to reconcile this conflict and reach the best result for the trial process.

The Reporter explained that the Committee had previously discussed a purely discretionary approach to protection beyond the courtroom, with an amended Rule 615 continuing to mandate physical exclusion from the courtroom only, but expressly authorizing the trial judge to extend or not extend protection further at the judge's discretion. A draft of such a discretionary amendment was included in the Agenda materials at page 660. The Reporter noted that another amendment alternative requiring extension beyond the courtroom at a party's request had been included in the Agenda materials at page 662, at Liesa Richter's suggestion. The Reporter explained that physical sequestration currently in Rule 615 was made *mandatory* upon request both because sequestration is crucial to accurate testimony and because the trial judge lacks information about potential

tailoring risks upon which to exercise discretion. As noted by the many circuits that already extend sequestration protection beyond the courtroom automatically, the right to sequestration is meaningless without some extra-tribunal protection. Therefore, it can be argued that a party should have a right to demand some protection beyond the courtroom doors upon request (as they do with physical sequestration currently). Under this version of an amended Rule 615, the trial judge would not have discretion to deny completely protections outside the courtroom if a party asked for them. Importantly, such an amendment would leave the details and extent of protections afforded outside the courtroom to the trial judge's discretion based upon the needs of the particular case.

The Reporter noted additional issues raised by sequestration that the Committee should consider in its review of Rule 615. First, he noted the question of whether sequestration prohibitions on conveying testimony to witnesses should be binding on counsel --- a question that has previously been discussed by the Committee. He reminded the Committee that this issue of counsel regulation raised complicated constitutional issues concerning the right to counsel, as well as issues of professional responsibility beyond the typical ken of evidence rules. For that reason, the Committee had previously discussed potential amendments to Rule 615 that would not seek to control counsel, leaving any such issues that arise to trial judges in individual cases. Finally, the Reporter noted a possible dispute in the courts about the exception to sequestration in Rule 615(b) for representatives of entity parties. The Reporter explained that the purpose of the entity representative exception was to place entity parties on equal footing with individual parties who are permitted to remain in the courtroom. Accordingly, it would seem that an entity party would be entitled to a single representative in the courtroom to create parity with individual parties. Some courts, however, have suggested that trial judges have discretion to permit *more than one* agent or representative of an entity to remain in the courtroom under Rule 615(b) – particularly in criminal cases where the government seeks to have more than one agent remain in the courtroom. The Reporter noted that Judge Weinstein has suggested that trial courts have discretion to allow more than one entity representative under Rule 615(b); but the Reporter questioned what basis exists for exercising such discretion when the exception in (b) is as of right. He suggested that the superior approach would be to allow a single entity representative to remain in the courtroom under Rule 615(b) as of right, and for the trial judge to exercise discretion under Rule 615(c) to allow additional representatives to remain if a party bears the burden of demonstrating that they are "essential to presenting the party's claim or defense." The Reporter noted that such a result could easily be accomplished with a minor amendment to Rule 615(b). He emphasized that the Rule 615(b) issue was not important enough to justify an amendment to the Rule in its own right, but that it could be a useful clarification if the Committee were to propose other amendments to the Rule.

One Committee member suggested that counsel do not always invoke Rule 615 and may not want sequestration protection at all or at least none beyond the courtroom. For that reason, the Committee member expressed a preference for the purely discretionary amendment proposal on page 660 of the Agenda book, as it would not require protections beyond the courtroom. He agreed that the issue of regulating counsel was a "can of worms" beyond the scope of evidentiary considerations, so the Committee should not address it. As to the entity representative issue, he noted that entity parties often have only one representative remain in the courtroom under Rule 615(b) at any one time, but sometimes swap out representatives throughout the trial, particularly in long trials. He suggested that such swapping out of representatives should be sanctioned in an

Advisory Committee note should the Committee clarify that Rule 615(b) is limited to a single representative.

The Chair also noted that parties may not want sequestration orders to extend beyond the courtroom and that the Rule should not require something the parties do not want. The Reporter noted that sequestration protection is essentially pointless without some extended protection and that a mandatory amendment would extend protection beyond the courtroom only "at a party's request." Still, the Chair expressed a preference for a discretionary amendment such as the one on page 660 of the Agenda book, that would permit "additional orders" adding extra-tribunal protection but would not require a court to issue such protections upon request. To clarify the scope of a succinct order that simply invokes "Rule 615", the Chair suggested adding language to subsection (a) of the draft discretionary amendment on page 660 of the Agenda materials stating that an order affirmatively *does not* extend any protection beyond the courtroom unless it expressly states otherwise. He noted that this would be important to avoid punishing parties for extra-tribunal sequestration violations without adequate notice.

The Department of Justice expressed support for a discretionary approach to Rule 615, but questioned the proposal to limit entity representatives to just one under Rule 615(b). The Department queried why it should not be permitted to have two case agents sit in the courtroom notwithstanding sequestration. The Reporter again noted the purpose of Rule 615(b) was to put entity parties on par with individuals --- not to give entities an advantage. Therefore, the government should get a single representative under Rule 615(b) as of right without showing any justification, and could qualify additional agents under Rule 615(c) if they can show them to be "essential." The Department asked whether there would be a limit on the number of agents it could qualify as "essential" under Rule 615(c), expressing concern that an amendment could be read to limit the judge's discretion with respect to subsection (c). The Reporter replied in the negative, affirming that subsection (c) would permit as many persons to remain in the courtroom as were shown to be "essential." He suggested that an Advisory Committee note could clarify that point should the Committee advance an amendment limiting the number of representatives permitted under subsection (b), as well as acknowledging the propriety of swapping out representatives under subsection (b).

The Chair noted that the Rules are amended very infrequently and that there are limited opportunities to clarify issues. He asked that the Reporter retain a proposed amendment to Rule 615(b) in the draft for the spring meeting to afford the Committee more time to consider it.

The Federal Public Defender noted the expanding opportunities for witness-tailoring outside the courtroom in light of technological advances and the covid-19 pandemic. She noted that trials are being conducted on Zoom or streamed from one courtroom into another to allow for social distancing. Because such measures increase concerns about witness access to testimony, she suggested that an amended rule should be proactive about regulating access to trial testimony by witnesses who have been sequestered. Another Committee member suggested that a draft allowing, but not requiring, protections beyond the courtroom would suffice and noted the counsel issue potentially raised by protections beyond the courtroom. That Committee member also thought a clarification to Rule 615(b) would be helpful.

The Chair closed the discussion of Rule 615 by requesting that the Reporter prepare the discretionary draft of an amendment to the Rule akin to the one on page 660 of the Agenda materials, with an express addition to subsection (a) providing that a Rule 615 order does not extend beyond the courtroom doors unless it says so expressly. He also asked the Reporter to include a clarification of Rule 615(b) allowing only one entity representative at a time, with a Committee note explaining that swapping of representatives under (b) is permissible and that subsection (c) allowing exceptions for "essential" persons is not changed by the amendment and is not numerically limited.

VII. CARES Act and an Emergency Evidence Rule

Pursuant to the CARES Act, all of the federal rulemaking committees have been considering the need for the addition of an "emergency rule" that would allow the suspension of federal rules to account for emergency situations such as the covid-19 pandemic. The Judicial Conference asked the Reporter and the former Chair, Judge Livingston, to evaluate the need for an emergency rule of evidence to suspend the regular rules in times of crisis. After careful consideration, the Reporter and Judge Livingston agreed that there is no need for an emergency rule of evidence because the existing Evidence Rules are sufficiently flexible to accommodate emergency circumstances.

First, the Reporter documented his exhaustive examination of the Rules of Evidence to ascertain whether any of them demand that "testimony" occur in court (as opposed to virtually as has been done during the pandemic). He reported that none of the Rules require that testimony be given in a courtroom. He further explained that Rule 611(a) gives trial judges broad discretion to control the "mode of examination" and that many federal judges have utilized that authority during the pandemic to authorize virtual testimony. He acknowledged that remote testimony raised important issues of confrontation in the criminal context, but observed that it is the Sixth Amendment – and not the Evidence Rules – that control confrontation. Accordingly, an emergency evidence rule would not resolve confrontation concerns. In sum, the Reporter and Judge Livingston concluded that there was no need for an emergency evidence rule. The Reporter solicited thoughts and comments from Committee members as to the need for an emergency evidence rule. Committee members thanked the Reporter for his exhaustive work on the topic and concurred with the conclusion that there is no need for an emergency rule of evidence.

