ADVISORY COMMITTEE
ON
APPELLATE RULES

October 7, 2021

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of October 7, 2021
Via Teams

Table of Contents

TAB 1

TAB 1A

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter	Associate Reporter
Honorable Dennis R. Dow United States Bankruptcy Court Kansas City, MO	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robert M. Dow, Jr. United States District Court Chicago, IL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California San Francisco, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable Raymond M. Kethledge United States Court of Appeals Ann Arbor, MI	Professor Sara Sun Beale Duke Law School Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON APPELLATE RULES

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Members

Honorable Brian Fletcher Acting Solicitor General (ex officio) United States Department of Justice Washington, DC	Honorable Leondra R. Kruger Supreme Court of California San Francisco, CA
Honorable Carl J. Nichols United States District Court Washington, DC	Professor Stephen E. Sachs Harvard Law School Cambridge, MA
Danielle Spinelli, Esq. Wilmer Cutler Pickering Hale and Dorr LLP Washington DC	Honorable Paul J. Watford United States Court of Appeals Pasadena, CA
Honorable Richard C. Wesley United States Court of Appeals Geneseo, NY	Lisa B. Wright, Esq. Office of the Federal Public Defender Washington, DC

Liaisons

Honorable Bernice B. Donald (*Bankruptcy*) United States Court of Appeals Memphis, TN	Honorable Frank M. Hull (*Standing*) United States Court of Appeals Atlanta, GA

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Clerk
United States Court of Appeals
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Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1B

	FRAP Item	Proposal	Source	Current Status
7	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Approved by Standing Committee 6/20 Submitted to Supreme Court 10/20 Approved by Supreme Court 4/21
6	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Remanded by Standing Committee 6/20 Discussed at 10/20 meeting Final approval for submission to Standing Committee 4/21 Approved by Standing Committee 6/21
6	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Discussed at 4/19 meeting and subcommittee formed Discussed at 10/19 meeting and continued review Draft approved for submission to Standing Committee 4/20 Draft approved for publication by Standing Committee 6/20 Discussed at 10/20 meeting Final approval for submission to Standing Committee 4/21 Approved by Standing Committee 6/21
3	None assigned	Rules for Future Emergencies	Congress (CARES Act)	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Draft approved for publication by Standing Committee 6/21

	FRAP Item	Proposal	Source	Current Status
1	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting Discussed at 4/19 meeting Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Remanded by Standing Committee 6/21
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting Discussed at 4/21 meeting
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19 Discussed at 4/20 meeting and subcommittee formed Discussed at 10/20 meeting Discussed at 4/21 meeting
1	20-AP-A	Relation Forward of Notices of Appeal	Bryan Lammon	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting Discussed at 4/21 meeting
1	20-AP-D	IFP Forms	Sai	Initial consideration 10/20 and referred to IFP subcommittee Discussed at 4/21 meeting
1	20-AP-E	Rule 3	Sai	Initial consideration 10/20 and referred to Relation Forward subcommittee Discussed at 4/21 meeting
1	20-AP-G	Amicus Briefs and Recusal	Alan Morrison	Initial consideration and referred to Amicus subcommittee 4/21
1	21-AP-B	IFP Forms	Sai	Initial consideration and referred to IFP subcommittee 4/21
1	21-AP-C	Amicus Disclosures	Senator Whitehouse & Representative Johnson	Issue noted and subcommittee formed 10/19 Initial consideration of suggestion 4/21
1	21-AP-D	Costs on Appeal	Alan Morrison	Initial consideration of suggestion 10/21
1	21-AP-E	Electronic Filing by Pro Se Litigants	Sai	Initial consideration of suggestion 10/21

	FRAP Item	Proposal	Source	Current Status
1	21-AP-F	Time Frame to Rule on Habeas Corpus	Gary Peel	Initial consideration of suggestion 10/21
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21 Discussed at 4/21 meeting and postponed until 4/24
0	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19 and subcommittee formed Discussed at 4/20 meeting and to be considered in 4/23
0	21-AP-A	Adding Time After Service of Judgment	Greg Patmythes	Initial consideration and removed from the agenda 4/21
0	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration 10/20 and tabled pending consideration by Civil Rules Committee

