

**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
June 22, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 22, 2021. The following members were in attendance:

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

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –  
Judge Jay S. Bybee, Chair  
Professor Edward Hartnett, Reporter

Advisory Committee on Civil Rules –  
Judge Robert M. Dow, Jr., Chair  
Professor Edward H. Cooper, Reporter  
Professor Richard L. Marcus,  
Associate Reporter

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

Advisory Committee on Evidence Rules –  
Judge Patrick J. Schiltz, Chair  
Professor Daniel J. Capra, Reporter

Advisory Committee on Criminal Rules –  
Judge Raymond M. Kethledge, Chair  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King,  
Associate Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Rules Committee Staff Acting Chief Counsel; Bridget Healy and Scott Myers, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate at the FJC. Rebecca A. Womeldorf, the former Secretary to the Standing Committee, attended briefly at the start of the meeting.

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\* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Andrew Goldsmith was also present on behalf of the DOJ.

## OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He expressed hope that next January's meeting could be in person and began by reviewing the technical procedures by which this virtual meeting would operate. He welcomed new ex officio Standing Committee member Deputy Attorney General Lisa O. Monaco, though she was not available to join the meeting, and thanked the other DOJ representatives joining on her behalf. He also acknowledged and thanked Daniel Girard and Professor Bill Kelley, both completing their service on the Standing Committee.

Judge Bates next acknowledged Rebecca Womeldorf, former Secretary to the Standing Committee. She departed the Administrative Office in January of this year to become the Reporter of Decisions of the U.S. Supreme Court. Judge Bates thanked Ms. Womeldorf for her years of tremendous service to the rules committees and her friendship. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the January 5, 2021 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 53 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2020. It also sets out proposed amendments (to the Appellate and Bankruptcy Rules) that were recently adopted by the Supreme Court and transmitted to Congress; these will go into effect on December 1, 2021, provided Congress takes no action to the contrary. The chart also includes rules at earlier stages of the REA process.

## JOINT COMMITTEE BUSINESS

### *Emergency Rules Project Pursuant to the CARES Act*

Judge Bates introduced this agenda item, included in the agenda book beginning at page 77. The emergency rules project has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He extended his thanks and admiration to everyone who worked on these issues. In particular, he acknowledged Professor Daniel Capra's instrumental role in guiding the drafting of the proposed amendments and promoting uniformity among them.

Section 15002(b)(6) of the CARES Act directed the Judicial Conference and the Supreme Court to consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In January 2021, the Committee reviewed draft rules from each advisory committee, with the exception of the Advisory Committee on Evidence Rules, which had determined that no emergency rule was necessary. The Standing

Committee offered feedback at that point, focusing primarily on broader issues. During their Spring 2021 meetings, the advisory committees considered this feedback and revised their proposed amendments accordingly. The advisory committees now sought permission to publish the resulting proposals for public comment in August 2021. Any emergency rules approved for publication would be on track to take effect in December 2023 (if approved at each stage of the REA process and if Congress were to take no contrary action).

Professor Struve echoed Judge Bates’s thanks to Professor Capra and all the participants in the emergency-rules project. She invited Professor Capra to frame the discussion of issues for the Standing Committee to consider. Professor Capra reminded the Committee members that uniformity issues had been discussed in detail during the January 2021 meeting of the Standing Committee. The advisory committees, he reported, had taken the Standing Committee’s feedback to heart when finalizing their proposals at their spring meetings. As to most of the issues discussed at the January meeting, the advisory committees had achieved a uniform approach.

One such issue was who should declare a rules emergency. Should only the Judicial Conference be able to do this, or might any other bodies also be authorized to do so? The advisory committees understood the members of the Standing Committee to be in general agreement that it would be best if only the Judicial Conference had the power to declare emergencies. All four proposed emergency rules are now consistent on this point.

The definition of a rules emergency was also discussed at the January meeting. With one exception, the advisory committees’ proposals now use the same definitional language. The proposals all state that a 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.” The proposed emergency Criminal Rule adds a requirement that “no feasible alternative measures would sufficiently address the impairment within a reasonable time.” The understanding of the Advisory Committee on Criminal Rules was that the Standing Committee was comfortable with this remaining difference given the constitutionally-based interests and protections uniquely implicated by the Criminal Rules. With the goal of uniformity in mind, each of the other three advisory committees developing emergency rules had considered adding this “no feasible alternative” language to their own proposals; however, each of those advisory committees ultimately determined this was unnecessary.

Another issue discussed in January was the relatively open-ended nature of the draft Appellate Rule. The Advisory Committee on Appellate Rules thought this would be appropriate because Appellate Rule 2 was already very flexible and allowed the suspension of almost any rule in any particular case. There was some concern among members of the Standing Committee that, to offset this open-ended rule, more procedural protections might be useful. The Advisory Committee responded by revising its proposal to include safeguards that track those adopted by the other advisory committees.

The termination of rules emergencies was also discussed. This issue involves whether the rules should mandate that the Judicial Conference terminate an emergency declaration when the emergency condition no longer exists. The advisory committees agreed that it would be

inappropriate to impose such an obligation on the Judicial Conference and that termination would likely occur toward the end of the emergency period anyway, such that it would be useful to accord the Judicial Conference discretion to simply let the declaration's original term run its course.

The advisory committees also discussed whether there should be a provision in the emergency rules to account for the possibility that, during certain types of emergencies, the Judicial Conference itself might not be able to communicate, meet, or declare an emergency. The advisory committees did not think it was necessary to include such a provision because it would take extreme if not catastrophic circumstances to trigger this provision and, under such circumstances, a rules emergency is unlikely to be a priority. The courts would probably want to have plans in place for these kinds of circumstances, but the rules of procedure did not seem like the appropriate place for them, nor were the rules committees in the best position to work them out.

Finally, the advisory committees had discussed what Professor Capra termed a “soft landing” provision—a provision addressing what should happen when a proceeding that began under an emergency rule was still ongoing when a rules emergency terminated. The advisory committees had addressed this issue in different ways. Proposed Criminal Rule 62 would allow a proceeding already underway to be completed under the emergency procedures (if resuming compliance with the ordinary rules would be infeasible or unjust) so long as the defendant consented, while proposed Bankruptcy Rule 9038 and Civil Rule 87 deal with the “soft landing” issue on more of a rule-by-rule basis.

One provision that remained nonuniform was the provision laying out what the Judicial Conference's rules emergency declaration would contain. The proposed Bankruptcy and Criminal Rules provide that the Judicial Conference declaration must state any restrictions on the provisions (set out in these emergency rules) that would otherwise go into effect, while the proposed Civil Rule provides that the declaration must “adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them.” Professor Capra described this as a “half-full / half-empty” distinction.

Professor Capra thanked the Standing Committee members for the valuable input they provided at their January meeting and he observed that the proposals were in a good place with regard to uniformity. Most provisions were uniform and the reasons for any remaining points of divergence had been well explained. Judge Bates invited questions or comments on Professor Capra's presentation regarding uniformity. There were none.

Judge Bates next invited Judge Kethledge and Professors Beale and King to present proposed Criminal Rule 62. Judge Kethledge thanked Judge Dever, the chair of the Rule 62 Subcommittee, as well as the reporters, Judge Bates, and Judge Furman for their input on the proposed rule. He began by describing the Advisory Committee's process. The Subcommittee held a miniconference at which it heard from practitioners and judges describing their experiences during the COVID-19 emergency and prior emergencies. Judge Dever also surveyed chief district judges for their input. Judge Kethledge noted an overarching principle that had guided the drafting effort: The Subcommittee and Advisory Committee are stewards of the values protected by the Criminal Rules—protections historically rooted in Anglo-American law. The paramount concern

is not efficiency but, rather, accuracy. Accordingly, proposed Criminal Rule 62 authorizes departures from normal procedures only when absolutely necessary. The “no feasible alternative measures” requirement contained in the proposed rule reflected that approach. Proposed Rule 62 takes a graduated approach to remote proceedings, with higher thresholds for holding more important proceedings by videoconference or other remote technology. Concerns about the importance of in-person proceedings reach their apex with respect to pleas and sentencings.

Judge Kethledge pointed out that many of the recent changes to the proposed rule responded to helpful feedback from members of the Standing Committee. Proposed Rule 62(e)(4), for example, has been revised to make clear that its requirements (for conducting proceedings telephonically) apply whenever any one or more of the participants will be participating by audio only. Thus if one or more of the participants in a videoconference proceeding lose their video connection, and Rule 62(e)(4)’s requirements are met, the proceeding can continue as a videoconference in which those specific participants participate by audio only. Professors Beale and King added that the committee was grateful to Professor Kimble and his style-consultant colleagues and to Julie Wilson for helping finalize late-breaking changes to the proposed rule. Judge Kethledge and Professor Beale noted that some minor changes to the proposed rule—indicated in brackets in the copy of the draft rule and committee note at pages 161, 170, and 174-75 of the agenda book—had been made after the Advisory Committee’s spring meeting and therefore had not been approved by the full committee; but those changes had the endorsement of Judges Kethledge and Dever and the reporters.

Judge Bates suggested that the reporters open discussion of proposed Rule 62 by highlighting two changes that were made after publication of the agenda book. Professor King explained the first, located in paragraph (e)(3), found on page 159 line 101 in the agenda book. In the agenda book’s version, Rule 62(e)(3)’s requirements for the use of videoconferencing for felony pleas and sentencings incorporated by reference the requirements of Rules 62(e)(2)(A) and (B) (which apply to the use of videoconferencing at other, less crucial proceedings). Judge Bates had pointed out that it was not necessary to incorporate by reference Rule 62(e)(2)(A)’s requirement, because Rule 62(e)(3)(A)’s requirement is more stringent. The suggestion, which the reporters and chair endorsed, was that line 101 be revised to read “the requirement in (2)(B),” eliminating the reference to (2)(A).

Another change not reflected in the agenda book was in the committee note on page 166 line 274. This too was in response to a suggestion by Judge Bates, this time concerning Rule 62’s “soft landing” provision. As noted previously, the “soft landing” provision addresses what happens if there is an ongoing proceeding that has not finished when the declaration terminates. The committee note to Rule 62(c), as approved by the Advisory Committee, explained that the termination of an emergency declaration generally ends the authority to depart from the ordinary requirements of the Criminal Rules but “does not terminate ... the court’s authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3).” Judge Bates had suggested that it would be helpful to explain how this statement in the committee note (shown at lines 271-74 at page 166 of the agenda book) related to the text of proposed Rule 62. To provide that explanation, the chair and reporters proposed to augment the relevant sentence in the committee note so that it would read: “It does not terminate, however, the court’s authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the

proceeding authorized by (d)(3) is the completed impanelment.” This explanation reflected the consensus view at the spring Advisory Committee meeting.