VIII. Future Agenda Items

The Reporter reminded Committee members that he had included a memorandum on a number of existing circuit splits with respect to the application of the Federal Rules of Evidence in the Agenda materials. He explained that his goal was to acquaint the Committee with potential problems that may lend themselves to rulemaking solutions and to solicit the Committee's feedback as to whether it would like to see any of the identified splits prepared for consideration at a future meeting. The Chair suggested that Committee members could email the Reporter or the Chair if they wished to discuss any of the circuit splits further. One Committee member commended the Reporter for his thorough work in identifying so many circuit splits. The Reporter explained that it is difficult to define a circuit split with precision and explained that there are actually four additional splits to be added to the memorandum for future consideration. The Chair

suggested that the Reporter add the additional four circuits splits to his memorandum and encouraged Committee members to email with suggestions for discussion.

The Chair then explained that there were a number of evidentiary issues he had asked the Reporter to place on the Agenda for the Committee's consideration, noting that two of them had been considered by the Committee within the last 5-7 years.

First, the Chair suggested that it is not clear why a witness's prior statement should be considered hearsay when the witness testifies at trial subject to cross-examination. He noted that some states do not include a testifying witness's prior statements in their definitions of hearsay. The Chair explained that he would like the Committee to consider whether to amend FRE 801 to permit witness statements to be admissible for their truth when the witness testifies at trial subject to cross-examination. He suggested that there was no justification for the existing rule and that a change would save much needless inquiry and analysis. The Chair acknowledged the Committee's past consideration of the issue, and that such a project could wind up allowing only prior *inconsistent* witness statements to be admissible for truth, but expressed his desire for the Committee to consider the issue anew.

The Chair next discussed the potential for a rule of evidence governing the admissibility of illustrative and demonstrative evidence. He noted that such evidence is presented in virtually every case tried in federal court and yet there is no rule of evidence that even mentions the subject. Courts and litigants must look to the common law with cases all over the map in their regulation of demonstrative evidence and illustrative aids. The Chair noted that the cases do not agree about: 1) the nomenclature used to describe such evidence; 2) when it may be used; 3) whether it may go to the jury room during deliberations; or 4) how to create a record of it for appeal. The Chair noted that he had asked the Reporter to prepare materials on the topic for the Committee's consideration.

The Chair next noted an issue regarding the use of English language transcripts of foreign language recordings in federal court. Here again, he noted that the Rules are silent, and that case law appears divided. The Chair noted a recent drug prosecution in which there were relevant Spanish language recordings. Both the government and the defense agreed that English transcripts of the recordings were accurate, and the government admitted only the transcripts without admitting the underlying Spanish language recordings (presumably because the jury could not have understood them in any event). The Chair explained that the Tenth Circuit – over a dissent -- had reversed the conviction, finding that the Best Evidence rule required the admission of the Spanish recordings. He noted that both the majority and dissent had cited conflicting cases in support of their respective positions and suggested that a clear rule regarding English transcripts of foreign language recordings could be helpful.

The Chair also noted that trial judges utilize their broad discretion in Rule 611(a) to support many different interventions. For example, a trial judge might order all parties to ask their questions of an out-of-town witness on a single day. As the Reporter noted earlier, trial judges have used Rule 611(a) during the pandemic to justify remote trials. The Chair explained that he had asked the Reporter to examine the federal cases to see what types of specific actions trial judges are using Rule 611(a) to support, with the idea being to consider an amendment to Rule 611(a) to list more specific measures that cover what trial judges actually do with the Rule.

The Chair finally suggested that the Committee might consider resolving a circuit split on the use of a decedent's statements against her estate at trial. He noted that some courts allowed such use, essentially equating the decedent and her estate for hearsay purposes. Other courts have declined to allow such statements against an estate, however, essentially giving the estate a better litigating position than the decedent would have had at trial The Chair noted that there was a useful law review note on the topic in the *N.Y.U Law Review* and suggested that this issue might be a useful component of a package amendments should others be considered.

The Chair closed by emphasizing that Committee members should feel no pressure to agree on any of these matters but expressed his view that they are worthy of discussion and consideration.

IX. Closing Matters

The Chair thanked everyone for their contributions and noted that the spring meeting of the Committee will be held on April 30, 2021 – hopefully in person at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., depending upon the public health situation, with a Committee dinner to be held the night before. The meeting was adjourned.

Respectfully Submitted,

Liesa L. Richter, Academic Consultant

TAB 8

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JUDICIARY STRATEGIC PLANNING (ACTION)

The Committee will be briefed on the update to the *Strategic Plan for the Federal Judiciary (Plan)*. The Committee will also consider recommendations for the Executive Committee regarding the *Plan's* strategies and goals that should receive priority attention over the next two years.

BACKGROUND

On the recommendation of the Executive Committee, the Judicial Conference approved an updated *Strategic Plan for the Federal Judiciary* on September 15, 2020. The *Plan* is included as Attachment 1.

The update followed an assessment of the implementation of the 2015 *Plan* by Judicial Conference Committees, an analysis of issues likely to impact the judiciary in the coming years, and the consideration of committee-proposed updates and revisions. Drafts of the updated *Plan* were then prepared by an ad hoc strategic planning group composed of Judicial Conference committee chairs, Executive Committee members, and at-large members including magistrate and bankruptcy judges and unit executives. In addition to significant input from Conference committees, the Planning Group engaged other stakeholders in the *Plan* update process including the Federal Judicial Center, Advisory Councils and Groups, and Administrative Office Senior Staff. Subject matter experts also were engaged to inform the Planning Group's drafting teams, and the draft *Plan* was shared with all 13 Chief Circuit Judges and 94 Chief District Judges.

CHANGES TO THE *PLAN*

The 2020 *Plan* retains the mission, core values, and scope of the 2015 and 2010 versions of the *Plan* while adding a new core value titled "Diversity and Respect," an addition that was proposed and subsequently endorsed by several Judicial Conference committees, together with supporting strategies and goals. The *Plan* also highlights the importance of preserving public trust, confidence, and understanding, by moving that Issue to second place in the *Plan*'s framework, which is built around seven Issues, following the structure of the 2010 and 2015 plans. Other substantial changes reflect significant policy changes adopted by the Conference since 2015, most notably to the newly numbered Issue 2 (Preserving Public Trust, Confidence, and Understanding); Issue 4 (The Judiciary Workforce and Workplace); and Issue 6 (Enhancing Access to Justice and Judicial Process). Changes to all seven of the Issue descriptions revise out-of-date language, underline the judiciary's commitment to the delivery of fair and impartial justice, and emphasize the judiciary's strategic priorities. These revisions are subsequently reflected in several new strategies and supporting goals related to workplace conduct, workforce diversity, transparency and accountability, civics education, health and wellness, and criminal defense.

In summary, the 2020 *Plan* includes 17 strategies and 59 goals, compared with 13 strategies and 43 goals included in the 2015 *Plan*. The 2020 *Plan* incorporates changes to seven of the 2015 strategies, leaving six strategies unchanged while adding four new strategies. Attachment 2 provides an overview of these changes.

IMPLEMENTATION OF THE *PLAN*

Consistent with the approach to planning approved by the Judicial Conference in September 2010, efforts to pursue the strategies and goals in the updated *Plan* will be led by the committees of the Judicial Conference, with facilitation and coordination by the Executive Committee.

The primary mechanism for committee integration of the *Plan* into regular committee business has been through the identification and reporting on "strategic initiatives." A strategic initiative is a project, study, or other effort with the potential to make a significant contribution to the accomplishment of a strategy or goal in the *Plan*. Strategic initiatives are distinct from the ongoing work of committees, for which there already are a number of reporting mechanisms, including committee reports to the Judicial Conference.

Committee missions and responsibilities vary greatly. Similarly, there is great variety among the types of committee activities relating to the *Plan's* strategies and goals. The planning approach provides committees with substantial flexibility in the development of strategic initiatives. In general, committees are asked to identify the following for each initiative:

- the purpose and/or desired outcome;
- the timeframe or schedule;
- partnerships with other Judicial Conference committees or other groups; and
- the assessment approach.

Committees last reported on the implementation of strategic issues during the summer of 2019, as part of the effort to prepare for the update to the *Plan*. Attachment 3 is a list of Conference committee initiatives that were in progress at that time.

Pursuant to the strategic planning cycle for Judicial Conference committees, the Committee will be asked to report on the implementation of strategic initiatives during its June 2021 meeting.

PRIORITY SETTING (ACTION)

The planning approach for the Conference and its committees assigns the responsibility for priority setting to the Executive Committee, with recommendations from Judicial Conference committees and others.

At its meeting in February 2018, the Executive Committee identified the core value of accountability and Goal 3.2b as priorities, and affirmed the four strategies and two goals previously identified (in 2011, 2013, and 2016) to establish the following as priorities:

(Note: As shown below, the updated 2020 Plan incorporated changes to the numbering and content of some of the priority Strategies and Goals, as indicated by underlining and strikeouts in the far right column.)