0 removed from agenda or deferred to future meeting
1 pending before Advisory Committee prior to public comment
2 approved by Advisory Committee and submitted to Standing Committee for publication
3 out for public comment
4 pending before Advisory Committee after public comment
5 final approval by Advisory Committee and submitted to Standing Committee
6 approved by Standing Committee
7 approved by SCOTUS

TAB 1C

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2021)

REA History:

- Transmitted to Supreme Court (Oct 2020)
- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)

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

Revised August 24, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Approved by Standing Committee (June 2021 unless otherwise noted)

REA History:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

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

Revised August 24, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Approved by Standing Committee (June 2021 unless otherwise noted)

REA History:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subsection (a)(4)(A)(vi).	CV 87 (Emergency CV 6(b)(2))
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2021.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the twenty-second day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d).	

TAB 1D

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
PROTECT Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Co-sponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Adminstrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee

Sunshine in the Courtroom Act of 2021	**S.818** *Sponsor:* Grassley (R-IA) *Co-sponsors*: Blumenthal (D-CT) Cornyn (R-TX) Durbin (D-IL) Klobuchar (D-MN) Leahy (D-VT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines. This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."	• 3/18/21: Introduced in Senate; referred to Judiciary Committee • 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 6/25/21: Ordered to be reported without amendment favorably by Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Co-sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)		**Senate Bill Text (HR text not available):** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."	• 3/18/21: Introduced in Senate and House; referred to Judiciary Committees • 5/3/21: Letter received from Sen. Grassley and Rep. Issa • 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates

Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Co-sponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes." Section 2 of the bill contains the following two subdivisions that implicate Rules: "(b) PROTECTION OF TRADE SECRETS.— (1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts. (2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, as such rules would function in the absence of an evidentiary privilege." "(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software."	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology
Juneteenth National Independence Day Act	**S. 475**	AP 26; BK 9006; CV 6; CR 45	Established Juneteenth National Independence Day (June 19) as a legal public holiday	• 6/17/21: Became Public Law No: 117-17.

Bankruptcy Venue Reform Act of 2021	H.R. 4193 *Sponsor*: Lofgren (D-CA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 **Summary:** Modifies venue requirements relating to Bankruptcy proceedings.	• 6/28/21 Introduced in House, Referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	S. 2497 *Sponsor*: Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195 **Summary:** Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate. • Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate.	• 7/28/21 Introduced in Senate, Referred to Judiciary Committee

TAB 2

TAB 2A

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

The following attended on behalf of the advisory committees:

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

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

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

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

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

* 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 re-start 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 <u>one</u> 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 <u>is</u> based on sufficient data, some courts have asked whether the opinion <u>could be found by a reasonable juror to be</u> 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,[†] 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

[†] 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[‡] 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

[‡] The proposed amendment clarifies the language of Rule 42, including by restoring the pre-restyling 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). 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.

TAB 2B

Agenda E-19 (Summary)
Rules
September 2021

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 6-7

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and .... pp. 9-13

   b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 13-14

3. Approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 18-21

4. Approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 23-25

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 22, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Acting Chief Counsel, Rules Committee Staff; Bridget Healy and Scott Myers, Rules Committee Staff

Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC).

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

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also discussed the advisory committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Additionally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic and discussed an action item regarding judiciary strategic planning.

EMERGENCY RULES[1]

Section 15002(b)(6) of the CARES Act directs the Judicial Conference and the Supreme Court to consider rule amendments that address emergency measures that may be taken by the courts when the President declares a national emergency. The advisory committees immediately began to review their respective rules last spring in response to this directive and sought input from the bench, bar, and public organizations to help evaluate the need for rules to address emergency conditions. At its January 2021 meeting, the Standing Committee reviewed draft rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response

[1] The proposed rules and forms amendments approved for publication, including the proposed emergency rules, will be published no later than August 15, 2021 and available on the Proposed Amendments Published for Public Comment page on uscourts.gov.

to that directive. The Evidence Rules Committee concluded that there is no need for an emergency evidence rule.