Judge Kethledge suggested that the Standing Committee discuss the proposed rule section-by-section. Judge Bates agreed. There were no comments on subdivisions (a) through (c), which lay out the emergency declaration and termination provisions that Professor Capra had already summarized, and which are largely consistent with those employed in the other proposed emergency rules. Discussion then moved to subdivision (d), which details authorized departures from the rules following a declaration.

A judge member expressed strong support for the proposed Rule overall. This member suggested a change to the committee note’s discussion concerning Rule 62(d)(1). Rule 62(d)(1) states that when “conditions substantially impair the public’s in-person attendance at a public proceeding, the court must provide reasonable alternative access” which should be “contemporaneous if feasible.” The Rule text focuses on the timing of the access. The proposed committee note, at page 167, lines 312-15, instead focused on the form of access, stating with respect to videoconference proceedings that an audio feed could be provided to the public “if access to the video transmission is not feasible.” This language in the note indicated a preference—for video instead of audio access—that was not grounded in the text of the proposed rule. Instead, the rule states that contemporaneous access—whether audio or video—is preferable to asynchronous transmission such as a transcript released after the proceeding. And the committee note’s suggestion that video access should be provided to the public if “feasible” seemed to raise an undue barrier for courts—such as this member’s court—that (due to bandwidth and other concerns) had been providing the public with audio-only access to video proceedings. It could be hard to make a finding that public video access was not “feasible”—would that require considering whether switching to a different electronic platform would permit public video access? The member suggested deleting this sentence from the committee note. Professor Beale explained that this was just one example and the Advisory Committee was not wedded to it. Judge Kethledge agreed that this example could be misunderstood. He thought there would not be much harm in striking that sentence from the committee note. Judge Bates also agreed, noting that his court had also been providing the public with audio-only access to video proceedings.

A second judge member suggested that, even if the Note’s language about “feasibility” should be deleted, it could be useful for the Note to discuss the possibility of using audio to provide the public with “reasonable alternative access.” The first judge endorsed the Rule’s feasibility language concerning the timing of access: public access should be contemporaneous if that is feasible. A third judge member warned that requiring a feasibility analysis could suggest that courts should engage in “heroics” to try to provide contemporaneous video access to the public. An emergency rule will only apply in unusual circumstances. It is not helpful for the rules to require judges operating under such circumstances to devote extensive attention to information technology issues. The idea is to protect the rights of the defendant while acknowledging the rights of the public and to reconcile those in a timely fashion. This judge urged the deletion of any words that could introduce new points of dispute.

Professor Struve wondered whether a way to keep the thought about audio transmission as an option would be to insert a reference to it around line 300, as an example of a reasonable form

of access. She suggested a sentence reading: “Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.” The judge who first raised this issue agreed that this would be a better place for this example, as did Judge Bates. This would allow the deletion of the sentence at lines 312–15 that had been critiqued.

Discussion then moved to subdivision (e), which addresses the use of videoconferencing and teleconferencing after the declaration of a rules emergency. A judge member asked, in light of the decision to strike the reference to subparagraph (2)(A) from paragraph (e)(3), whether it would make sense to repeat in paragraph (e)(3) the requirements laid out in subparagraph (2)(B), the remaining cross-referenced provision. Judge Bates noted that the cross-reference only referred back ten lines or so and would thus be easy enough to follow. Professor Kimble noted that, when possible, it is better to avoid unnecessary cross-references, but that it always depends on how much language would need to be repeated and on the distance from the original language. Professor Kimble thought that the cross-reference was reasonable here.

A judge member wanted to make Committee members aware of caselaw interpreting Rule 43(c)(1)(B)’s provision that a noncapital defendant who has pleaded guilty “waives the right to be present ... when the defendant is voluntarily absent during sentencing.” In 2012—before the pandemic or the CARES Act—the Second Circuit had addressed the circumstances under which, pursuant to Criminal Rule 43(c)(1)(B), a defendant could consent to the substitution of video participation for presence in person. *See United States v. Salim*, 690 F.3d 115 (2d Cir. 2012). The Second Circuit had said that consent for purposes of Rule 43(c)(1)(B) can be made through counsel, though it must be knowing and voluntary. *Salim*’s requirements, this member stated, are nowhere near as stringent as those in proposed Rule 62(e)(3). The judge wondered whether the Second Circuit would adhere to *Salim*, in the non-emergency context, if Rule 62 were to be adopted. But the member did not think that this was a reason not to proceed with the rule as drafted.

Another judge member thanked the Advisory Committee for the proposed rule, which this member characterized as excellent. This judge had a question about subparagraph (e)(3)(B), which (as set out in the agenda book) provided that a felony plea or sentencing proceeding could not be conducted by videoconference unless “the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing.” The phrase “requests in writing” had replaced “consents in writing” in an earlier draft. The committee note explained that this change was intended to provide an additional safeguard, and suggested that a judge might want to hold a colloquy with the defendant to confirm actual consent. The judge wanted to know whether the Advisory Committee intended that the court must make a finding that there is consent, as opposed to simply treating the written request as necessarily demonstrating consent. A written request is not the same as actual consent because it is always possible that a defendant could be confused or feel pressured. This judge did not think that subparagraph (e)(3)(B) was sufficiently clear about requiring a finding that would guarantee actual consent. Subparagraph (e)(2)(C), by comparison, suggested the need for a finding in a much clearer way. The judge suggested referencing the “requirements in (2)(B) and (C)” on line 101 as one possible way of clarifying the need for a finding.

Professor King asked whether the insertion of the words “and consents” after “in writing” in (e)(3)(B) on line 111 would suffice to clarify the point. The judge member responded that such

a change would ensure that there is a writing in the record that evinces consent; but that change by itself would not make clear that the judge should verify that the *defendant* (as distinct from the defendant’s lawyer) was actually consenting. The member asked whether consultation was required on the record for a consent to videoconferencing at other types of proceedings under paragraph (e)(2). Professor King responded that Rule 62(e)(2)(C) does not require a finding on the record (with respect to that Rule’s requirement that the defendant consents after consulting with counsel). Judge Bates noted that he had been considering a similar suggestion to Professor King’s, that lines 110-11 might require that a defendant “consent by requesting in writing.” But he was not sure whether that addressed the concern. The committee note might have to be changed as well.

Another judge member asked how subparagraph (e)(2)(C)—requiring that a defendant “consents after consulting with counsel”—would work for defendants who had refused counsel and were proceeding pro se. Judge Bates noted that consultation with counsel is required under both (e)(2) and (e)(3). Professor Beale responded that the Advisory Committee had not discussed this question, but that she assumed that consultation requirements would not apply for a defendant who had waived the right to counsel. Proposed Rule 62(d)(2) provides that “the court may sign for” a pro se defendant “if the defendant consents on the record,” but no specific cross-reference to that provision appears in the (e)(2) and (e)(3) consultation provisions. The judge noted that “an adequate opportunity to consult”—used in (e)(2)(B)—might be a better formulation for (e)(2)(C) than “consulting.”

A practitioner member noted that there were different consultation or consent requirements in the different subsections of (e) and wondered how much protection would be lost if (e)(2)(C) just said “the defendant consents.” This might resolve the pro se defendant issue. In (e)(3)(B) the word “consent” could be added somewhere. And (e)(4)(C) simply requires that “the defendant consents.” This would level out the articulation in all three provisions. Professor Beale stated that this was one possible way to resolve the issue. As an alternative, she expressed support for revising (e)(2)(C) to say “after the opportunity to consult.” A defendant who has waived representation clearly has had an opportunity to consult with counsel.

The judge who had raised the concern about the writing and consent issue in the first place suggested a solution that involved substituting “consent in writing” for “request in writing.” Professor King then explained that the Advisory Committee had intended to create an added protection by requiring a request from the defendant, rather than just consent. The idea has to come from the defendant, not from any outside pressure. To maintain the Advisory Committee’s policy choice, “consent in writing” would need to be in addition to a written request, not a substitute for it.

As to the suggestion that the phrase “after consulting with counsel” be deleted from (e)(2)(C), Professor King pointed out that the videoconferencing and teleconferencing proceedings authorized by the CARES Act can only take place with the defendant’s consent “after consultation with counsel.” So Congress made a policy choice to require that consultation with counsel precede the consent. The Advisory Committee carried forward that policy choice. But inserting a reference to the “opportunity” to consult, Professor King suggested, would not be inconsistent with the Advisory Committee’s intent.



Judge Kethledge noted that it was a judgment call whether to require the court to determine that the defendant actually has consulted with counsel with respect to consent to videoconferencing, or whether to require the court to find merely that the defendant generally had an opportunity to consult with counsel before and during the proceeding (leaving it to district judges in particular proceedings to determine how searching the inquiry should be with respect to consultation on the specific issue of consent to videoconferencing). Judge Kethledge acknowledged that the practitioner member’s drafting suggestion would make the provisions under (e)(2)(C), (e)(3)(B), and (e)(4)(C) more uniform, but—Judge Kethledge suggested—spelling out a requirement concerning opportunity to consult with counsel seems worthwhile given the gravity of consenting to videoconferencing.

An appellate judge member followed up on Professor King’s point that “request” was a higher requirement than consent. This member expressed support for requiring a request from the defendant; such a request is more likely to trigger a finding of waiver in the event that the defendant later tries (on appeal) to challenge the district court’s use of videoconferencing.

Professor Capra reminded the members that at this stage the Standing Committee was only going to be voting on whether to send the rule out for public comment. He cautioned against too much drafting on the floor at this stage. These issues could always be kept in mind going forward.

An academic member expressed support for requiring only an opportunity to consult, and not actual consultation, with counsel; avoiding a requirement of actual consultation eliminates the risk that a defendant might later deny that the consultation occurred. A judge member stated that, if the rule refers to an “opportunity to consult,” it should use the “adequate opportunity” language used in other provisions—lest someone draw an inference from the fact that different formulations are used in different places. This judge member pointed out, approvingly, that it was a policy choice by the Advisory Committee that subparagraph (e)(4)(C) not include the “opportunity” or “consultation” language. Subparagraph (e)(4)(C) omits those requirements because the idea is to allow the defendant to consent quickly and easily to continuing a proceeding if a participant loses video connection when a proceeding is already underway.