2015 Plan	**Core Value, Strategy, Goal**	**2020 Plan**	**Core Value, Strategy, Goal**
Core Value	Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources.	Core Value	Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources.
Strategy 1.1	Pursue improvements in the delivery of justice on a nationwide basis.	Strategy 1.1	Pursue improvements in the delivery of fair and impartial justice on a nationwide basis.
Strategy 1.3	Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.	Strategy 1.2	Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
Strategy 2.1	Allocate and manage resources more efficiently and effectively.	Strategy 3.1	Allocate and manage resources more efficiently and effectively.
Goal 3.2b	Identify future workforce challenges and develop programs and special initiatives that will allow the judiciary to remain as an employer of choice while enabling employees to strive to reach their full potential.	Goal 4.1c	Identify current and future workforce challenges and develop and evaluate strategies to enhance the judiciary's standing as an employer of choice while enabling employees to ~~strive to~~ reach their full potential.
Strategy 4.1	Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.	Strategy 5.1	Harness the potential of technology to identify and meet the needs of judiciary users and the public for information, service, and access to the courts.

Goal 4.1d	Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information.	Goal 5.1d	Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. In addition, raise awareness of the threat of cyberattacks and improve defenses to secure the integrity of judiciary IT systems.
Goal 7.2b	Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.	Goal 2.4a	Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary and its accountability and oversight mechanisms and external financial reporting.

Following the identification of priorities, the Executive Committee provided guidance to committees about how to incorporate these priorities into committee planning and policy development efforts, asking that particular attention be paid to priority core values, strategies, and goals from the *Plan* when setting the agendas for future committee meetings and determining which actions and initiatives to pursue. Committees also were asked to consider these priorities when assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures.

At its February 8-9, 2021 meeting, the Executive Committee will consider which strategies and goals from the updated 2020 *Plan* should receive priority attention over the next two years. Committee input is critical to the Executive Committee's deliberations.

Action Requested: On or before January 12, 2021 the Committee is asked to provide recommendations to the Executive Committee, through the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (1st Circuit), regarding the prioritization of the *Strategic Plan for the Federal Judiciary*'s strategies and goals over the next two years.

Attachments:

1. *Strategic Plan for the Federal Judiciary* (September 2020)
2. Overview of changes to the *Plan*
3. List of the strategic initiatives of Judicial Conference committees' (summer 2019)

Strategic Plan for the Federal Judiciary

September 2020

Judicial Conference of the United States

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Strategic Plan for the Federal Judiciary

Judicial Conference of the United States
James C. Duff, Secretary
Administrative Office of the U.S. Courts
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Strategic Plan for the Federal Judiciary

The federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice.

This plan begins with expressions of the mission and core values of the federal judiciary. Although any plan is by nature aspirational, these are constants which this plan strives to preserve. The aim is to stimulate and promote beneficial change within the federal judiciary—change that helps fulfill, and is consistent with, the mission and core values.

Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values

Rule of Law: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law.

Equal Justice: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect.

Judicial Independence: the ability to render justice without fear that decisions may threaten tenure, compensation, or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management.

Diversity and Respect: a workforce of judges and employees that reflects the diversity of the public it serves; an exemplary workplace in which everyone is treated with dignity and respect.

Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources.

Excellence: adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and employees; commitment to innovative management and administration; availability of sufficient financial and other resources.

Service: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner.

The Plan in Brief

The *Strategic Plan for the Federal Judiciary*, updated in 2020, continues the judiciary's tradition of meeting challenges and taking advantage of opportunities while preserving its core values. It takes into consideration various trends and issues affecting the judiciary, many of which challenge or complicate the judiciary's ability to perform its mission effectively. In addition, this plan recognizes that the future may provide tremendous opportunities for improving the fair and impartial delivery of justice.

This plan anticipates a future in which the federal judiciary is noteworthy for its accessibility, timeliness, and efficiency; attracts to judicial service the nation's finest legal talent; is an employer of choice providing an exemplary workplace for a diverse group of highly qualified judges and employees; works effectively with the other branches of government; and enjoys the people's trust and confidence.

This plan serves as an agenda outlining actions needed to preserve the judiciary's successes and, where appropriate, bring about positive change. Although its stated goals and strategies do not include every important activity, project, initiative, or study that is underway or being considered, this plan focuses on issues that affect the judiciary at large, and on responding to those matters in ways that benefit the entire judicial branch and the public it serves.

Identified in this plan are seven fundamental issues that the judiciary must now address, and a set of responses for each issue. The scope of these issues includes the fair and impartial delivery of justice; the public's trust and confidence in, and understanding of, the federal courts; the effective and efficient management of resources; a diverse workforce and an exemplary workplace; technology's potential; access to justice and the judicial process; and relations with the other branches of government.

Strategic Issues for the Federal Judiciary

The strategies and goals in this plan are organized around seven issues— fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values:

Issue 1: Providing Justice
Issue 2: Preserving Public Trust, Confidence, and Understanding
Issue 3: The Effective and Efficient Management of Public Resources
Issue 4: The Judiciary Workforce and Workplace
Issue 5: Harnessing Technology's Potential
Issue 6: Enhancing Access to Justice and the Judicial Process
Issue 7: The Judiciary's Relationships with the Other Branches of Government

These issues also take into account the judiciary's organizational culture. The strategies and goals developed in response to these issues are designed with the judiciary's decentralized systems of governance and administration in mind.

Issue 1. Providing Justice

How can the judiciary provide fair and impartial justice in a more effective manner and meet new and increasing demands, while adhering to its core values?

Issue Description. Exemplary and independent judges, high quality employees, conscientious jurors, well-reasoned and researched rulings, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation. Equal justice requires fairness and impartiality in the delivery of justice and a commitment to non-discrimination, regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability. Scarce resources, changes in litigation and litigant expectations, and certain changes in the law, challenge the federal judiciary's effective and prompt delivery of justice. This plan includes three strategies that focus on improving performance while ensuring that the judiciary functions under conditions that allow for the fair, impartial, and effective administration of justice:

Pursue improvements in the delivery of fair and impartial justice on a nationwide basis. (Strategy 1.1)

Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values. (Strategy 1.2)

Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations. (Strategy 1.3)

Strategy 1.1. Pursue improvements in the delivery of fair and impartial justice on a nationwide basis.

Background and Commentary. Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of civil case management, and has a number of mechanisms to identify and assist stressed courts. These mechanisms include biannual reports of pending civil cases and motions required under the Civil Justice Reform Act of 1990, and identifying stressed courts and the categories of cases with the longest disposition times.

National coordination mechanisms include the work of the Judicial Panel on Multidistrict Litigation, which is authorized to transfer certain civil actions pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The work of chief judges in managing each court's caseload is critical to the timely handling of cases, and these local efforts must be supported at the circuit and national level. Circuit judicial councils have the authority to issue necessary and appropriate orders for the effective and expeditious administration of justice, and the Judicial Conference is responsible for approving changes in policy for the administration of federal courts. Cooperative efforts with state courts have also proven helpful, including the sharing of information about related cases that are pending simultaneously in state and federal courts.

Despite ongoing efforts, some pockets of case delays and backlogs persist in the courts. Some delays are due to external forces beyond the judiciary's control, cannot be avoided, and do not reflect on a court's case management practices. With this understanding, this plan calls for the courts, Judicial Conference committees, and circuit judicial councils to undertake reasonable, concerted, and collaborative efforts to reduce the number and length of preventable case delays and backlogs.

The fair and impartial delivery of justice is also affected by high litigation costs. High costs make the federal courts less accessible, as is discussed in Issue 6. Litigation costs also have the potential to skew the mix of cases that come before the judiciary, and may unduly pressure parties towards settlement. Rule 1 of the Federal Rules of Civil Procedure calls for the "just, speedy, and inexpensive determination of every action and proceeding," and this plan includes a goal to avoid unnecessary costs and delay.

This strategy also includes a goal to ensure that all persons entitled to representation under the Criminal Justice Act are afforded well qualified representation through either a federal defender or panel attorney. Well qualified representation requires sufficient resources to assure adequate pay, training, and support services. Further, where the defendant population and needs of districts differ, guidance and support must be tailored to local conditions, subject to Judicial Conference policy.

In addition, this plan includes a goal to enhance the fair and effective management of all persons under supervision. Probation and pretrial services offices have led judiciary efforts to measure the quality of services to the courts and the community, including the use of evidence-based practices in the management of persons under supervision.

Other efforts to improve the fair and impartial delivery of justice must continue. For example, a number of significant initiatives to transform the judiciary's use of technology are underway, including the development and deployment of next-generation case management and financial administration systems. The work of the probation and pretrial services offices has also been enhanced through the use of applications that integrate data from other agencies with probation and pretrial services data to facilitate the analysis and comparison of supervision practices and outcomes among districts.