In their initial review, the advisory committees concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to developing emergency rules that are uniform to the extent reasonably practicable given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. At its January 2021 meeting, the Standing Committee encouraged the advisory committees to continue seeking uniformity and made a number of suggestions to further that end. Since that meeting, the advisory committees have made progress toward this goal in a number of important respects including: (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

The advisory committees' proposals initially diverged significantly on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some of the draft emergency rules also allowed certain courts and judges to make the declaration. In light of feedback received from the Committee at its January meeting, all of the

proposed rules now provide the Judicial Conference with the sole authority to declare a rules emergency.

The basic definition of what constitutes a "rules emergency" is now uniform across all four emergency rules. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

Proposed new Criminal Rule 62 (Criminal Rules Emergency) additionally requires that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The other advisory committees saw no reason to impose this extra requirement in their own emergency rules given the strict standards set forth in the basic definition. The Committee approved divergence in this instance given the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

The proposed bankruptcy, civil, and criminal emergency rules all allow the Judicial Conference to activate some or all of a predetermined set of emergency rules when a rules emergency has been declared. But the language of proposed new Civil Rule 87 (Civil Rules Emergency) differs from the other two. Proposed new Rule 87 states that the declaration of emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed bankruptcy and criminal emergency rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question. The Civil Rules Committee feared that authorizing the placement of "restrictions on" the emergency rule variations listed in Rule 87(c) could cause problems by suggesting that one of those emergency rules could be adopted subject to restrictions that might alter the functioning of that particular emergency rule. The Civil Rules Committee designed Rule 87 to authorize the Judicial Conference to adopt fewer than all of the emergency rules listed

in Rule 87(c), but not to authorize the Judicial Conference to place additional "restrictions on" the functioning of any specific emergency rule that it adopts. Emergency Rule 6(b)(2), in particular, is intricately crafted and must be adopted, or not, in toto. After discussion, the Committee supported publishing the rules with modestly divergent language on this point.

Each of the proposed emergency rules limits the term of the emergency declaration to 90 days. If the emergency is longer than 90 days, another declaration can be issued. Each rule also provides for termination of an emergency declaration when the rules emergency conditions no longer exist. Initially, there was disagreement about whether the rules should provide that the Judicial Conference "must" or "may" enter the termination order. This matter was discussed at the Committee's January meeting and referred back to the advisory committees. After further review, the advisory committees all agreed that the termination order should be discretionary.

While the four emergency rules are largely uniform with respect to the definition of a rules emergency, the declaration of the rules emergency, and the standard length of and procedure for early termination of a declaration, they exhibit some variations that flow from the particularities of a given rules set. For example, the Appellate Rules Committee concluded that existing Appellate Rule 2 (Suspension of Rules) already provides sufficient flexibility in a particular case to address emergency situations. Its proposed emergency rule – a new subdivision (b) to Rule 2 – expands that flexibility and allows a court of appeals to suspend most provisions of the Appellate Rules for all cases in all or part of a circuit when the Judicial Conference has declared a rules emergency. Proposed new Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) is primarily designed to allow for the extension of rules-based deadlines that cannot normally be extended. Proposed new Civil Rule 87 focuses on methods for service of process and deadlines for postjudgment motions. Proposed new Criminal Rule 62 would allow for specified departures from the existing rules with respect to public access to the courts,

methods of obtaining and verifying the defendant's signature or consent, the number of alternate jurors a court may impanel, and the uses of videoconferencing or teleconferencing in certain situations.

After making modest changes to the text and note of proposed Criminal Rule 62 and to the text of proposed Bankruptcy Rule 9038 and Civil Rule 87, the Standing Committee unanimously approved all of the proposed emergency rules for publication for public comment in August 2021. This schedule would put the emergency rules on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Rules 25 and 42.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(a)(5) concerning privacy protection was published for public comment in August 2020. 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.