The judge who raised the writing and consent issue suggested revising paragraph (e)(3)(B) (at lines 109-13) to require that “the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing.” This would emphasize that a request is more than consent, while also ensuring that the defendant is actually consenting. Professor Beale and Judge Kethledge endorsed this suggestion because this was what the Advisory Committee had in mind. A judge member expressed concern that defendant signatures had been difficult to obtain during the pandemic, but Professor Beale noted that paragraph (d)(2) provides ways to comply with defendant-signature requirements when emergency conditions limit a defendant’s ability to sign.

Judge Bates confirmed that Judge Kethledge and the reporters agreed with the change to line 111 (which they did), and said that the Standing Committee would proceed with considering the rule with that change. The rule being voted on would include the following changes:

- bracketed changes indicated in the agenda book at pages 161, 170, and 174-75

- changes to paragraph (e)(3) and committee note discussion of subdivision (c) that had been suggested by Judge Bates after publication of the agenda book but prior to today's meeting
- changes to subparagraph (e)(3)(B)
- changes to committee note discussion of paragraph (d)(1)

No change to lines 94-95 was made at this time. The reporters would note the potential issue for pro se defendants and the Advisory Committee would give it further consideration following the public comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Criminal Rule 62 for public comment with the above-summarized changes.**

The Civil Rules Advisory Committee presented its proposed rule next. Judge Robert Dow introduced it, thanking the subcommittee chairs and the reporters, and noting his appreciation for the input provided by the members of the Standing Committee at the January meeting. Both the Advisory Committee and its CARES Act Subcommittee agreed that the Civil Rules had performed very well during the pandemic and that civil proceedings had generally moved forward, with the exception that trials are backed up. Judge Dow said that the Advisory Committee was looking forward to receiving public comment and that it was still open to proceeding down any of three very different paths with regard to the emergency rule. One possibility was to proceed with the emergency rule (proposed Civil Rule 87) as currently drafted. Another possibility was to directly amend Civil Rules 4 (on service) and 6 (on time limits for postjudgment motions). Finally, given that the Civil Rules had proven adaptable, the Advisory Committee had not ruled out recommending against a civil emergency rule and leaving the Civil Rules unaltered.

Professor Cooper introduced the discussion of proposed Civil Rule 87. Rule 87 contains six emergency rules, five of which concern service of the summons and complaint. Rule 87(c)(1) (addressing alternate modes of service during an emergency) provides for service through “a method that is reasonably calculated to give notice.” The Rule states that “[t]he court may order” such service in order to make clear that litigants need to obtain a court order rather than taking it on themselves to use the alternate mode of service and seek permission later. Proposed Rule 87(c)(1) builds in a “soft landing” provision, because the Advisory Committee concluded that each of the emergency Civil Rules should have its own “soft landing” provision. Rule 87(c)(1) provides that if the emergency declaration ends before service has been completed, the authorized method may still be used to complete service unless the court orders otherwise.

Rule 87(c)(2) softens Civil Rule 6(b)(2)'s ordinarily-impermeable barrier to extensions of time for motions under Civil Rules 50(b) and (d), 52(b), 59, and 60(b). Rule 87(c)(2) has been carefully integrated with the provisions of Appellate Rule 4(a)(4)(A) (concerning motions that restart civil appeal time). The Appellate Rules Committee has worked in tandem with the Civil Rules Committee, and is proposing an amendment to Appellate Rule 4(a)(4)(A)(vi) that will mesh with proposed Civil Rule 87(c)(2). Rule 87(c)(2)(C) sets out a “soft landing” provision that addresses the timeliness of motions and appeals filed after an emergency declaration ends; it provides that

“[a]n act authorized by an order under” Rule 87(c)(2) “may be completed under the order after the emergency declaration ends.”

The main remaining point of discontinuity with the other three proposed emergency rules was the fact—discussed earlier by Professor Capra—that proposed Rule 87(b)(1)(B) required the Judicial Conference to “adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them.” This differs from proposed Criminal Rule 62(b)(1)(B), which directs that the emergency declaration “state any restrictions on the authority” granted in subsequent portions of Criminal Rule 62. The Criminal Rule’s formulation would not work for Civil Rule 87(b)(1)(B), because it would not make sense to ask the Judicial Conference to cabin the district court’s discretion with respect to methods of service, or to invite the Judicial Conference to alter the intricate structure set out in Civil Rule 87(c)(2). Instead, the Judicial Conference should consider which of the emergency Civil Rules to adopt. Professor Cooper concluded by reminding the Standing Committee members of Professor Capra’s suggestion that it might be appropriate to allow disuniformity to remain for now in order to get public comment on the disuniformity itself.

Professor Marcus underscored the idea that Civil Rule 87 is dealing with very different issues than Criminal Rule 62. Rule 87(c)(1) authorizes a court to order additional manners of service in a given case. Trying to do something more global that did not require a court order had not been viewed as a good idea by the subcommittee.

A practitioner member supported publication of the rule. Given the design of each of the proposed emergency rules, this member acknowledged, achieving perfect uniformity is difficult. However, this member suggested that in a system where, for the first time, emergency rules are being introduced and the Judicial Conference is being tasked with declaring rules emergencies, there was something to say for establishing a consistent default rule along the lines set out in the proposed Bankruptcy and Criminal emergency rules—namely, that triggering the emergency triggers all the emergency rules. This would mean less work for the Judicial Conference, which would be able to activate all the emergency rules by declaring the emergency. But this could be discussed further following publication. Professor Cooper said that Civil Rule 87(b)(1)(B) envisioned substantially the same approach—namely, that all emergency provisions would be adopted in the emergency declaration unless the Judicial Conference affirmatively excepted one or more of them. But the member pointed out that Rule 87(b)(1)(B) requires explicit adoption of the emergency rules; what would happen if the Judicial Conference simply declared an emergency and said nothing else? Professor Capra agreed that if there is nothing in the declaration except the declaration itself, then nothing would happen under Rule 87. Professor Cooper suggested that the issue could be resolved if paragraph (b)(1) were revised to read: “[t]he declaration: (A) must designate the court or courts affected; (B) adopts all the emergency rules . . . unless it excepts one or more of them; and (C) must be limited to a stated period of no more than 90 days.” Professor Capra suggested that it was unnecessary to resolve now, but also that it would be preferable to copy the language used in the other sets of rules.

A judge member agreed that more uniformity would be better but that it did not have to be addressed today. This member then asked two questions. First, why did the rule, in paragraph (c)(1), say that a “court may order service” through an alternative method instead of saying that a “court may authorize service?” Would it not be better to allow a party to change its mind and

decide that a standard method of service would be fine after all? A court order might lock a party into the alternative service method. Professor Marcus explained that the Advisory Committee used “order” rather than “authorization” because an “order” guarantees that the judge approves service by an identifiable means (a court order). The member asked whether the “order” would require that service must be by the alternative means, but Professor Marcus thought that surely the order would only add an additional means rather than ruling out standard methods. The member suggested revising (c)(1), at line 27, to say “[t]he court may by order authorize.” Professor Cooper and Judge Dow approved of this change.

The member’s second question also related to paragraph (c)(1). The member appreciated the point, in the proposed committee note, that courts should hesitate before modifying or rescinding an order issued under paragraph (c)(1) for fear that a party may already be in the process of serving its adversary. The member had previously thought it might be advisable to require good cause for modifying the order. After consideration, the member no longer thought a good cause standard was necessary, but the member wondered if it would be better if paragraph (c)(1), at page 125 lines 35-36, required that the court give the plaintiff notice and an opportunity to be heard before modifying or rescinding the order. Professor Cooper was neutral on this suggestion. Judge Dow did not see any downside to requiring notice and opportunity to be heard and thought that this was what most judges would do anyway. Professor Hartnett suggested omitting the word “plaintiff” because plaintiffs are not the only ones who serve summonses and complaints. Accordingly, lines 35-36 were revised to read “unless the court, after notice and an opportunity to be heard, modifies or rescinds the order.”

A third change agreed upon was to delete (for style reasons) “authorized by the order” from line 33.

A judge member thought that the proposed rule addressed most of the Civil Rules that are integrated with Appellate Rule 4, which governs the time to file a notice of appeal. This judge noted, however, that proposed Civil Rule 87 did not seem to address Rules 54 and 58, each of which is also integrated with the Appellate Rules through Rule 59. (The member was referring to Civil Rule 58(e), which provides that “if a timely motion for attorney’s fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.”) Professor Struve responded that the Advisory Committee was attempting to account for the Rule 6(b)(2) provision stating that courts cannot extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The proposed rule targeted those particular constraints. The judge member acknowledged that explanation, but argued that Rule 58(e) contains its own bar on extensions that could not be avoided if a litigant wanted to preserve the option of waiting to appeal. Professor Struve responded that the deadline in Rule 58(e) (“a timely motion ... under Rule 54(d)(2)”) was extendable under Rule 6(b)(1); Judge Bates and Professor Cooper agreed with this view. The member responded that he read Rule 58(e) to incorporate the time deadline in Civil Rule 59, not the Civil Rule 59 deadline as it might be extended under the emergency rule. After some further discussion, Professor Struve suggested that this issue be noted for further discussion following public comment. Judge Bates agreed that this suggestion could be discussed further during the comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Civil Rule 87 for public comment** with the three modifications (to Rule 87(c)(1)) described above.

Judge Dennis Dow introduced the proposed emergency Bankruptcy Rule, new Rule 9038. He thanked Professor Gibson for her excellent work in spearheading the drafting of the proposed rule and Professor Capra for his leadership and coordination of the project. Changes since January largely resulted from guidance the Standing Committee had provided at its January meeting. Rules 9038(a) and (b) generally track the approach taken in the other emergency rules, while Rule 9038(c) addresses issues specific to the Bankruptcy Rules. Professor Gibson noted one point of disuniformity—the use of “bankruptcy court” instead of “court” throughout the proposed rule. Bankruptcy Rule 9001 defines “court” as the judicial officer presiding over a given case, so while the Advisory Committee thought the risk of confusion was low, the decision was made to use “bankruptcy court” when referring to the institution rather than the individual. The only substantive change since January was to revise paragraph (c)(1) to allow a chief bankruptcy judge to alter deadlines on a division-wide basis as opposed to district-wide when a rules emergency is in effect. The thinking was that if an emergency only affected part of a district, then deadlines could be extended in only that area. The emergency rule was largely an expansion of Rule 9006(b) (which addresses extensions). When the bankruptcy emergency subcommittee surveyed the Bankruptcy Rules, they determined that Rule 9006(b) was arguably insufficient in some emergency situations because it did not allow extensions of all rules deadlines (for example, the deadline for holding meetings of creditors). The proposed emergency rule would allow greater flexibility. The Advisory Committee agreed to make its rule uniform with the other proposed emergency rules in providing that only the Judicial Conference would be authorized to declare a rules emergency.