Goal 1.1a: Reduce delay through the dissemination of effective case management methods and the work of circuit judicial councils, chief judges, Judicial Conference committees and other appropriate entities.

Goal 1.1b: Avoid unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure.

Goal 1.1c: Ensure that all persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of all criminal defendants.

Goal 1.1d: Enhance the management of all persons under supervision to reduce recidivism and improve public safety.

Strategy 1.2. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Background and Commentary. The judiciary is facing an uncertain federal budget environment, with likely constraints on the ability of congressional appropriations committees to meet judiciary funding requirements. Multiweek government shutdowns have happened twice in the recent past (2013 and 2018/2019). The judiciary was able to remain open through reliance on fees and other no year balances, and by delaying contractual obligations not critical to the performance of constitutional responsibilities. However, judges, judicial employees, the bar and the public were impacted by the shutdown of many executive branch agencies and operations; by limits on normal court operations; and by time and resources being diverted to manage the effects of the funding lapse. Uncertainty and shortfalls, when they occur, present particular challenges to clerks offices, probation and pretrial services offices, and federal defender organizations in ensuring that operations are adequately staffed.

Another key challenge for the judiciary is to address critical longer-term resource needs. Many appellate, district and bankruptcy courts have an insufficient number of authorized judgeships. The judiciary has received very few Article III district judgeships, and no circuit judgeships, since 1990.

Resources are also needed for jurors. Compensation for jurors is limited and inadequate compensation creates a financial hardship for many jurors. While the judiciary has made progress in securing needed space — including the construction of new courthouses and annexes — some

court proceedings are still conducted in court facilities that are cramped, poorly configured, and lacking secure corridors separate from inmates appearing in court. As the judiciary's facilities continue to age, additional resources will be needed to provide proper maintenance and sustain courthouse functionality. The judiciary will need to continue apportioning resources based on priorities determined by the consistent application of policies across the courthouse portfolio.

Further, the judiciary relies on resources that are within the budgets of executive branch agencies, particularly the U.S. Marshals Service and the General Services Administration. The judiciary must continue to work with these agencies to ensure that the judiciary's resource needs are met.

The ability to secure adequate resources serves as the foundation for a vast majority of the judiciary's plans and strategies. For example, to ensure the well qualified representation of criminal defendants (Goal 1.1c), the defender services program requires funding sufficient to accomplish its mission. Additionally, to enhance the management of persons under supervision to reduce recidivism and improve public safety (Goal 1.1d), probation and pretrial services offices require sufficient funding. Strategy 4.4 and its associated goals focus on the importance of attracting, recruiting, developing, and retaining the competent employees that are required for the effective performance of the judiciary's mission, and critical to supporting tomorrow's judges and meeting future workload. Also, a goal under Strategy 5.1 urges the judiciary to continue to build and maintain robust and flexible technology systems and applications, requiring a sustained investment in technology.

Goal 1.2a: Secure needed circuit, district, bankruptcy and magistrate judgeships.

Goal 1.2b: Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.

Goal 1.2c: Secure adequate compensation for jurors.

Goal 1.2d: Secure adequate resources to provide the judiciary with the employees and resources necessary to meet workload demands

Strategy 1.3. Strengthen the protection of judges, court employees, and the public at court facilities, and of judges and their families at other locations.

Background and Commentary. Judges must be able to perform their duties in an environment that addresses their concerns for their own personal safety and that of their families. The judiciary works closely with the U.S. Marshals Service to assess and improve the protection provided to the courts and individuals. Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.

While judiciary standards for court facilities provide separate hallways and other design features to protect judges, many older court facilities require judges, court personnel, and jurors to use the same corridors, entrances, and exits as prisoners, criminal defendants, and others in custody.

Assuring safety in these facilities is particularly challenging. Protection for judges must also extend beyond court facilities and include commuting routes, travel destinations, and the home. A key area of focus for the judiciary has been raising the level of awareness of security issues, assisting judges in taking steps to protect themselves while away from court facilities, and educating judges on how they can minimize the availability of personal information on the internet.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.2 includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 5.1 includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Goal 1.3a: Improve the protection of judges, court employees, and the public in all court facilities, and the protection of judges in off-site judicial locations.

Goal 1.3b: Improve the protection of judges and their families at home and in non-judicial locations.

Goal 1.3c: Provide continued training to raise the awareness of judges and judiciary employees on a broad range of security topics.

Goal 1.3d: Improve the interior and exterior security of court facilities through the collaborative efforts of the judiciary, the U.S. Marshals Service, the Federal Protective Service, and the General Services Administration.

Goal 1.3e: Work with the U.S. Marshals Service and others to improve the collection, analysis and dissemination of protective intelligence information concerning individual judges.

Issue 2. Preserving Public Trust, Confidence, and Understanding

How should the judiciary promote public trust and confidence in the federal courts in a manner consistent with its role within the federal government?

Issue Description. The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the judiciary. In large part, the judiciary earns that trust and confidence by faithfully performing its duties; adhering to ethical standards; and effectively carrying out internal oversight, review, and governance responsibilities. These responsibilities include accountability for a failure to observe scrupulous adherence to ethical standards. The surest way to lose trust and confidence is failure to live up to established ethical standards and failure to hold judges and judiciary personnel accountable for misconduct. Transparency in efforts to ensure accountability for misconduct, where possible and appropriate, helps foster public trust and confidence.

Public perceptions of the judiciary are often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate. Changes in social media and communication will continue to play a key role in how the judiciary is portrayed to and viewed by members of the public. These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost. However, they also present the challenge of ensuring that judiciary information is complete, accurate, and timely. This challenge is especially difficult because judges are constrained in their ability to participate in public discourse. This plan includes four strategies to enhance public trust and confidence in, and understanding of, the judiciary:

> Assure high standards of conduct and integrity for judges and employees. (Strategy 2.1)
>
> Hold accountable judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct. (Strategy 2.2)
>
> Improve the sharing and delivery of information about the judiciary. (Strategy 2.3)
>
> Encourage involvement in civics education activities by judges and judiciary employees. (Strategy 2.4)

Strategy 2.1. Assure high standards of conduct and integrity for judges and employees.

> **Background and Commentary.** Judges and judiciary employees are guided by codes of conduct, internal policies, and robust accountability mechanisms within the judiciary that work together to uphold standards relating to conduct and the management of public resources. These mechanisms include disciplinary action, as well as formal complaint procedures for impacted employees to seek redress, such as dispute resolution processes, audits, program reviews of judiciary operations, internal control and information technology self-assessments, and workplace conduct oversight and response processes. The judiciary has adopted several measures, described in Issue 4 of this plan, to ensure an exemplary workplace in which all employees are treated with dignity and respect, and on a non-discriminatory basis.

Accountability mechanisms must address critical risks, keep pace with changes in regulations and business practices, and respond to public and government interest in detailed and accessible information about the judiciary. The regular review and update of policies, along with efforts to ensure that they are accessible to judges and employees, will help to improve judiciary compliance and controls. In addition, guidance relating to conduct that reflects current uses of social media and other technologies can help to avoid the inappropriate conveyance of sensitive information.

This strategy emphasizes up-to-date policies, timely education, and relevant guidance about ethics, integrity, and accountability. The strategy also relies upon the effective performance of critical integrated internal controls; governance of judiciary financial information; audit, investigation, and discipline functions; risk management practices; and self-assessment programs.

Goal 2.1a: Enhance education and training for judges and judiciary employees on ethical conduct, integrity, accountability, and workplace conduct.

Goal 2.1b: Ensure the integrity of funds, information, operations, and programs through strengthened internal controls and audit programs.

Strategy 2.2. Hold accountable judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct.

Background and Commentary. The judiciary seeks to ensure accountability by openly receiving information about potential misconduct and following existing procedures to address misconduct. Credible allegations of misconduct will be examined, investigated, and subject to appropriate action in accordance with existing statutory, policy, and other procedures. Individuals who experience or witness possible misconduct should be able to seek redress or satisfy their obligation to take appropriate action by bringing these issues to the attention of an appropriate official without fear of retaliation or adverse consequences. The judiciary's codes of conduct, Rules for Judicial Conduct and Judicial Disability Proceedings, and Model Employment Dispute Resolution Plan were updated in 2019 to reinforce these principles.

Transparency, to the extent permissible and possible, demonstrates the judiciary's fidelity to accountability for misconduct. Law and policy related to confidentiality and the legitimate privacy interests of victims, witnesses, and others may limit what information can be made public. The judiciary strives to make public information about misconduct procedures and related actions, where permissible and appropriate.

Goal 2.2a: Ensure avenues for seeking advice, obtaining assistance as to potential misconduct, obtaining redress, where appropriate, and filing a complaint are easily accessible.