Rule 42 (Voluntary Dismissal)

The proposed amendment to Rule 42 was published for public comment in August 2019. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Standing 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. These local rules take a variety of approaches such as requiring a personally signed statement from the defendant or a statement from counsel about the defendant's knowledge and consent. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 25 and 42 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that a proposed amendment to Rule 2 be published for public comment in August 2021. The Advisory Committee also recommended for publication a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to be published with the emergency rules proposals. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 4(a)(4)(A) provides that a motion listed in the rule and filed "within the time allowed by" the Civil Rules re-sets the time to appeal a judgment in a civil case; specifically, it

re-sets the appeal time to run "from the entry of the order disposing of the last such remaining motion." The Civil Rules set a 28-day deadline for filing most of the motions listed in Rule 4(a)(4)(A), *see* Civil Rules 50(b), 52(b), and 59, but the deadline for a Civil Rule 60(b) motion varies depending on the motion's grounds. *See* Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). For this reason, Appellate Rule 4(a)(4)(A)(vi) does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those filed no later than 28 days after entry of judgment – a limit that matches the 28-day time period applicable to most of the other post-judgment motions listed in Appellate Rule 4(a)(4)(A).

Civil Rule 6(b)(2) prohibits extensions of the deadlines for motions "under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Proposed Emergency Civil Rule 6(b)(2) would lift this prohibition, creating the possibility that (during an emergency) a district court might extend the 28-day deadline for, inter alia, motions under Civil Rule 59. In that event, a Rule 59 motion could have re-setting effect even if filed more than 28 days after the entry of judgment – but if Appellate Rule 4(a)(4)(A) were to retain its current wording, a Rule 60(b) motion would have re-setting effect only if filed within 28 days after entry of judgment. Such a disjuncture would be undesirable, both because it could require courts to discern what is a Rule 59 motion and what is instead a Rule 60(b) motion, and because parties might be uncertain as to how the court would later categorize such a motion. To avoid this disjuncture and retain Rule 4(a)(4)(A)'s currently parallel treatment of both types of re-setting motions, the proposed amendment would revise Rule 4(a)(4)(A)(vi) by replacing the phrase "no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59." The proposed amendment would not make any change to the operation of Rule 4 in non-emergency situations.

Information Items

The Advisory Committee met by videoconference on April 7, 2021. In addition to the matters discussed above, agenda items included: (1) two suggestions related to Rule 29 (Brief of an Amicus Curiae), including study of potential standards for when an amicus brief triggers disqualification and a review of the disclosure requirements for organizations that file amicus briefs; (2) a suggestion regarding the criteria for granting in forma pauperis status and the disclosures directed by Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis); (3) a suggestion to revise Rule 4(a)(2)'s treatment of premature notices of appeal; and (4) the continued review of whether the time-counting rules' presumptive deadline for electronic filings should be moved earlier than midnight.

The Advisory Committee will reconsider proposed amendments it had approved for publication that would abrogate Rule 35 (En Banc Determination) and amend Rule 40 (Petition for Panel Rehearing) so as to consolidate in one amended Rule 40 all the provisions governing en banc hearing and rehearing and panel rehearing. The Advisory Committee, in crafting that proposal, had sought to accomplish this consolidation without altering the current substance of Rule 35. Discussion in the Standing Committee brought to light questions about how to implement the proposed consolidation as well as suggestions that additional aspects of current Rule 35 be scrutinized. Accordingly, the Standing Committee re-committed the proposal to the Advisory Committee for further consideration.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended the following for final approval: (1) Restyled Parts I and II of the Bankruptcy Rules; (2) proposed amendments to 12 rules, and a proposed new rule, in response to the Small Business Reorganization Act of 2019

(SBRA), Pub. L. 116-54, 133 Stat. 1079 (Aug. 26, 2019), (Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, and new Rule 3017.2); (3) proposed amendments to four additional rules (Rules 3002(c)(6), 5005, 7004, and 8023); and (4) a proposed amendment to Official Form 122B in response to the SBRA. The proposed amendments were published for public comment in August 2020. As to all of these proposed amendments other than the Restyled Parts I and II of the Bankruptcy Rules, the Advisory Committee sought transmission to the Judicial Conference; the Restyled Rules, as noted below, will be held for later transmission.