Judge Bates had a question about Rule 9038(c). In subsection (c)(1) a chief bankruptcy judge is allowed to toll or extend time in a district or division and in (c)(2) a presiding judge can extend or toll time in a particular proceeding. Judge Bates’s question concerned (c)(4)’s provision on “Further Extensions or Shortenings.” He asked if that provision was intended to allow presiding judges to further modify deadlines regardless of who had modified them in the first place. Professor Gibson and Judge Dow said yes.

A judge member noted that the rule did not permit chief judges to adjust the deadline extensions authorized by their own prior orders. Professor Gibson agreed that chief judges could not do this, except in individual cases over which they are presiding. The idea was that the chief judge’s extensions would be general. This member also asked what it meant to say that further extensions or shortenings could occur “only for good cause after notice and a hearing and only on the judge’s own motion or on motion of a party in interest or the United States trustee.” Would it be enough to refer simply to notice and an opportunity to be heard, rather than a hearing? And why spell out whose motion could trigger the adjustment? Professor Gibson and Judge Dow explained that under the Bankruptcy Code, “notice and a hearing” is a defined term and that it required only an opportunity to be heard. There would be no need to hold a hearing if one was not requested. The point of mentioning whose motion could trigger the adjustment was to establish that the court could adjust the deadlines *sua sponte*. Judge Dow said that without this language he did not think it would be clear that judges could initiate the process on their own. Judge Bates asked whether

this language was necessary. In the district courts, judges can always initiate these kinds of processes on their own. Professor Gibson thought there were some situations where parties had to file motions. Judge Dow explained that the language was there for clarity and to prevent litigants from arguing that a court lacked the power to act *sua sponte*. Professor Hartnett asked about the significance of saying that “only” these persons could move. Who else could possibly move other than the persons listed? Professor Gibson and Judge Dow agreed that words “and only” could probably be cut.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Bankruptcy Rule 9038 for public comment** with the sole modification of the words “and only” on line 63 being deleted.

Judge Bybee and Professor Hartnett introduced the Advisory Committee on Appellate Rules’ proposed amendments to Appellate Rules 2 and 4. Judge Bybee thanked everyone for their input and expressed that the Advisory Committee was satisfied with the proposed amendments. Professor Hartnett explained that the Advisory Committee had made significant changes to proposed Appellate Rule 2 since January in order to achieve greater uniformity and to respond to the Standing Committee’s suggestions. The power to declare an emergency now rested only with the Judicial Conference, and sunset and early termination provisions had been added. The Advisory Committee had retained its suggestion that the Appellate Rules include a broad suspension power. The proposed appellate emergency rule would be added to existing Appellate Rule 2, which authorizes the suspension of almost any rule in a given case.

Professor Hartnett explained that the proposed amendment to Rule 4 that accompanied the proposed emergency rule was not quite an emergency rule itself, but rather was a general amendment to Rule 4. The idea was to amend Rule 4 so that it would work appropriately if Emergency Civil Rule 6(b)(2) ever came into effect; but the proposed amendment would make no change at all to the functioning of Appellate Rule 4 in non-emergency situations. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions made shortly after entry of judgment re-set the time to take a civil appeal, such that the appeal time does not begin to run until entry of the order disposing of the last such remaining motion. For most types of motion listed in Rule 4(a)(4)(A), the motion has such re-setting effect if the motion is filed “within the time allowed by” the Civil Rules. If Emergency Civil Rule 6(b)(2) were to come into effect and a court (under that Rule) extended the deadline for making such a postjudgment motion, that motion (when filed within the extended deadline) would be filed “within the time allowed by” the Civil Rules and thus would qualify for re-setting effect under Appellate Rule 4(a)(4)(A). But for Civil Rule 60(b) motions to have re-setting effect, Rule 4(a)(4)(A) sets an additional requirement: under Rule 4(a)(4)(A)(vi), a Rule 60 motion has re-setting effect only “if the motion is filed no later than 28 days after the judgment is entered.” This text, left as is, would mean that in a situation where a court (under Emergency Civil Rule 6(b)(2)) extended the deadline for a Civil Rule 59 motion, the re-setting effect of a motion filed later than Day 28 after entry of judgment would depend on whether it was a Rule 59 or a Rule 60(b) motion. To avoid this discontinuity, the proposal amends Rule 4(a)(4)(A)(vi) to accord re-setting effect to a Civil Rule 60 motion filed “within the time allowed for filing a motion under Rule 59.” That wording, Professor Hartnett pointed out, leaves Rule 4(a)(4)(A)(vi)’s effect unaltered in non-emergency situations, because under the ordinary Civil Rules the (non-extendable) deadline for a Rule 59 motion is 28 days.

Judge Bates solicited comments on the proposed amendments to Appellate Rules 2 and 4. No comments were offered.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed amendments to Appellate Rules 2 and 4 for public comment.**

### **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on April 30, 2021. The Advisory Committee presented three action items; in addition, it listed in the agenda book six information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 818.

#### *Action Items*

*Publication of Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements).* Judge Schiltz introduced this first action item: a proposed amendment to Rule 106, often referred to as the “rule of completeness.” Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the other side may require admission of a completing portion of the statement in order to correct the misimpression. The proposed amendment is intended to resolve two issues with the rule.

First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. Suppose, for example, that a prosecutor introduces only part of a defendant's confession and the defendant wants to introduce a completing portion of the confession. The question becomes whether the prosecutor can object on grounds that the defendant is trying to introduce hearsay. Courts of appeals have taken three approaches to this question. Some exclude the completing portion altogether on grounds that it is hearsay, basically allowing the prosecution to mislead the jury. Some courts will admit the completing portion but will provide a limiting instruction that the completing portion can be used only for context and not for truth. This may confuse jurors. Other courts will allow a completing portion in with no instruction. The Advisory Committee unanimously agreed that Rule 106 should be amended to provide that the completing portion must be admissible over a hearsay objection. In other words, the judge cannot exclude the completing portion on hearsay grounds, but may still exclude it for some other reason (Rule 403 grounds, for example) or may give a limiting instruction.

The second issue is that the current rule applies to written and recorded statements but not to unrecorded oral statements. This means that, unlike any other rule of evidence, the rule of completeness is dealt with by a combination of the Federal Rules of Evidence and the common law, with the common law governing in the area of unrecorded oral statements. Completeness issues often arise at trial. Judges and parties often have to address these issues on the fly, in situations where they may not have time to thoroughly research the common law. There are circuit splits in this area as well. Some circuits allow the completion of an unrecorded oral statement and

others do not. The Advisory Committee unanimously supported an amendment that would extend Rule 106 to all statements so that it fully supersedes the common law. The DOJ initially opposed amending Rule 106 but thanks to the hard work of Ms. Shapiro and Professor Capra, the Advisory Committee was able to propose language for the amendments and committee note that garnered the DOJ's support.

A practitioner member complimented the proposal. A judge member, likewise, expressed support for the proposal; this member asked about the inclusion of case citations in the committee notes. This member pointed out that another advisory committee, explaining its decision not to adopt a suggested change to a committee note, had stated that “as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended.” Professor Capra responded that the Standing Committee has never taken a position on case citations in committee notes. For a time there were certain members on the Standing Committee who believed that cases should never be cited in committee notes. The Evidence Rules Committee takes the view that case citations are permissible in committee notes, provided that they are employed judiciously. Here, the citations are useful because they note arguments, made by courts, that provide support for the rule.

Professor Coquillette said that case citations can be problematic when a case citation is used to justify a rule amendment. If the case in question is later overturned, one cannot at that point amend the committee note. If, however, the case is cited to illustrate how the rule works, there is less reason to think there is a problem. Professor Capra thought there was no risk in citing a case as a basis for a rule—if a case's reasoning is adopted by the rule and that case's holding becomes the new rule, then that case will not be overturned. Professor Coquillette decried this as circular reasoning, but Professor Capra disagreed. Professor Capra gave examples of prior committee notes to the Evidence Rules that cited cases. Judge Schiltz suggested that there was a difference between a note explaining that a rule amendment resolves a circuit split and a note explaining that a rule amendment was adopted because a case required the amendment. He thought the cases here were being used to illustrate the different approaches courts are taking as of the time of the amendment's adoption; such citations, he suggested, will not become outdated based on later events. Professor Capra agreed.

Professor Struve noted a diversity of opinion and past practice. She thought it was a good question but that since the rule was only going out for comment, it could be considered later rather than trying to fine-tune every citation at this meeting. Professor Capra stated that if there was going to be a policy never to include case citations in notes he would be willing to follow such a policy going forward, but he said such a policy should not be created without more careful consideration and should not be applied to this rule retroactively. Professor Beale noted that the Advisory Committee on Criminal Rules has not taken the position that case citations are never appropriate. Such citations, she suggested, can be employed judiciously and can provide relevant background about the history of a rule amendment. Multiple participants noted that this topic could be discussed among the reporters and at the Committee's January 2022 meeting.

Judge Bates observed that the committee note (on page 829 of the agenda book) states that the amendment to Rule 106 “brings all rule of completeness questions under one rule.” He asked whether that was technically accurate, given Rule 410(b)(1) (which provides that “[t]he court may



admit a statement described in Rule 410(a)(3) or (4) . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together”). Professor Capra responded that Judge Bates’s question was a good one and the Committee would consider that question going forward.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 106.**

*Publication of Proposed Amendment to Rule 615 (Excluding Witnesses).* Judge Schiltz introduced the proposed amendment to Rule 615, a “deceptively simple” rule providing, with certain exceptions, that “[a]t a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony.” The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typically brief orders that courts issue under Rule 615 simply physically exclude witnesses from the courtroom or whether they also prevent witnesses from learning about what happens in the courtroom during periods when they have been excluded. Some circuits hold that a Rule 615 order automatically bars parties from telling excluded witnesses what happened in the courtroom and automatically bars excluded witnesses from learning the same information on their own, even when the judge’s order does not go into this detail. Other circuits view Rule 615 as strictly limited to excluding witnesses from being present in a courtroom, requiring that any further restrictions must be spelled out in the order. The Advisory Committee unanimously voted to amend the rule to explicitly authorize judges to enter further orders to prevent witnesses from learning about what happens in the courtroom while they are excluded. But, under the amended Rule, any such additional restrictions will have to be spelled out in the order; they will not be deemed implicit in an order that mentions no such restrictions. Judge Schiltz pointed out that, in response to a Standing Committee member’s comment in January, the committee note had been revised (as shown on page 834 of the agenda book) to include the observation that a Rule 615 order excluding witnesses from the courtroom “includes exclusion of witnesses from a virtual trial.”