Goal 2.2b: Ensure timely action is taken on credible allegations of misconduct according to established procedures, and when the evidence supports it, ensure action is taken with regard to misconduct.

Goal 2.2c: Ensure each circuit's website prominently displays actions taken under the Judicial Conduct and Disability Act and Rules for Judicial Conduct and Judicial Disability Procedures, in accordance with the requirements of the Act and the Rules, and summaries of other records or reports of workplace conduct issues, where permissible and appropriate.

Goal 2.2d: Consider conducting reviews of systemic issues, when appropriate.

Strategy 2.3. Improve the sharing and delivery of information about the judiciary generally.

Background and Commentary. Sources of news, analysis, and information about the federal judiciary continue to change, as do communication tools used by the public. These changes can present challenges to the accurate portrayal of the judiciary and the justice system. Enhanced communication between the judiciary and the media is one way to help increase the accuracy of stories about the justice system and public understanding of the courts. Since the media is a significant way in which the public learns about the judiciary, helping reporters understand court processes is one way to improve the public understanding of the justice system. Judges can undertake these efforts within the parameters of the Code of Conduct and while avoiding discussion of any specific cases.

It is now easier to communicate directly with the public, which can help to improve the public's understanding of the federal judiciary's role and functions. The judiciary must keep pace with ongoing changes in how people access news and information when formulating its own communications practices.

The federal judiciary also serves as a model to other countries for its excellence, judicial independence, and the delivery of equal justice under the law. The judiciary should continue to work with the executive branch when called on to communicate with representatives of other countries about the mission, core values, and work of the federal judiciary.

Goal 2.3a: Develop a communications strategy that considers the impact of changes in journalism and electronic communications and the ability of federal judges and employees to communicate directly with the public.

Goal 2.3b: Develop or increase communications and relationships between judges and journalists, consistent with the Code of Conduct and not specific to any case, to foster increased understanding of the judiciary.

Goal 2.3c: Communicate with judges in other countries to share information about the federal judiciary in our system of justice and to support rule-of-law programs around the world.

Strategy 2.4. Encourage involvement in civics education activities by judges and judiciary employees.

Background and Commentary. The federal judiciary relies on public respect, understanding, and acceptance. The lack of civics knowledge can have an adverse effect on the branch. A civically

informed public will also be better inoculated against attempts to undermine trust in the justice system. As noted by the Chief Justice of the United States in his 2019 Year End Report on the Federal Judiciary, "[t]he judiciary has an important role to play in civic education ... " Reinforcing the perspective of the Chief Justice, at its March 2020 session, the Judicial Conference of the United States "affirmed that civics education is a core component of judicial service; endorsed regularly-held conferences to share and promote best practices of civics education; and encouraged circuits to coordinate and promote education programs."

Public outreach and civics education efforts by judges and judiciary employees take place inside courthouses and in the community. These efforts could be facilitated through greater coordination and collaboration with civics education organizations. Resources to help judges and judiciary employees participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges' associations.

Goal 2.4a: Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary and its accountability and oversight mechanisms and external financial reporting.

Goal 2.4b: Facilitate participation by judges and court employees in public outreach and civics education programs.

Goal 2.4c: Support education about the defense function and the critical role it plays in ensuring fair trials and proceedings, as well as in maintaining public confidence in the justice system.

Issue 3. The Effective and Efficient Management of Public Resources

How can the judiciary provide justice consistent with its core values while managing limited resources and programs in a manner that reflects workload variances and funding realities?

Issue Description. The judiciary's pursuit of cost-containment initiatives has helped to reduce current and future costs for rent, information technology, the compensation of court employees and law clerks, and other areas. These initiatives have also improved resource allocation within the bankruptcy judges system, as well as the prudent allocation and management of resources within the magistrate judges system, and have helped the judiciary operate under difficult financial constraints. Cost-containment efforts have also helped the judiciary demonstrate to Congress that it is an effective steward of public resources, and that its requests for additional resources are well justified (Strategy 1.2).

The judiciary relies upon effective decision-making processes governing the allocation and use of judges, employees, facilities, and funds to ensure the best use of limited resources. These processes must respond to a federal court workload that varies across districts and over time. Developing, evaluating, publicizing, and implementing best practices will assist courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices must be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary wide. This plan includes a single strategy to address this issue.

Strategy 3.1. Allocate and manage resources more efficiently and effectively.

> **Background and Commentary.** The judiciary has worked to contain the growth in judiciary costs, and has pursued a number of studies, initiatives, and reviews of judiciary policy. Significant savings have been achieved, particularly for rent, compensation, and information technology. Cost containment remains a high priority, and new initiatives to contain cost growth and make better use of resources are being implemented or are under consideration.
>
> For example, over the past several years, court units throughout the judiciary have developed and implemented alternative approaches for carrying out their operational and administrative functions. These approaches have helped courts maintain the level and quality of services they deliver, and in many instances, have increased efficiencies and controlled costs associated with providing those services.
>
> This strategy also includes two goals to increase the flexibility of the judiciary in matching resources to workload. The intent is to enable available judges and court employees to assist heavily burdened courts on a temporary basis, and to reduce the barriers to such assistance. Supporting these goals is a third goal to ensure that the judiciary utilizes its networks, systems, and space in a manner that supports efficient operations. A fourth goal speaks to the critical need to maintain effective court operations and anticipate alternative delivery of services when disaster strikes.

Goal 3.1a: Make more effective use of judges to relieve overburdened and congested courts, including expanding ways to provide both short- and long-term assistance to districts and circuits with demonstrated needs for additional resources, and ensuring the effective utilization of magistrate judge resources.

Goal 3.1b: Analyze and facilitate the implementation of organizational changes and business practices that make effective use of limited administrative and operational employees but do not jeopardize public safety or negatively impact outcomes or mission.

Goal 3.1c: Manage the judiciary's infrastructure in a manner that supports effective and efficient operations, and provides for a safe and secure environment.

Goal 3.1d: Plan for and respond to natural disasters, terrorist attacks, pandemics and other physical threats in an effective manner.

Issue 4. The Judiciary Workforce and Workplace

How can the judiciary attract, develop, and retain a highly diverse and competent complement of judges, employees, and Criminal Justice Act (CJA) attorneys, and ensure an exemplary workplace in which everyone is treated with dignity and respect?

Issue Description. The judiciary can retain public trust and confidence and meet workload demands only if it is comprised of a diverse complement of highly competent judges, employees, and CJA attorneys. It cannot attract and retain the most capable people from all parts of society, nor can it keep the public's trust and confidence, unless it maintains a diverse and exemplary workplace in which all are treated with dignity and respect and are valued for their contributions regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability. Attracting and retaining highly capable and diverse judges, employees, and CJA attorneys, will require fair and competitive compensation and benefit packages. The judiciary must abide by and enhance, where appropriate, its standards and procedures to assure proper workplace conduct, and must also plan for new methods of performing work, and prepare for continued volatility in workloads, as it develops its future workforce. Three strategies to address this issue follow:

> Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary's future workforce requirements. (Strategy 4.1)
>
> Support a lifetime of service for federal judges. (Strategy 4.2)
>
> Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct. (Strategy 4.3)

Strategy 4.1. Recruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary's future workforce requirements.

> **Background and Commentary.** Public trust and confidence are enhanced when the judiciary's workforce – judges, employees, and CJA attorneys – broadly reflects the diversity of the public it serves. While it has no control over the appointment of Article III judges, the judiciary can and should strive for diversity in all other positions, particularly bankruptcy judges, magistrate judges, federal defenders, and CJA panel attorneys, all of whom occupy positions highly visible to the public. The judiciary must continue to pursue initiatives to attract future judges, such as the "Roadways to the Bench" programs, that are designed to secure a wide and diverse pool of applicants for every position, and ensure diversity among members of screening and selection committees. Judges must be encouraged to give special attention to diversity in their law clerk hiring practices.
>
> The judiciary must also continue to pursue initiatives to retain its position as an employer of choice. The judicial branch provides employees with many resources and services, including training and education programs. To remain competitive, especially with hard-to-fill occupations, the judiciary must have a strong program to attract, recruit, develop, and retain a diverse and highly qualified workforce.

Ongoing changes that the judiciary must address include an increase in the amount of work performed away from the office, shifting career and work-life expectations, and the unique challenges faced by probation and pretrial services offices in recruiting, retaining, training, and ensuring the physical and mental well-being of officers. Changes in how employees communicate and interact, and in how and where work is performed, are related to Strategy 3.1, as certain types of changes provide opportunities for the judiciary to reduce its space footprint and rental costs while creating a better and more efficient work environment. The judiciary must continue to invest in technology and explore changes to policy and procedures that allow for an effective remote and mobile workforce.