Restyled Rules Parts I and II

Parts I and II of the Restyled Rules (the 1000 and 2000 series) received extensive comments. Many of the comments addressed specific word choices, and changes responding to those comments were incorporated into the versions that the Advisory Committee recommended for final approval. The Advisory Committee rejected other suggestions. For example, the National Bankruptcy Conference (NBC) objected to capitalizing of the words "Title," "Chapter," and "Subchapter" because those terms are not capitalized in the Bankruptcy Code. The Advisory Committee concluded that this change was purely stylistic and deferred to the Standing Committee's style consultants in retaining capitalization of those terms. The NBC also suggested that the Restyled Rules add a "specific rule of interpretation" or be accompanied by "a declarative statement in the Supreme Court order adopting the new rules" that would assert that the restyling process was not intended to make substantive changes, and that the Restyled Rules must be interpreted consistently with the current rules. The Advisory Committee disagreed with this suggestion and noted that none of the four prior restyling projects (Appellate, Civil, Criminal, and Evidence) included such a statement in the text of a rule or promulgating order. As was done in the prior restyling projects, the Advisory Committee has included a general committee note describing the restyling process. The note also emphasizes that restyling is not

intended to make substantive changes to the rules. Moreover, the committee note after each individual rule includes that following statement: "The language of Rule [ ] has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The Advisory Committee recommended that the Standing Committee approve the 1000 and 2000 series of Restyled Rules as submitted, but that it wait until the remainder of the Restyled Rules have been approved after publication in 2021 and 2022 before sending any of the rules to the Judicial Conference. The Advisory Committee anticipates a final review of the full set of Restyled Rules in 2023, after the upcoming publication periods end, to ensure that stylistic conventions are consistent throughout the full set, and to incorporate any non-styling changes that have been made to the rules while the restyling process has been ongoing. The Standing Committee agreed with this approach and approved the 1000 and 2000 series, subject to reconsideration once the Advisory Committee is ready to recommend approval and submission of the full set of Restyled Rules to the Judicial Conference in 2023.

The SBRA-related Rule Amendments

The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA-related form amendments.

The following rules were published for public comment:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- Rule 2009 (Trustees for Estates When Joint Administration Ordered);

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

No comments were submitted on these SBRA-related rule amendments, and the Advisory Committee approved the rules as published.

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

Rule 3002(c)(6) (Filing Proof of Claim or Interest). The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment would create a uniform standard. Regardless of whether a creditor's address is foreign or domestic, the court could grant an extension if it finds that the notice was insufficient under the circumstances to give that creditor a reasonable time to file a proof of claim. There were no comments, and the Advisory Committee approved the proposed amendment as published.

Rule 5005 (Filing and Transmittal of Papers). The proposed amendment would allow papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system, and would dispense with the requirement of proof of transmittal when the transmittal is made by that means. The amendment would also eliminate the requirement for

verification of the statement that provides proof of transmittal for papers transmitted other than through the court's electronic-filing system. The only comment submitted noted an error in the redlining of the published version, but it recognized that the committee note clarified the intended language. With that error corrected, the Advisory Committee approved the proposed amendment.

Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. Although no comments were submitted, the Advisory Committee deleted a comma from the text of the proposed amendment and modified the committee note slightly by changing the word "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the proposed amendment as revised.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to the pending proposed amendment to Appellate Rule 42(b) (discussed earlier in this report). The amendment would clarify, inter alia, that a court order is required for any action other than a simple voluntary dismissal of an appeal. No comments were submitted, and the Advisory Committee approved the proposed amendment as published.

<u>SBRA-related Amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income)</u>

When the SBRA went into effect on February 19, 2020, the Advisory Committee issued nine Official Bankruptcy Forms addressing the statutory changes. Unlike the SBRA-related rule amendments, the SBRA-related form amendments were issued by the Advisory Committee under its delegated authority to make conforming and technical amendments to the Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. Although the SBRA-related form amendments were

already final, they were published for comment along with the proposed rule amendments in order to ensure that the public had a thorough opportunity to review them. There were no comments and the Advisory Committee took no further action with respect to them.