Judge Schiltz then explained another issue resolved by the proposed amendment. Rule 615 says that a court cannot exclude parties from a courtroom, so a natural person who is a party cannot be excluded from a courtroom. If one of the parties is an entity, that party can have an officer or employee in the courtroom. But some courts allow entities to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. The Advisory Committee considered this difference in treatment to be unfair. The proposed amendment would make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. Like any party, though, if an entity-party can make a showing that additional representatives are necessary, then the judge has the discretion to allow more.

Judge Bates noted a typo in the proposed committee note (on page 835 of the agenda book, the word “one” was missing from “only one witness-agent is exempt at any one time”). A judge member expressed support for the amendment but asked a broader historical question about why the default was not for witnesses to be excluded from the courtroom unless they fall into one of the categories set out in current Rule 615. Why should exclusion require an order? Professor Capra thought this would be less practical as a default rule. Requiring an order helps ensure notice to participants, and violating a court order can trigger a finding of contempt. Judge Schiltz noted that

there is a background default rule of open courtrooms, and a departure from that should require an order.

A practitioner member asked about rephrasing part of the committee note at the bottom of page 834 to be more specific. The committee note observes that the Rule does not “bar[] a court from prohibiting counsel from disclosing trial testimony to a sequestered witness,” but then goes on to say that “an order governing counsel’s disclosure of trial testimony to prepare a witness raises difficult questions . . . and is best addressed by the court on a case-by-case basis.” The member suggested that this passage seemed to spot issues without giving much guidance. Judge Schiltz explained that this is a nuanced issue that would be very difficult to treat in more detail. Professor Capra observed that the Advisory Committee had debated whether to mention the issue at all. The member expressed support for mentioning the issue in the committee note. The member pointed out that the language of proposed Rule 615(b)(1) suggests that a court can issue an order flatly prohibiting disclosure of trial testimony to excluded witnesses, full stop. So that raises the question of how that would apply to lawyers doing witness preparation, particularly in a criminal case. Professor Capra noted that the Advisory Committee would be open to considering revisions to the note language (so long as those revisions did not go into undue detail on the issue). Professor Coquillette expressed approval for the approach taken by the proposed committee note. This issue, he said, implicates difficult questions of professional responsibility (such as the scope of the duty of zealous representation)—questions that are regulated by state rules and state-court decisions. Going into any further detail would take the committee note’s drafters into a real thicket.

An academic member asked what the standard would be for the issuance of an additional order (under proposed Rule 615(b)) preventing disclosure to or access by excluded witnesses. Professor Capra said there was no standard provided because the issue was highly discretionary. He saw it as similar to Rule 502(d), which provides no limitations on a court’s discretion. Again, the rule could not be detailed enough to account explicitly for every situation that might come up. The member also asked why paragraph (a)(4), stating that a court cannot exclude “a person authorized by statute to be present,” was necessary. The member expressed the view that the rules cannot authorize something inconsistent with a statute. Professor Capra explained that this provision had been added to the Rule in 1998 to account for legislation that limited the grounds on which a victim could be excluded from a criminal trial. Originally the 1998 proposal had been drafted to refer to that particular legislation, but (as a result of discussion in the Standing Committee) the provision as ultimately adopted refers generically to any statutory authorization to be present. The inclusion of this provision avoids the issue of supersession of a prior statute by a subsequent rule amendment (*see* 28 U.S.C. § 2072(b)).

Professor Bartell asked whether orders under Rule 615(b) require a party’s request. Professor Capra noted that, like orders under Rule 615(a), an order under Rule 615(b) could be issued upon request or *sua sponte*. A judge member suggested that, after public comment, it may be worth making this explicit in (b) as it is in (a). Professor Capra did not think it made sense to try to make the language of Rules 615(a) and (b) parallel on this point. Orders under Rule 615(a), he pointed out, “must” be issued upon request whereas orders under Rule 615(b) are discretionary. Another judge member complimented the Advisory Committee’s work and noted that the amendment addresses an issue that comes up all the time. Another judge member asked why 615(b) referenced additional orders and whether there was a reason that all Rule 615 issues could not be

addressed in a single order. Professor Capra and Judge Schiltz agreed there was no intent to require separate orders, and undertook to clarify the language after the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 615** (with the committee-note typo on page 835 corrected).

*Publication of Proposed Amendment to Rule 702 (Testimony by Expert Witnesses)*. Rule 702 addresses the admission of expert testimony. Judge Schiltz described it as an important and controversial rule. Over the past four years, the Advisory Committee has thoroughly considered Rule 702. Ultimately, the Committee decided to amend it to address two issues.

The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702 such testimony must help the jury, must be based on sufficient facts, must be the product of a reliable method, and must represent a reliable application of that method to adequate facts. It is clear that a judge should not admit expert testimony without first finding by a preponderance of the evidence that each of these requirements of Rule 702 are met. The problem is that many judges have not been correctly applying Rule 702. They have treated the 702 requirements as if they go to weight rather than admissibility, and some have explicitly said that this is what they are doing even though it is not consistent with the text of Rule 702. For example, instead of asking whether an expert's opinion is based on sufficient data, some courts have asked whether the opinion could be found by a reasonable juror to be based on sufficient data. This is an entirely different question and sets a lower and incorrect standard.

The main reason for the confusion in the caselaw is that discerning the correct standard takes some digging. One starts with *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993), which directs that “the trial judge must determine at the outset, pursuant to Rule 104(a),” whether Rule 702's requirements are met. Rule 104(a) merely says that it's the judge who decides whether evidence is admissible; that Rule doesn't say what standard of proof the judge should apply. For the latter, one must turn to *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), which directs that judges—in making admissibility determinations—should apply a preponderance-of-the-evidence standard. A lot of judges and litigants have had trouble connecting those dots. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that all the requirements of Rule 702 are met. This will not change the law at all but will clarify the Rule so that it is not misapplied so often.

The second issue to be addressed was the problem of overstatement—especially with respect to forensic expert testimony in criminal cases. That is, experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. All members of the Advisory Committee agreed that this was a problem, but they were sharply divided over whether an amendment was necessary to address it. The criminal defense bar felt strongly that the problem should be addressed by adding a new subsection to the rule explicitly prohibiting this kind of overstatement. The DOJ and some other committee members felt strongly that there should not be such an amendment; they argued that the problem with overstatement was poor lawyering. These members argued that Rule 702 already

provides the defense attorney with the grounds for objecting to, and the court with the basis for excluding, overstatements. Ultimately, an approach proposed by a judge member of the Standing Committee garnered support from all members of the Advisory Committee. That approach entails making a modest change to existing subsection (d) that is designed to help focus judges and parties on whether the opinion being expressed by an expert is overstated.

A judge member praised the proposed amendments to Rule 702 as beneficial and thoughtful. No other members had any comments on this proposal.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 702.**

### **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on April 8, 2021. The Advisory Committee presented twelve action items (two of which were presented together); in addition, it listed in the agenda book four information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 252.

#### *Action Items*

*Final Approval of Restyled Rules Parts I and II.* Professor Bartell introduced these restyled rules, Part I, or the 1000 series of Bankruptcy Rules, and Part II, the 2000 series of the Rules. The Advisory Committee had received extensive and very helpful comments on these revisions from the National Bankruptcy Conference. The Advisory Committee's responses to those comments are catalogued in the agenda book. The style consultants worked alongside the reporters and the subcommittee leading this project. Although the Advisory Committee was submitting these first two parts of the restyled rules for final approval, they asked that the Standing Committee not transmit them to the Judicial Conference at this time but instead wait until all the restyled Bankruptcy Rules have gone through the public comment process and can be submitted as a group. In addition, the Restyled Rules Parts I and II will need to be updated to account for amendments that have been made to those rules since the restyling process began, and the style consultants plan to conduct a final "top-to-bottom review" of all the Restyled Rules after the final comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the restyled Parts I and II for approval by the Judicial Conference** but not to transmit them to the Judicial Conference immediately.

*Final Approval of Proposed Amendments Implementing the Small Business Reorganization Act of 2019 (SBRA or Act).* Professor Gibson explained that after the SBRA was passed, the Advisory Committee promulgated interim rules to deal with several changes made to the Bankruptcy Code by the SBRA. The interim rules took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. The interim rules were published for comment last summer, along with the SBRA form amendments, as proposed final rules. There were no

comments. The Advisory Committee recommended final approval of the SBRA amendments and new Rule.

Professor Gibson noted that one of the affected Rules, Rule 1020, had also been amended on an interim basis to reflect certain statutory definitions that applied under the CARES Act. However, the version of Rule 1020 being submitted for final approval is the pre-CARES Act version. This is appropriate, Professor Gibson explained, because the relevant CARES Act statutory definitions are on track to expire by the time the SBRA amendments go into effect (the Advisory Committee will monitor for any extension of the sunset date for the relevant CARES Act provisions). Professor Struve complimented the members of the Advisory Committee, its reporters, and Judge Dow for their excellent work on these rules and on many others, often on short notice, over the past year.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the SBRA Rules—amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, and 3019, and new Rule 3017.2—for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 3002(c)(6) (Filing Proof of Claim or Interest).* Judge Dow explained that the proposed amendment to Rule 3002(c)(6) clarified and made uniform for domestic and international creditors the standard for extensions of time to file proofs of claim. No comments had been received on the proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 3002(c)(6) for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers).* Judge Dow explained that this rule concerned filing and transmittal of papers to the United States trustee. The proposed amendments would permit transmittal to the United States trustee by filing with the court’s electronic-filing system, and would eliminate the verification requirement for the proof of transmittal required for papers transmitted other than electronically. The United States trustee had been consulted during the drafting of the proposed amendment and consented to it. The only public comment on the proposal concerned some typographical issues, which had been corrected.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 5005 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint).* The amendment adds a new subdivision (i) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on officers or agents by use of their titles rather than their names. No public comments were submitted on the proposed amendment. Before giving final approval to the proposed amendment, the Advisory Committee had deleted a comma from the proposed rule text and, in the committee note, changed the word “Agent” to “Agent for Receiving Service of Process.”