In addition, the judiciary must develop the next generation of executives. The management model in federal courts provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The judiciary must maintain a meaningful leadership and executive development training program and create executive relocation programs to ensure a wide pool of qualified internal applicants, while also conducting outreach efforts to attain a diverse and talented field of candidates.

Goal 4.1a: Establish, maintain and expand outreach efforts and procedures to make diverse audiences aware of employment opportunities in the judiciary, including as judicial officers.

Goal 4.1b: Strengthen the judiciary's commitment to workforce diversity, equity, and inclusion by expanding diversity program recruitment, education, and training; identifying barriers to recruitment of a diverse workforce; ensuring all recruitments are designed to attract and consider a diverse pool of applicants; and ensuring screening and hiring committees consist of diverse members.

Goal 4.1c: Identify current and future workforce challenges and develop and evaluate strategies to enhance the judiciary's standing as an employer of choice while enabling employees to reach their full potential.

Goal 4.1d: Deliver leadership, management, and human resources programs and services to help judges (especially chief judges), executives and supervisors develop, assess and lead employees.

Goal 4.1e: Provide mentoring and career advancement opportunities to all employees.

Goal 4.1f: Provide resources and develop Health and Wellness Committees to examine policy, practices, and programs that provide a supportive and healthy work environment for the maintenance or restoration of judiciary employees to promote health and competence throughout their career and beyond.

Strategy 4.2. Support a lifetime of service for federal judges.

Background and Commentary. It is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior judges, judges recalled to service, and retired judges.

In addition, education, training, and orientation programs offered by the Federal Judicial Center and the Administrative Office will need to continue to evolve and adapt. Training and education programs, and other services that enhance the well-being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Goal 4.2a: Strengthen policies that encourage senior Article III judges to continue handling cases as long as they are willing and able to do so. Judges who were appointed to fixed terms and are recalled to serve after retirement must be provided the support necessary for them to fully discharge their duties.

Goal 4.2b: Seek the views of judges on practices that support their development, retention, and morale, and evolve and adapt education, training, and orientation programs to meet the needs of judges.

Goal 4.2c: Encourage circuits to develop circuit-wide Health and Wellness Committees to promote health and wellness programs, policies, and practices that provide a supportive environment for the maintenance or restoration of health and wellness in support of a lifetime of service for judges.

Strategy 4.3. Ensure an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct.

Background and Commentary. Public trust and confidence and workforce morale and productivity are enhanced when the judiciary provides an exemplary workplace for everyone. As a result of efforts by the judiciary's Workplace Conduct Working Group – which recommended more than thirty measures to enhance the judiciary's workplace policies and procedures – the judiciary has adopted amendments to the applicable codes of conduct and the Rules for Judicial Conduct and Judicial Disability Proceedings to expressly state that sexual and other harassment, discrimination, abusive conduct, and retaliation are misconduct. In addition, the judiciary has adopted an improved Model Employment Dispute Resolution Plan to clearly describe prohibited conduct and provide simplified and effective redress, has established a Judicial Integrity Office and regional workplace conduct committees and workplace relations directors, and has undertaken extensive training on workplace civility and preventing harassment and other forms of discrimination. Beyond these and other measures already taken, the judiciary can continuously improve. The judiciary must diligently continue to work to ensure that it provides an exemplary workplace for all of its employees.

Goal 4.3a: Educate all judges and employees on standards of appropriate and inappropriate conduct, with continuing education on a regular basis, including as related to the codes of conduct and judicial conduct and disability procedures.

Goal 4.3b: Educate all judges and employees about the obligation to take appropriate action when they have reliable information about misconduct by a judge or other person, and about the available options for guidance regarding reporting misconduct, as well as mechanisms to report misconduct.

Goal 4.3c: Enhance accountability and effective redress, where appropriate, through universal adoption and conscientious application of the Model Employment Dispute Resolution Plan, and be transparent regarding judicial conduct and disability proceedings and other workplace conduct procedures in furtherance of and consistent with the law, related judiciary policy, and legitimate privacy interests.

Goal 4.3d: Provide a circuit director of workplace relations in each circuit, to whom employees within the circuit can report wrongful conduct concerns, and who will provide circuit-wide assistance to managers and employees on workplace conduct issues, including training, conflict resolution, and workplace investigations. Ensure that all court Employment Dispute Resolution (EDR) Coordinators are trained and certified under the CourtsLearn EDR Coordinator Certification course.

Goal 4.3e: Consider conducting reviews of systemic issues related to workplace conduct at the circuit and district level, when appropriate, and systematically evaluate whether guidance and procedures designed to foster an exemplary workplace are effective and whether additional action may be needed.

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Issue 5. Harnessing Technology's Potential

How can the judiciary develop, operate, and secure cost-effective national and local systems and infrastructure that meet the needs of court users and the public for information, service, and access to the courts?

Issue Description. Implementing innovative technology applications will help the judiciary to meet the changing needs of judges, judiciary employees, and the public. Technology can increase productive time, and facilitate work processes. For the public, technology can improve access to courts, including information about cases, court facilities, and judicial processes. The judiciary will be required to build, maintain, and continuously enhance effective IT systems in a time of growing usage, and judicial and litigant reliance. At the same time, the security of IT systems must be maintained, and a requisite level of privacy assured.

Responsibility for developing major national IT systems is shared by several Administrative Office divisions and Judicial Conference committees, and many additional applications are developed locally. In addition, local courts have substantial responsibilities for the management and operation of local and national systems, including the ability to customize national applications to meet local needs. The judiciary's approach to developing, managing, and operating national IT systems and applications provides a great deal of flexibility but also poses challenges for coordination, prioritization, and leadership. A key challenge will be to balance the economies of scale that may be achieved through operating as an enterprise with the creative solutions that may result from allowing and fostering a more distributed model of IT development and administration. The judiciary's strategy for addressing this issue follows.

Strategy 5.1. Harness the potential of technology to identify and meet the needs of judiciary users and the public for information, service, and access to the courts.

> **Background and Commentary.** The judiciary is fortunate to be supported by an advanced information technology infrastructure and services that continue to evolve. Next-generation case management systems are being developed, while existing systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology. In addition, technology is allowing for exponentially more data to be created, stored, and managed. The effective use of data tools supports evidence-based decision making.
>
> The effective use of advanced and intelligent applications and systems will provide critical support for judges and other court users. This plan includes a goal supporting the continued building of the judiciary's technology infrastructure, and another encouraging a judiciary-wide perspective for the development of certain systems. Another goal in this section focuses on the security of judiciary-related records and information.
>
> The effective use of technology is critical to furthering other strategies in this plan. In particular, the effective use of technology is critical to judiciary efforts to contain costs, and to effectively

allocate and manage resources (Strategy 3.1). Technology also supports improvements in the delivery of justice (Strategy 1.1); efforts to strengthen judicial security (Strategy 1.2); the delivery of training and remote access capabilities (Strategies 4.3 and 4.4); the accessibility of the judiciary for litigants and the public (Strategies 6.1 and 6.2); and judiciary accountability mechanisms (Strategies 2.1, 2.2, and 2.3). In addition, the judiciary must be aware of the ongoing threat of cyberattacks from domestic and foreign actors, and both individual and state-backed threats, and prepared to maintain the integrity of judiciary IT systems.

An effective technology program is also dependent upon the successful implementation of other strategies in this plan. In a rapidly changing field requiring the support of highly trained people, it is critical that the judiciary succeed in recruiting, developing, and retaining highly competent employees (Strategy 4.4). Investments in technology also require adequate funding (Strategy 1.2).

Goal 5.1a: Continue to build, maintain, and continuously enhance robust and flexible technology systems and applications that anticipate and respond to the judiciary's requirements for efficient communications, record-keeping, electronic case filing, public access, case management, and administrative support.

Goal 5.1b: Coordinate and integrate national IT systems and applications from a judiciary-wide perspective; continue to utilize local initiatives to improve services; and leverage judiciary data to facilitate decision-making.

Goal 5.1c: Develop system-wide approaches to the utilization of technology toachieve enhanced performance and cost savings.

Goal 5.1d: Continuously improve security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. In addition, raise awareness of the threat of cyberattacks and improve defenses to secure the integrity of judiciary IT systems.

Issue 6. Enhancing Access to Justice and the Judicial Process

How can the judiciary ensure that justice in the federal courts is fair, impartial, and accessible to all, regardless of wealth or status, and that the courts remain comprehensible, accessible, and affordable for people who participate in the judicial process?

Issue Description. Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. The federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. In the criminal context, where the vast majority of federal criminal defendants are eligible for the appointment of counsel, the judiciary must ensure that the needs of appointed counsel and the clients they represent are met. This plan includes three strategies that focus on identifying unnecessary barriers to justice and court access, and taking steps to eliminate them.

> Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process. (Strategy 6.1)
>
> Ensure that the federal judiciary is open and accessible, on a non-discriminatory basis, to all those who participate in the judicial process. (Strategy 6.2)
>
> Promote effective administration of the criminal defense function in the federal courts. (Strategy 6.3)

Strategy 6.1. Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.

> **Background and Commentary.** The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood.
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> To improve access, rules of practice and procedure undergo regular review and revision to reflect changes in law, to simplify and clarify procedures, and to enhance uniformity across districts. Rules changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. National mechanisms to consolidate and coordinate multidistrict litigation have been implemented to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. In addition, many courts provide settlement conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and pursuing federal litigation can be time consuming and expensive.

To improve access for lawyers and litigants in the judicial process, this plan includes the following goals:

Goal 6.1a: Ensure that court rules, processes, and procedures are published or posted in an accessible manner.

Goal 6.1b: Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.

Strategy 6.2. Ensure that the federal judiciary is open and accessible, on a non-discriminatory basis, to all those who participate in the judicial process.

Background and Commentary. As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings — including jurors, litigants, bankruptcy participants, witnesses, journalists, and observers — are treated with dignity and respect and understand the process. The judiciary's national website and the websites of individual courts provide the public with information about the courts themselves, court rules, procedures and forms, judicial orders and decisions, and schedules of court proceedings. Court dockets and case papers and files are posted on the internet through a judiciary-operated public access system. Court forms commonly used by the public have been rewritten in an effort to make them clearer and simpler to use, and court facilities are now designed to provide greater access to persons with disabilities. Some districts offer electronic tools to assist pro se filers in generating civil complaints. The Judicial Conference is working to enhance citizen participation in juries by improving the degree to which juries are representative of the communities in which they serve, reducing the burden of jury service, and improving juror utilization.

However, federal court processes are complex, and it is an ongoing challenge to ensure that participants have access to information about court processes and individual court cases, as well as court facilities. Many who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants and bankruptcy participants. Continued efforts are needed, and this strategy sets forth four goals to make courts more accessible for jurors, litigants, bankruptcy participants, witnesses, and others.

Goal 6.2a: Provide jurors, litigants, bankruptcy participants, witnesses, journalists, and observers with comprehensive, readily accessible information about court cases and the work of the courts.

Goal 6.2b: Improve the extent to which juries are representative of the communities in which they serve, reduce the hardships associated with jury service, and improve the experiences of citizens serving as grand and petitjurors.

Goal 6.2c: Develop best practices for handling claims of pro se litigants in civil and bankruptcy cases.

Strategy 6.3. Promote effective administration of the criminal defense function in the federal courts.

Background and Commentary. In the criminal context, access to fair and impartial justice is supported by appointing counsel to represent defendants who cannot afford to pay for their own counsel or other services necessary for their defense. Under the Criminal Justice Act (CJA), the judiciary oversees the provision of these defense services to eligible criminal defendants. In exercising this role, consistent with the Sixth Amendment, judges, acting as neutral arbiters in individual cases, must fairly and reasonably determine the resources available to the defense in any given case involving appointed counsel. To ensure the effective operation of the adversarial system and access to effective and conflict-free representation, the judiciary must strive to ensure that CJA practitioners can mount a skilled and vigorous defense of their clients, regardless of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability, so that the rights of individual defendants are safeguarded and enforced.

Consistent with the recommendations of the Judicial Conference's Ad Hoc Committee to Review the Criminal Justice Act Program, the judiciary must continue to consider improvements to the national administration of the defender services program.

This strategy supports the judiciary's efforts to pursue improvements in the fair and impartial delivery of justice (Strategy 1.1) and promotes public trust and confidence in the justice system by ensuring fair trials and proceedings (Issue 2), through three goals:

Goal 6.3a: Encourage districts to adopt and implement CJA plans based on the judiciary's model CJA plan to ensure compliance with relevant Judicial Conference policies.

Goal 6.3b: Ensure that CJA practitioners have the resources to provide effective and conflict-free representation.

Goal 6.3c: Provide training regarding best practices for criminal defense representation.

Issue 7. The Judiciary's Relationships with the Other Branches of Government

How can the judiciary develop and sustain effective relationships with Congress and the executive branch, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Issue Description. The judiciary is an independent branch of government with the solemn responsibility of safeguarding the constitutional rights and liberties of the nation's citizens, not simply a line item in the non-defense discretionary portion of the federal budget.

An effective relationship with Congress is critical to success in securing adequate resources. The judiciary must provide Congress timely and accurate information about issues affecting the administration of justice, and demonstrate that the judiciary has a comprehensive system of oversight and review that ensures the integrity of financial information, provides comprehensive financial reporting, and builds upon its foundation of internal controls and methods to prevent and detect fraud, waste, and abuse.

The judiciary's relationships with the executive branch are also critical, particularly in areas where the executive branch has primary administrative or program responsibility, such as reporting on annual government-wide financial activity, judicial security and facilities management. Ongoing communication about Judicial Conference goals, policies, and positions may help to develop the judiciary's overall relationship with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs. This plan includes two strategies to build relationships with Congress and the executive branch:

> Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress. (Strategy 7.1)
>
> Strengthen the judiciary's relations with the executive branch. (Strategy 7.2)

Strategy 7.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and Congress.

> **Background and Commentary.** This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance activities that are already underway, and to stress their importance in shaping a favorable future for the judiciary. Progress in implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to report measurable progress in meeting goals may also strengthen the judiciary's relationship with Congress. Congressional awareness of the judiciary's ongoing efforts to strengthen its financial oversight and reporting — building upon its existing foundation of internal controls and methods to prevent and detect fraud, waste and abuse — is critical to assure oversight bodies, as well as the public, that the judiciary has a robust program of oversight and effective controls in place.

Goal 7.1a: Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.

Goal 7.1b: Implement effective approaches, including partnerships with legal, academic, and private sector organizations, to achieve the judiciary's legislative goals.

Goal 7.1c: Encourage judges to engage with members of their local congressional delegation to foster mutual understanding and respect, and to establish lines of communication between the two branches.

Strategy 7.2. Strengthen the judiciary's relations with the executive branch.

Background and Commentary. The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and procedures that affect the administration of justice. The executive branch is also a source of financial reporting requirements for government-wide financial activity. The judiciary's ongoing efforts to transform financial reporting, enhance the judiciary's internal controls programs, and strengthen the integrity of judiciary financial data, provide tangible assurance to judiciary officials, oversight bodies, taxpayers, and others for whom the judiciary holds money in trust. This strategy focuses on enhancing the ability of the judiciary to provide input and information to its executive branch partners.

Goal 7.2a: Improve communications and working relationships with the executive branch to facilitate greater consideration of policy changes and other solutions that will improve the administration of justice.

Strategic Planning Approach for the Judicial Conference of the United States and its Committees

Committees of the Judicial Conference are responsible for long-range and strategic planning within their respective subject areas, with the nature and extent of planning activity varying by committee based on its jurisdiction.

The Executive Committee is responsible for facilitating and coordinating planning activities across the committees. Under the guidance of a designated planning coordinator, the Executive Committee hosts long-range planning meetings of committee chairs, and asks committees to consider planning issues that cut across committee lines.

At its September 2010 session, the Judicial Conference approved a number of enhancements to the judiciary planning process:

Coordination: The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator facilitates and coordinates the strategic planning efforts of the Judicial Conference and its committees.

Prioritization: With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee identifies issues, strategies, or goals to receive priority attention every two years.

Integration: The committees of the Judicial Conference integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy activities, including through the development and implementation of committee strategic initiatives – projects, studies, or other efforts that have the potential to make significant contributions to the accomplishment of a strategy or goal in the *Strategic Plan*.

Assessment of Progress: For every goal in the *Strategic Plan,* mechanisms to measure or assess the judiciary's progress are developed.

Substantive changes to the *Strategic Plan for the Federal Judiciary* require the approval of the Conference, but the Executive Committee has the authority, as needed, to approve technical and non-controversial changes to the *Strategic Plan*. A review of the *Strategic Plan* takes place every five years. (JCUS-SEP 10, p. 6)

Once approved by the Judicial Conference, updated or revised editions of the *Strategic Plan for the Federal Judiciary* supersede previous long-range and strategic plans as planning instruments to guide future policy-making and administrative actions within the scope of Conference authority. However, the approval of an updated or revised strategic plan should not necessarily be interpreted as the rescission of the individual policies articulated in the recommendations and implementation strategies of the December 1995 *Long Range Plan for the Federal Courts*.

Acknowledgements

On the recommendation of its Executive Committee, the 2020 edition of the *Strategic Plan for the Federal Judiciary* was approved by the Judicial Conference of the United States on September 15, 2020. This edition was prepared following an assessment of the implementation of the 2015 *Strategic Plan*, an analysis of issues and trends likely to affect the federal judiciary, and the consideration of updates and revisions proposed by Judicial Conference committees. An Ad Hoc Strategic Planning Group prepared drafts of the revised plan for review by Judicial Conference committees and consideration by the Executive Committee, which facilitates and coordinates strategic planning for the Conference and its committees.