In addition to the previously approved SBRA-related form amendments, a proposed amendment to Official Form 122B was published in order to correct an instruction embedded in the form. The instruction currently explains that the form is to be used by individuals filing for bankruptcy under Chapter 11. The form is not applicable under new subchapter V of chapter 11, however, so the instruction was modified as follows (new text emphasized): "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 *(other than under subchapter V)*." There were no comments and the Advisory Committee approved the form as published.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Official Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to the Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules); Rule 3002.1; Official Form 101; Official Forms 309E1 and 309E2; and new Official Forms 410C13-1N,

410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R with a recommendation that they be published for public comment in August 2021. In addition, as discussed in the emergency rules section of this report, the Advisory Committee recommended approval for publication of proposed new Rule 9038 (Bankruptcy Rules Emergency). The Standing Committee unanimously approved the Advisory Committee's recommendations. The August 2021 publication package will also include proposed amendments to Rules 3011 and 8003, and Official Form 417A, which the Standing Committee approved for publication in January 2021 and which are discussed in the Standing Committee's March 2021 report.

Restyled Rules Parts III, IV, V, and VI

The Advisory Committee sought approval for publication of Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules). This is the second group of Restyled Rules recommended for publication. The first group of Restyled Rules, as noted above, received approval by the Standing Committee after publication and comment; and the Advisory Committee expects to present the final group of Restyled Rules for publication next year.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

The proposed amendment is intended to encourage a greater degree of compliance with the rule's provisions for determining the status of a mortgage claim at the end of a chapter 13 case. Notably, the existing notice procedure used at the end of the case would be replaced with a motion-based procedure that would result in a binding order from the court on the mortgage claim's status. The amended rule would also provide 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 amended rule includes proposed stylistic changes throughout.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

Changes are made to lines 2 and 4 of the form to clarify that the requirement to report "other names you have used in the last 8 years … [including] *doing business as* names" is meant to elicit only names the debtor has personally used in doing business and not the names of separate entities such as an LLC or corporation in which the debtor may have a financial interest.

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))

The proposed amendments to line 7 of Official Form 309E1 and line 8 of Official Form 309E2 clarify the distinction between the deadline for objecting to discharge and the deadline for seeking to have a debt excepted from discharge.

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)

The proposed amendment to Rule 3002.1 discussed above calls for the use of five new Official Forms. Subdivisions (f) and (g) of the amended rule would require the notices, motions, and responses that a chapter 13 trustee and a holder of a mortgage claim must file to conform to the appropriate Official Forms.

The first form – Official Form 410C13-1N – would be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of

payments to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using the second form – Official Form 410C13-1R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments.

The proposed third and fourth forms – Official Forms 410C13-10C and 410C13-10NC – would implement Rule 3002.1(g)(1). One is used if the trustee made the ongoing postpetition mortgage payments from the debtor's plan payment (as a conduit), and the other is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has completed all plan payments, and it seeks a court order determining the status of the mortgage claim.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using the final proposed form – Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments.

Information Items

The Advisory Committee met by videoconference on April 8, 2021. In addition to the recommendations discussed above, the meeting covered a number of other matters, including a suggestion by 45 law professors to streamline turnover procedures in light of *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021).

In its January 2021 decision in *City of Chicago v. Fulton*, the Supreme Court held that a creditor who continues to hold estate property acquired prior to a bankruptcy filing does not violate the automatic stay under § 362(a)(3). *City of Chicago*, 141 S. Ct. at 592. In so ruling, the Court found that a contrary reading of § 362(a)(3) would render superfluous § 542(a)'s provisions for the turnover of estate property. *Id.* at 591. In a concurring opinion, Justice Sotomayor noted that current procedures for turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She stated, however, that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id.* at 595.