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 7004 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 8023 (Voluntary Dismissal).* The proposed amendments would conform Rule 8023 to pending amendments to Appellate Rule 42(b). The amendments clarify that a court order is required for any action other than a simple voluntary dismissal of an appeal. No public comments were submitted on the proposed amendments, and the Advisory Committee had approved them as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 8023 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Official Form 122B (Chapter 11 Statement of Current Monthly Income).* Judge Dow explained that this Form (which is used by a debtor in an individual Chapter 11 proceeding to provide information for the calculation of current monthly income) instructed that “an individual . . . filing for bankruptcy under Chapter 11” must fill out the form. The issue was that individuals filing under subchapter V of Chapter 11 do not need to make the calculation that Form 122B facilitates. The amendment therefore added “(other than under subchapter V)” to the end of the above-quoted instruction. No comments were submitted and the Advisory Committee approved the amendment as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Official Form 122B for approval by the Judicial Conference.**

*Publication of Restyled Rules Parts III (3000 series), IV (4000 series), V (5000 series), and VI (6000 series).* Professor Bartell expressed great satisfaction with the productive process of restyling the rules. These four parts are ready to go out for public comment. Unlike the procedure with Parts I and II, these proposed restyled rules would be accompanied by committee notes. The publication package would also include the committee note to Rule 1001 (which explains the restyling process and its goals). The Advisory Committee anticipates that the remaining three parts will be ready for public comment a year from now.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the restyled versions of Parts III, IV, V, and VI of the Bankruptcy Rules.**

*Publication of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor’s Principal Residence) and New Official Forms 410C13-1N (Trustee’s Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee’s Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee’s Motion to Determine the Status of the Mortgage Claim).* Judge Dow introduced the proposed amendments to Rule 3002.1, which would substantially revise the existing rule. The rule addresses notices concerning claims

secured by a debtor's principal residence (such as notices of payment changes for mortgages), charges and expenses incurred in the course of the bankruptcy proceeding with respect to such claims, and the status of efforts to cure arrearages. The proposed amendments were suggested by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

Professor Gibson explained that this is an important rule intended to deal with the situation of debtors filing Chapter 13 cases in order to save their homes. Often, these debtors would continue to make their monthly payments under the plan but then find out at the end of their bankruptcy case that they were behind on their mortgage either because they had not gotten accurate information about changes in the payment amount or because fees or other charges had been assessed without their knowledge. The purpose of the rule was to ensure that the trustee and debtor have the information they need to cure arrearages and stay up to date on the mortgage over the life of the plan.

Stylistic changes were made throughout the rule, and there were notable substantive changes. The amendments make two important changes in Rule 3002.1(b) (which deals with notices of changes in payment amount). New Rule 3002.1(b)(2) provides that if the notice of a mortgage payment increase is late, then the increase does not take effect until the debtor has at least 21 days' notice. New Rule 3002.1(b)(3) addresses home equity lines of credit. Dealing with notice of payment changes for HELOCs poses challenges because the payments may change by small amounts relatively frequently. New Rule 3002.1(b)(3) requires an annual notice of any over- or underpayment on a HELOC during the prior year (and an additional notice if the HELOC payment amount changes by more than \$10 in a given month). Rule 3002.1(e) currently gives the debtor up to a year (after notice of postpetition fees and charges) in which to object. The amendment to Rule 3002.1(e) would authorize the court to shorten that one-year period (as might be appropriate toward the end of a Chapter 13 case). Proposed new Rule 3002.1(f) provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The existing procedure used at the end of the case would be replaced with a motion-based procedure, under new Rule 3002.1(g), that would result in a binding order from the court (under new Rule 3002.1(h)) on the mortgage claim's status. Five new Official Bankruptcy Forms have been developed for use by the debtor, trustee, and mortgage claim creditor in complying with the provisions of the rule.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 3002.1, and new Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R.**

*Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy).* This is the document filed by an individual to start a bankruptcy proceeding. Judge Dow explained that Official Form 101 requires the debtor to provide certain information, including, for the purpose of identification, names under which the debtor has done business in the past eight years. Judge Dow said that in answering that question, some debtors also reported the names of separate businesses such as corporations or LLCs in which they had some financial interest. The proposed amendment clarifies that legal entities separate from the debtor should not be listed.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Official Form 101.**

*Publication of Proposed Amendments to Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)).* Judge Dow explained that the 309 forms are a series of forms used in different cases and by different kinds of debtors and entities; the forms provide notice of the filing of a bankruptcy case and of certain deadlines in the case. Two versions of the form, 309E1 and 309E2, are used in chapter 11 cases filed by individuals. The Advisory Committee received a suggestion from two bankruptcy judges noting that these two forms did not clearly distinguish the deadlines for objecting to the debtor's discharge and for objecting to the dischargeability of a particular claim. The proposed amendments reorganized the two forms' graphical structure as well as some of the language addressing the different deadlines.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendments to Official Forms 309E1 and 309E2.**

#### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on April 23, 2021. The Advisory Committee presented two action items. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 642.

##### *Action Items*

*Final Approval of Proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g).* Judge Dow introduced these new supplemental rules. The Advisory Committee received some public comments but not many. Two witnesses testified at a public hearing in January. The Advisory Committee was nearly unanimous in supporting these proposed rules. One member (the DOJ) opposed the proposed rules, but conceded that the rules were fair, reasonable, and balanced. Another member abstained (having been absent for the relevant discussion). All other members were strongly in favor. Judge Sara Lioi had done great work in chairing the subcommittee that prepared the proposed rules.

One obvious concern that has been raised about these rules has been that rules promulgated under the Rules Enabling Act process are ordinarily trans-substantive, whereas these rules address a particular subject area. A related concern was that any departure from trans-substantivity would make it harder to oppose promulgating specialized rules for other types of cases.

Judge Dow expressed that he had personally been on the fence about the creation of these rules for some time but had come to support them for a few reasons. First, Social-Security review actions are atypical because they are essentially appeals based on an administrative record. Second,



there are a great many of these cases. Third, magistrate judges viewed the proposed rules very favorably, and—at least in Judge Dow’s district—magistrate judges handle most of these cases. District judges in districts where there has been a high volume of Social Security Review Actions also supported the rules. Fourth, the proposed supplemental rules would be helpful to pro se litigants. They had been clearly written and were as streamlined as they could possibly be. Finally, some districts have good local rules in this area, but many do not, and those districts without such rules would benefit from a fair, balanced, and comprehensible set of rules.

Professor Cooper summarized the changes that had been made in response to public comment. Supplemental Rule 2(b)(1)(A) now requires the complaint to include not the last four digits of the Social Security number but instead “any identifying designation provided by the Commissioner with the final decision”; a conforming change was made to the committee note. Supplemental Rule 6’s language was clarified. The committee note now observes that the rules’ scope encompasses instances where multiple people will share in an award from a claim based on one person’s wage record.

Professor Cooper highlighted an issue concerning the drafting of Rule 3. That Rule dispenses with Civil Rule 4’s provisions for service of summons and the complaint. Instead, the Rule mandates transmittal of a notice of electronic filing to the U.S. Attorney’s Office for the relevant district and “to the appropriate office within the Social Security Administrations’ Office of General Counsel.” The quoted language was crafted by the Social Security Administration. It will be applied by the district clerk, who will know which office is the “appropriate office.”

Professor Cooper observed that this project was originally proposed by the Administrative Conference of the United States and was supported by the Social Security Administration. The supplemental rules as now presented for final approval are greatly pared down compared with prior drafts. They are designed to serve public, not private, interests. As to the concern that private interests might in future invoke this example as support for the adoption of further substance-specific rules—Professor Cooper conceded that this was not a phantom concern. But, he suggested, the rulemaking process could withstand any incremental weakening of the trans-substantivity norm that might result from the adoption of these rules.

Professor Coquillette complimented the Advisory Committee on its work on these rules, which he saw as the rare appropriate exception to the general principle of trans-substantivity in the rules. He suggested that departure from that principle was justified here for three reasons: (1) the rules are set out as a separate set of supplemental rules; (2) the rules address matters of significant public interest and will assist pro se litigants; and (3) the rules were crafted with significant input from the Social Security Administration. Judge Bates also expressed support for the proposed new rules. He had chaired the Advisory Committee throughout much of the process. Judge Bates suggested that the committee note, on page 686 at lines 93-94, be updated to reflect the change in the proposed text of Supplemental Rule 6 (from “after the court disposes of all motions” to “after entry of an order disposing of the last remaining motion”). Professor Cooper endorsed the change.

A judge member expressed some concern that the supplemental rules might limit judges’ ability to handle matters on a case-by-case basis. This judge thought that magistrate judges in particular liked being able to handle pro se cases, for example, in somewhat different ways. The

judge recognized, however, that constraining the discretion of judges and increasing consistency were, in many ways, the goals of the new supplemental rules. The judge thought the benefits did probably outweigh the costs. The judge then raised a few additional points, addressed below. The discussion has been reorganized here for clarity.

First, the judge asked whether the committee note language at page 685 lines 60-61 (“Notice to the Commissioner is sent to the appropriate regional office”) should mirror the language in Supplemental Rule 3 itself (referencing notice being sent “to the appropriate office within the Social Security Administration’s Office of General Counsel”). Judge Bates asked if deleting the word “regional” would be enough, and the judge indicated that this would be an improvement. It was agreed upon.

Additionally, the judge pointed out, electronic notice often raises troublesome technical issues (to what email is the notice sent? Can it be opened more than once?). The judge expressed the expectation that such issues would be resolved by the technical system designer and thus need not concern the Standing Committee.

Concerning Supplemental Rule 2(b)(1)(A), the judge was worried that no one would know what “any identifying designation provided by the Commissioner” referred to. He acknowledged that this formulation was preferable to requiring inclusion of parts of social security numbers. But it would be better to say specifically what the new identifier would be—maybe through a technical amendment in the near future—than to risk confusing litigants, particularly pro se litigants. Professor Struve thought that the idea of this language was to remain flexible and accommodating to the extent that practices change. She asked whether it would make sense to say something like “including any designation identified by the Commissioner in the final decision as a Rule 2(b)(1)(A) identifier.” This would put the onus on the Commissioner to highlight the identifier, which would help pro se litigants. Professor Cooper pointed out that the Appeals Council, not the Commissioner, would be putting out the final decision. This was why the language used was “provided by the Commissioner.” Later, Judge Dow expressed that he could not think of a better way of phrasing this and that the current language was the best of the options considered throughout the process. Judge Dow pointed out that if the rule was approved, the Commission would know that this was their opportunity to work out an identifying designation. Everyone knew that this was a problem that needed to be solved. Judge Dow wondered whether the language in that subparagraph could be developed along with the Commission and whether there could be flexibility to change the phrasing going forward. Judge Bates thought it would be difficult to keep the language flexible after the Standing Committee gave final approval and after the proposed rules were sent on to the Judicial Conference, Supreme Court, and Congress.