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SEPTEMBER 2020

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JUDICIAL CONFERENCE OF THE UNITED STATES
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	OVERVIEW OF CHANGES TO STRATEGIES AND GOALS BY ISSUE 2020 UPDATE TO THE STRATEGIC PLAN FOR THE FEDERAL JUDICIARY								
CORE VALUES	A new Core Value "Diversity and Respect" was added to underscore the judiciary's commitment to workforce diversity and nondiscrimination.								
ISSUES	**STRATEGIES**				**GOALS**				**SUMMARY**
	New	Edited	Deleted	No Change	New	Edited	Deleted	No Change	
1. Providing Justice	-	2	-	1	1	7	-	5	A new goal secures adequate resources to provide the judiciary with the employees and resources necessary to meet workload demands.
2. Preserving Public Trust, Confidence, and Understanding	2	1	-	1	6	4	(2)	2	This Issue was elevated to second place to highlight its importance to the judiciary. One new strategy and supporting goals focus on accountability for misconduct and transparency in addressing and reporting misconduct. A second new strategy encourages involvement in civics education activities by judges and judiciary employees.
3. The Effective and Efficient Management of Public Resources	-	-	-	1	-	3	-	1	Edits to three goals emphasize efforts to assist overburdened districts and circuits; ensure cost effectiveness does not jeopardize public safety or negatively impact outcomes or mission; and efficiently and effectively manage the judiciary's infrastructure while providing for a safe and secure environment.
4. The Judiciary Workforce and Workplace	1	1	-	1	9	5	(1)	-	A new strategy ensures an exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct. This strategy has 5 new supporting goals that address workplace conduct, such as training, accountability, and redress, and the universal adoption of the judiciary's Model Employment Dispute Resolution Plan. Other edits underscore the judiciary's commitment to workforce diversity, career opportunities, and the health and wellness of judges and employees.
5. Harnessing Technology's Potential	-	1	-	-	-	3	-	1	Edits to the strategy and goals emphasize continuously enhancing robust and flexible technology systems and applications; using local initiatives to improve services and leverage judiciary data to facilitate decision-making; and raising awareness of the threat of cyberattacks and improving defenses to secure the integrity of judiciary IT systems.
6. Enhancing Access to Justice and the Judicial Process	1	1	-	1	3	2	(1)	3	A new strategy promotes the effective administration of the criminal defense function in federal courts. Its supporting goals encourage districts to adopt the judiciary's model CJA plan to ensure compliance with relevant Judicial Conference policies; ensure CJA practitioners have the resources to provide effective and conflict-free representation; and provide training regarding best practices for criminal defense representation.
7. The Judiciary's Relationships with the Other Branches of Government	-	-	-	2	1	-	-	3	A new goal encourages judges to engage with members of their local congressional delegation to foster mutual understanding and respect and establish lines of communication between the two branches.
Sub-Total	*4*	*6*	-	*7*	*20*	*23*	*(4)*	*15*	
TOTAL	**17 Strategies**				**59 Goals**				*2015: 13 Strategies; 43 Goals*

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JUDICIAL CONFERENCE COMMITTEES
ACTIVE STRATEGIC INITIATIVES AS AT SUMMER, 2019

Audits and Administrative Office Accountability	Update of the judiciary's cyclical audit program for court units and federal public defender organizations
	Internal controls outreach and training
Administration of Bankruptcy System	Bankruptcy Judicial Resources Surveys
	Bankruptcy Judgeship Vacancy Pilot Program
	Multi-District Designation Initiative
	Horizontal Consolidation Pilot Project
	Diversity and the Bankruptcy Bench
Budget	Cost Containment
	Congressional Outreach
Codes of Conduct	Provide confidential ethics advisory opinions to judges and judicial employees on request
	Review and update ethics publications for judges and judicial employees
	Expand ethics outreach and education programs for judges and judicial employees
	Respond to the Report of the Federal Judiciary Workplace Conduct working Group within the Committee's jurisdiction
Court Administration and Case Management	Cost Containment
	Next Generation Case Management/Electronic Case Filing (CM/ECF) System
	Most Stressed Courts
	Juror Utilization
Criminal Law	Monitoring of research on judge-involved supervision programs
	Implementing evidence-based practices in the federal probation and pretrial services system
	Becoming an outcome-based organization with a comprehensive outcome measurement system
Defender Services	Establish Federal Defender Organizations (FDOs)
	Fair Compensation for Panel Attorneys
	Case Budgeting
	Litigation Support
	Request DOJ Streamline its Death Penalty Authorization Protocol
	Promote Panel Attorney Access to Expert and Other Services
	FDO Staffing Formulas
	Electronic CJA Voucher System
	Workforce Diversity

JUDICIAL CONFERENCE COMMITTEES
ACTIVE STRATEGIC INITIATIVES AS AT SUMMER, 2019

Federal-State Jurisdiction	Jurisdictional Improvements Project
	Enhancing Federal-State Cooperation – expanded to include state court efforts to study or address racial fairness and implicit bias.
	Civic Engagement Initiatives
Financial Disclosure	Develop and implement a national system for electronic filing and management of financial disclosure reports
Information Technology	Next Generation Case Management Systems
	Data Strategy and Governance Plan
	Enhanced Hosting Services
	Next Generation Communications Network
	Support for Unified Communications
	Cybersecurity Efforts
Intercircuit Assignments	Judge Sharing Pilot Program
	Intercircuit Assignments Database System (ICADS)
International Judicial Relations	Outreach to the International Development Community
	Judicial Overseas Security
	Promoting Best Practices Related to Use of Electronic Equipment Outside of the United States
Judicial Branch	Judicial Compensation Benefits
	Judiciary Wellness
	Judiciary 101: provide information about the judiciary, and host local court visits for members of Congress and their staffs
	Congressional Member and Staff Contacts: increase the number of contacts with members of Congress that are not directly related to the judiciary's legislative goals.
	Programs for Judges and Journalists
	Civic Engagement Activities
Judicial Conduct and Disability	Judicial Conduct and Disability Training
	Judicial Conduct and Disability Website Enhancement
	Judiciary Health and Wellness Initiatives
Judicial Resources	Improved Diversity in the Judiciary Workforce
	Comprehensive Judgeship Legislation
	Targeted Judgeship Legislation
	Broadened Workforce Competencies
	Staff Relief in Congested Courts
	Improved Precision of Staffing Formulas

JUDICIAL CONFERENCE COMMITTEES
ACTIVE STRATEGIC INITIATIVES AS AT SUMMER, 2019

Judicial Security	Judiciary Emergency Management Program
	Physical Access Control Systems (PACS) Management
	Restricting Access to Federal Court Space
	Interagency Judicial Security Council
	Security Awareness (New – replaces Facility Access Cards which was completed)
Administration of the Magistrate Judges System	Effective Utilization of Magistrate Judges
	Role of Magistrate Judges in Court Governance
	Technology for Magistrate Judges
	Office of Magistrate Judge
	Cost Containment
Rules of Practice and Procedure	Implementing the 2010 Civil Litigation Conference
	Evaluating the Rules Governing Prosecutors' Disclosure Obligations
	Evaluating the Impact of Technological Advances
	• Analyzing and Promoting Recent Rules Amendments • Improving the Public's Understanding of the Federal Judiciary • Preserving the Judiciary's Core Values
Space and Facilities	Judiciary/General Services Administration Service Validation Initiative
	No Net New/Space Efficiency Program
	Review and Update of the *U.S. Courts Design Guide*
	Replacement Space for Non-Resident Courthouses

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Proposed Amendment to Civil Rule 7.1 Unanimously Approved by the Standing Committee by Email Vote on January 13, 2021

Revised January 5, 2021

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or ~~any~~ a nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* 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 ~~that names~~. The statement must name and identify~~ies~~ the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor ~~when~~:

(A) when the action is filed in or removed to federal court, and

(B) when any ~~subsequent~~later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party, ~~or~~ intervenor, or proposed intervenor must:

(1) file the disclosure statement * * *.

COMMITTEE NOTE

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of jurisdiction.

Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative

of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar——such as partnerships and limited partnerships——and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor. The rules that govern attribution, and the time that controls the determination of

complete diversity, are matters of subject-matter jurisdiction that this rule does not address. A supplemental statement is required if ~~events subsequent to the~~an event occurs after initial filing in federal court or removal to it that requires a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provisions in Rule 7.1(a)~~(1)~~ that extend~~s~~ the disclosure obligation to proposed intervenors and intervenors.