Finally, the same judge member pointed out that since the statute provides for venue not only in the judicial district in which the plaintiff resides, but also the judicial district where the plaintiff has a principal place of business, it seems odd that subparagraph 2(b)(1)(B) only asks about residence. Professor Cooper wanted to take time to confirm this venue point and to make sure it had not intentionally been left unmentioned for a particular reason. Professor Cooper proposed taking the rule as it was for now with the understanding that if a principal place of business was indeed relevant for the kinds of individual claims encompassed by the supplemental rules then it would be added to subparagraph 2(b)(1)(B). Professor Marcus added that

subparagraph 2(b)(1)(B) was only about what the complaint must state. That would not control venue so long as a statutory permission for venue existed elsewhere.

Another judge member raised a stylistic point regarding subparagraph 2(b)(1)(A), and suggested that the gerund “identifying” in line 8 sounded somewhat awkward. This judge also thought that subparagraph (A) was listing several things that a complaint must state and wondered whether it might be broken up into a few separate shorter subparagraphs. The judge had thought the rules committees were trying to move in the direction of breaking up lists into separate subheadings in this way. After some discussion it was decided that paragraph (b)(1) would read:

- (1) The complaint must:
  - (A) state that the action is brought under § 405(g);
  - (B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;
  - (C) state the name and the county of residence of the person for whom benefits are claimed;
  - (D) name the person on whose wage record benefits are claimed; and
  - (E) state the type of benefits claimed.

The judge who raised this point liked this suggestion and thought it helpfully provided a checklist for *pro se* litigants. A style consultant approved of this adjustment. Judge Dow agreed.

Judge Bates reviewed the changes that had been agreed upon. Supplemental Rule (2)(b)(1) would be reorganized as set out immediately above. Three changes would be made to the committee note: adjustments on page 685 at lines 51-52 to account for the revisions to subdivision (2)(b)(1); the deletion of the word “regional” on page 685 at line 61; and the change on page 686 at lines 93-94 identified by Judge Bates.

Upon motion, seconded by a member, and on a voice vote: **The Committee, with one member abstaining,<sup>†</sup> decided to recommend the proposed new Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) for approval by the Judicial Conference.**

*Proposed Amendment to Rule 12(a)(4)(A) concerning time to file responsive pleadings.* The proposed amendment would extend from fourteen days to sixty the presumptive time to serve a responsive pleading after a court decides or postpones a disposition on a Rule 12 motion in cases brought against a 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. Judge Dow explained that the DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to consult between local U.S. Attorney offices and main Justice or the Solicitor General.

Two major concerns had been raised at the Advisory Committee’s April meeting. First, some thought the amendment might be overbroad and should be limited only to cases involving immunity defenses. Second, there was concern over whether the time period was too long. As

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<sup>†</sup> Ms. Shapiro explained that the DOJ was abstaining for the reasons it had previously expressed.

Judge Dow saw it there were three types of cases. In some, it would be prejudicial to the plaintiff to extend the deadline because expedition is important. In others, the DOJ genuinely needs more time to decide whether to appeal. And sometimes the timing of the answer does not matter because discovery or settlement is proceeding regardless. Judge Dow said that he was persuaded during discussion that there are a lot more cases in the second category than in the first. If the default remained at fourteen days, there would be many motions by the government seeking extensions whereas if the default were sixty there would only be a few motions by plaintiffs seeking to expedite. Judge Dow noted that there had been a motion in the Advisory Committee meeting to limit the extended response time to cases in which there was an immunity defense, but that motion had failed by a vote of 9 to 6. The Advisory Committee decided by a vote of 10 to 5 to give final approval to the proposed amendment as published.

Professor Cooper explained that the proposal's substance was the same as that in the DOJ's initial proposal. He agreed that the minutes of the discussion accurately reflect the extensive discussion at the Advisory Committee meeting. There was some discussion of whether a number between fourteen and sixty might be appropriate. Professor Cooper noted that in the type of case addressed by Civil Rule 12(a)(3) and by the proposed amendment (i.e., a case in which a U.S. 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), Appellate Rule 4(a)(1)(B)(iv) provides all parties with 60 days to take a civil appeal. There is some logic, he suggested, to according the same number of days for responding to a pleading as for the alternative of taking an appeal.

A judge member was sympathetic to Judge Dow's view that a sixty-day default rule would promote efficiency, but this member wondered whether thirty days might be a better choice. A frequent criticism of our system, this member noted, is that litigation gets delayed. Professor Cooper stated that, while the issue of the number of days had come up at the Advisory Committee's meeting, it had not been discussed extensively. The government often moves for an extension under the current rule and often receives it. Professor Cooper recalled that a number of the judges participating in the Advisory Committee's discussion thought the 60-day period made sense. Judge Bates thought the judge member's suggestion was valuable. He said it was important, however, not to increase the likelihood that the government would file protective notices of appeal. He wanted to make sure the DOJ had time to actually decide representational issues and appeal issues.

Another judge member thought that the gap between sixty days for the government and fourteen for everyone else was too much. It would look grossly unfair to give the government more than four times as much time. (By comparison, the 60-day appeal time for cases involving the government was double the usual appeal time.) The government gets only forty-five days to move for rehearing and that is a more significant decision. Given that the number of days was not substantially discussed at the advisory committee level, this member asked what justification the government had given for needing 60 days. The member suggested that 30 days might be more appropriate, and noted that the government had been managing under the current rule by making motions when necessary.

This judge later noted that the government typically got extra time because of the Solicitor General process and that many states also have solicitors general. Professor Cooper noted that states had previously suggested that their solicitors general needed extra time, but those arguments

had been countered by concerns over delay, and questions about how to draw the line between state governments and other organizations with cumbersome processes. A practitioner member expressed uncertainty as to whether states' litigation processes are as centralized as the federal government's.

Still another judge member suggested that forty days might be more appropriate. Other parties, after the disposition or postponement of disposition of a motion, get fourteen days to answer, which is two-thirds of the twenty-one-day limit initially set for them by Civil Rule 12(a)(1)(A)(i). Forty days is two-thirds of the sixty-day limit initially set for the government by Civil Rules 12(a)(2) and (3). Keeping the ratio the same would be fair. Judge Dow noted that the Advisory Committee had focused on the immunities issue and might not have given enough thought to the number of days. The first judge member who had spoken on this issue thought that moving things along was a good idea across the board.

Judge Bybee asked how this integrated with the Westfall Act. If the government has already made its decision under the Westfall Act (whether the employee's actions were within the scope of employment), why would the government need extra time at this stage? Judge Bates responded that though the official-capacity decision would already have been made, the government would still need time to determine how to respond to the judicial determination on immunity. Judge Dow agreed that the government had reported that its need for time at this stage usually concerned whether to appeal a decision on immunity.

Another judge member raised concerns about the committee note. Even though the rule is not limited to situations where an immunity defense is raised, the committee note gives the impression of privileging not just the government as such but the official immunity defense in particular. This member suggested that the proposed rule really looked like preferential treatment that had not been fully vetted and may not have been warranted.

Ms. Shapiro spoke next. She had not gotten a definitive response from the DOJ during this conversation. She believed that the sixty-day period had been suggested because that is the time period for the United States to answer a complaint or take a civil appeal. The government has a unique bureaucracy, and careful deliberation, consultation, and decision-making can take time. With that said, the DOJ would prefer forty or forty-five days to no extension of the period.

Judge Bates noted that any number higher than fourteen would constitute special treatment for the United States. He was reluctant to see the Standing Committee vote on a number without the Advisory Committee having given the issue full consideration. Judge Dow said he would be happy for the proposal to be remanded to the Advisory Committee and to obtain more information from the DOJ on the question of length. By consensus, the matter was returned to the Advisory Committee for further consideration.

Judge Dow added that proposed amendments to Civil Rules 15 and 72 had been approved for publication at the January meeting of the Standing Committee but that they had been held back from public comment until another more significant amendment or set of amendments was moving forward. Judge Bates agreed that now was the time to send them out for public comment alongside proposed new Civil Rule 87, the proposed emergency rule.

*Information Items*

Professor Marcus updated the Committee on two items. The agenda materials noted that the Discovery Subcommittee was considering possible rule amendments concerning privilege logs. With the help of the Rules Committee Support Office, an invitation for comments on this topic had been posted. Second, the Multidistrict Litigation Subcommittee was interested in a collection of issues regarding settlement review, appointment of leadership counsel, and common benefit funds. Yesterday, a thorough order on common benefit funds had been entered in the Roundup MDL, which Professor Marcus anticipated might raise the profile of this issue.

**REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met via videoconference on May 11, 2021. The Advisory Committee presented one action item. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 747.

*Action Item*

*Final Approval of Proposed Amendment to Rule 16 (Discovery and Inspection).* Judge Kethledge introduced this proposed amendment, which clarifies the scope and timing of the parties' obligations to disclose expert testimony that they plan to use at trial. He explained that Criminal Rule 16 is a rule regularly on the Advisory Committee's agenda. The proposed amendment here reflected a delicate compromise supported by both the DOJ and the defense bar. Judge Kethledge thanked both groups and in particular singled out the DOJ representatives, Mr. Wroblewski, Mr. Goldsmith, and Ms. Shapiro, who had worked in such good faith on this amendment.

The Advisory Committee received six public comments. All were supportive of the concept of the proposal and all made suggestions directed at points that the Advisory Committee had carefully considered before publication. In the end, it was not persuaded by the suggestions, and some of the suggestions would upset the delicate compromise that had been worked out.

Since the proposed amendment was last presented to the Standing Committee, the Advisory Committee had made some clarifying changes. Professor King summarized these changes and they are explained in more detail at pages 753-54 of the agenda book. Professor Beale called the Standing Committee's attention to an additional administrative error on page 769 of the agenda book. The sentence spanning lines 219–21 ("The term 'publications' does not include internal government documents.") had not been accepted by the Advisory Committee. It therefore should not have appeared in the agenda book.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 16 for approval by the Judicial Conference, with the sole change of the removal of the committee-note sentence identified by Professor Beale.**

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on April 7, 2021. The Advisory Committee presented three action items and one information item, and listed five additional information items in the agenda book. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 180.

### *Action Items*

*Final Approval of Proposed Amendment to Rule 25 (Filing and Service) concerning the Railroad Retirement Act.* Judge Bybee presented a proposed amendment to Rule 25, which he described as a minor amendment that would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 25 for approval by the Judicial Conference.**

*Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal).* Judge Bybee noted that this proposed amendment had last been before the Committee in June 2020. Rule 42 deals with voluntary dismissals of appeals. At its June 2020 meeting, the Committee queried how the proposed amendment<sup>‡</sup> might interact with local circuit rules that require evidence of a criminal defendant’s consent to dismissal of an appeal. The Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 42 for approval by the Judicial Conference.**

*Publication of Proposed Consolidation of Rule 35 (En Banc Determination) and 40 (Petition for Panel Rehearing).* Judge Bybee introduced this final action item. The proposal, on which the Advisory Committee had been working for some time, entailed comprehensive revision of two related rules. The Advisory Committee understood that there had been some confusion

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<sup>‡</sup> The proposed amendment clarifies the language of Rule 42, including by restoring the pre-styling requirement that the court of appeals “must” dismiss an appeal if all parties agree to the dismissal.

among practitioners in the courts of appeals as to how and when to seek panel rehearing and rehearing en banc. Procedures for these different types of rehearing were laid out in two different rules. The Advisory Committee was proposing to consolidate the practices into a single rule. This would involve abrogating Rule 35, currently the en banc rule, and folding it into a new Rule 40 addressing both petitions for rehearing and petitions for rehearing en banc. This would improve clarity and would particularly help pro se litigants. It would also clarify that rehearing en banc is not the preferred way of proceeding. This consolidation would not involve major substantive changes, with the exception that new Rule 40(d)(1) would clarify the deadline to petition for rehearing after a panel amends its decision. A new Rule 40(f) would also make clear that a petition for rehearing en banc does not limit the authority of the original three-judge panel to amend or order additional briefing. Conforming changes in other Appellate Rules were proposed alongside this change.

A practitioner member expressed support for the idea of combining Rules 35 and 40, and predicted that this would make the rules much more user-friendly. This member had two questions about the proposal. The first question was about an apparent inconsistency between two provisions carried over from the existing rules. In subparagraph (b)(2)(A), on page 217, the new rule stated that petitions for rehearing en banc must (as one of two alternative statements) state that the full court's consideration is "necessary to secure and maintain uniformity of the court's decisions." Subdivision (c), however, on page 218, said that the court ordinarily would not order rehearing en banc unless (as one of two alternatives) en banc consideration was "necessary to secure or maintain uniformity of the court's decisions." The member recognized that the difference in wording had been carried over from the existing rules, but suggested that, for the sake of consistency, both provisions should use the word "or." Judge Bates agreed and had been prepared to say the same thing.

The practitioner member's second question related to the existing history (i.e., prior committee notes) concerning Rule 35. When a rule is abrogated, the former rule's history is no longer readily available. Here, Rule 35 would be transferred rather than abrogated. The historical evolution of Rule 35 would remain relevant to the new Rule 40. Professor Hartnett noted that the committee notes for now-abrogated Civil Rule 84 are all readily available on the internet (at [https://www.law.cornell.edu/rules/frcp/rule\\_84](https://www.law.cornell.edu/rules/frcp/rule_84)). Professor Capra recalled that, in 1997, Evidence Rules 803(24) and 804(b)(5) had been folded into Evidence Rule 807. He pointed out that, if you pull up Rule 804, it says that Rule 804(b)(5) was "[t]ransferred to Rule 807." Professor Capra stated that, in all the publications he was aware of, the legislative history of Rule 804(b)(5) is still there. Using a word like "transferred" might cue publishers that the former rule still existed and mattered. Later, another judge member looked at a Thomson-Reuters publication on hand in chambers and noted that it did include prior history even for transferred or abrogated rules. This member agreed that "transferred" would be a better term than "abrogated." Noting that the 1997 committee note to Evidence Rule 804(b)(5) explains why that provision was transferred to Rule 807, this member suggested that similar note language would be helpful to explain why Rule 35's contents were transferred to Rule 40. Professor Coquillette later stated that the Moore's Federal Practice treatise keeps the rules history in place, and Professor Marcus said that the Wright & Miller treatise does so as well.



Judge Bates asked whether the new, combined Rule 40 could not be titled simply “Petitions for Panel or En Banc Review” rather than (as in the current proposal) “Petition for Panel Rehearing; En Banc Determination.” Professor Struve noted that the rule also covered initial hearings en banc. Judge Bates suggested “Petitions for Panel or En Banc Rehearing or for Initial Hearing En Banc.”

A judge member who had worked with the subcommittee that developed this proposal liked the idea of saying “transferred” rather than “abrogated.” This judge had two other comments. First, this judge thought it would be better to change “or” to “and” on page 218 (subdivision (c)(1)) to accord with the “and” on page 217 (subdivision (b)(2)(A)); the “and” in (b)(2)(A), this member noted, was carried forward from current Rule 35(b)(1)(A). Second, the title of the proposed new rule had been discussed extensively at many subcommittee meetings. The reason for the current title was that a litigant could still file a petition for only panel rehearing. The title the subcommittee settled on was intended to emphasize that these are different and separate types of petitions.

Professor Bartell pointed out that the text of proposed Rule 40 omitted existing Rule 35(a)’s authorization for a court of appeals on its own initiative to order initial hearing en banc. Judge Bybee and the judge member who had worked on the subcommittee both agreed that the Advisory Committee had not intended to take that out of the rule. The judge member suggested that a potential fix might include inserting the words “hear[] or” before “rehear[]” at appropriate places in proposed Rule 40(c).

Another judge member, weighing in on the “and” versus “or” discussion (concerning subdivisions (b)(2)(A) and (c)(1)) favored using “or” in both places because securing and maintaining are not the same thing. This member also asked whether paragraph (c)(1) ought to reference conflict with a decision of the Supreme Court as a basis on which the court might grant rehearing en banc since subparagraph (b)(2)(A) identifies this as one reason why a party might appropriately seek rehearing en banc. Professor Hartnett noted that the committee was trying to combine rules without changing much substance, and the same issue existed with respect to the current rule. He surmised that the current rule may have been drafted this way on the theory that it is very easy for a party who lost in the Court of Appeals to say that the decision is inconsistent with a Supreme Court decision. Judge Bates agreed it was strange for the rule to reference inconsistency with the Supreme Court in one place and not the other.

The same judge member also asked about the provision of subdivision (g) stating that a “petition [for initial hearing en banc] must be filed no later than the date when the appellee’s brief is due.” The judge understood that this might have been a carryover from the existing rule, and expressed uncertainty as to whether the scope of the current project extended to considering a change to this feature. Nonetheless, this member suggested, this due date seemed to fall very late in the process. Professor Hartnett agreed that this was a carryover from the existing rule.

Another judge member thought that although the Advisory Committee had not been focusing on the “legacy” rule language so much as on how to combine the rules, this was nonetheless a good opportunity to clean up the language of the rules. This judge pointed to a syntactical ambiguity in subparagraph (b)(2)(A). As a matter of syntax, it is not clear whether the statement that “the full court’s consideration is therefore necessary to secure and maintain

uniformity of the court’s decisions” must be included *both* in petitions identifying an intra-circuit conflict *and* in petitions identifying a conflict with a Supreme Court decision. Logically that statement should be required only where the petition relies on an intra-circuit conflict. Moreover, when the petition relies on an intra-circuit conflict, the clause about securing and maintaining uniformity is redundant because if there is an intra-circuit conflict then rehearing is always necessary to secure and maintain uniformity. It might be worth considering deleting or revising the clause about securing and maintaining uniformity.

Judge Bates asked whether the number of comments that had been put forward suggested that the proposed amendments ought to go back to the committee. Judge Bybee and Professor Hartnett noted that the Advisory Committee had specifically tried to consolidate the two rules without otherwise altering their content. Given the feedback from members of the Standing Committee that some of that existing content should be reconsidered, the Advisory Committee would welcome the opportunity to reconsider the proposal with that new goal in mind. Judge Bates observed that the Advisory Committee, in doing so, need not feel obliged to overhaul the entirety of the rules’ substance, but also should not feel constrained to retain existing features that seem undesirable. By consensus, the proposal was remanded to the Advisory Committee.

#### *Information Item*

*Amicus Disclosures.* Judge Bybee invited input from the Standing Committee on the amicus-disclosure issue described in the agenda book beginning at page 193 (noting the introduction of proposed legislation that would institute a registration and disclosure system for amici curiae). A subcommittee of the Advisory Committee had been formed and would welcome any input from the Standing Committee on the issue. Judge Bates encouraged members of the Standing Committee with thoughts to reach out to Judge Bybee or Professor Hartnett.

### **OTHER COMMITTEE BUSINESS**

Julie Wilson delivered a legislative report. The chart in the agenda book at page 864 summarized most of the relevant information, but there had been a few developments since the book was published. First, the Sunshine in the Courtroom Act of 2021 had been scheduled for markup later in the week. It would permit broadcasting of any court proceeding. This would conflict with Criminal Rule 53 and its prohibition on broadcasting and photographing criminal proceedings. The Director of the Administrative Office expressed opposition to the bill in her capacity as Secretary to the Judicial Conference. Second, the Juneteenth National Independence Day Act was enacted late last week. Technical amendments to time-counting rules would be required to account for this new federal holiday. Third, a prior version of the Justice in Forensic Algorithms Act of 2021, which was included on the chart, would have directly amended the Criminal Rules and would have added two new Evidence Rules. The latest version of the Act had dropped those provisions. However, if passed, Evidence Rule 702 would be affected. Professor Capra was aware of the Act and the Rules Committee Staff will continue to monitor.

Bridget Healy summarized the Standing Committee’s strategic planning initiatives. Tab 8B in the agenda book contains a brief summary of the Judicial Conference’s Strategic Plan for the Federal Judiciary, a list of the Standing Committee’s initiatives, and a status report on each

initiative. A new initiative concerning the emergency rules had been added. Committee members were asked for any comments regarding the strategic initiatives and to submit any suggestions for long-range planning issues.

### **CONCLUDING REMARKS**

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their patience and attention. The Committee will next meet on January 4, 2022. Judge Bates expressed the hope that the meeting would take place in person in Miami, Florida.