Acting on Justice Sotomayor's suggestion, 45 law professors submitted a suggestion that would allow turnover proceedings to be initiated by motion rather than adversary proceeding, and the National Bankruptcy Conference has submitted a suggestion supportive of the law professors' position. A subcommittee of the Advisory Committee has begun consideration of the suggestions and is gathering information about local rules and procedures that already allow for turnover of certain estate property by motion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the

Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain

statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run

from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 87 (Civil Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation. The August 2021 publication package will also include proposed amendments to Civil Rules 15 and 72 that were previously approved for publication in January 2021 (as set out in the Standing Committee's March 2021 report).

Information Items

The Advisory Committee met by videoconference on April 23, 2021. In addition to the action items discussed above, the Advisory Committee considered reports on the work of the Subcommittee on Multidistrict Litigation, including a March 2021 conference on issues regarding leadership counsel and judicial supervision of settlement, as well as the work of the

newly reactivated Discovery Subcommittee. The Advisory Committee also determined to keep on its study agenda suggestions to develop uniform *in forma pauperis* standards and procedures, and to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind).

The Advisory Committee will reconsider a proposed amendment to Rule 12(a)(4)(A), the rule that governs the effect of a motion on the time to file responsive pleadings, following discussion and feedback provided at the Standing Committee meeting. The proposed amendment would have extended from 14 days to 60 days the presumptive time for the United States to serve a responsive pleading after a court denies or postpones a disposition on a Rule 12 motion "if the defendant is 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." 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 provide for consultation between local U.S. Attorney offices and the DOJ or the Solicitor General. The Advisory Committee determined that extending the time to 60 days would be consistent with other time periods applicable to the United States (e.g., Rule 12(a)(3), which provides a 60-day time to answer in such cases, and Appellate Rule 4(a)(1)(B)(iv), which sets civil appeal time at 60 days).

The proposed amendment has not been without controversy. It was published for public comment in August 2020 and, of the three comments received, two expressed concern that the proposed amendment was imbalanced and would cause unwarranted delay; that plaintiffs in these actions often are involved in situations that call for significant police reforms; that the amendment would exacerbate existing problems with the qualified immunity doctrine; and that the proposal was overbroad in that it would accord the lengthened period in actions in which there is no immunity defense. Discussion at the Advisory Committee's April 2021 meeting focused on two major concerns. First, some thought the amendment might be overbroad and

should be limited only to immunity defenses; however, a motion to add this limitation failed. Second, there was concern over whether the 60-day time period was too long. Ultimately, however, the Advisory Committee approved the proposed amendment by a divided vote.

At its meeting, members of the Standing Committee expressed similar concerns about the 60-day time period being too long, especially given that the time period for other litigants is 14 days. After much discussion, the Standing Committee asked the Advisory Committee to obtain more information on factors that would justify lengthening the period and consider further the amount of time that those factors would justify.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

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

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 62 (Criminal Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met by videoconference on May 11, 2021. The meeting focused on approval for publication of proposed new Rule 62 as well as final approval of the proposed amendments to Rule 16. Both of these items are discussed above. The Advisory Committee also received a report from the Rule 6 Subcommittee and considered suggestions for new amendments to a number of rules, including Rules 11 and 16.

Rule 11 (Pleas)

The Advisory Committee has received a proposal to amend Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Title 18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, provides a procedure by which a defendant may be found not guilty by reason of insanity; however, neither the plea nor the plea agreement provisions of Rule 11 expressly provide for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," and Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense." Initial research by the Rules Committee Staff found a number of instances in which a jury trial was avoided because both parties agreed on the appropriateness of a verdict of not guilty by reason of insanity. The procedure used in those instances was to hold a bench trial at which all the facts were stipulated in advance. This meets the statutory requirement of a verdict and does not use the Rule 11 plea procedure. The Advisory Committee determined to retain the suggestion on its study agenda in order to conduct further research on the use of the stipulated trial alternative.

Rule 16 (Discovery and Inspection)

The Advisory Committee considered two new suggestions to amend Rule 16 to require that judges inform prosecutors of their *Brady* obligations. Although the recently enacted Due

Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, the suggestions urge the Advisory Committee to develop a national standard. The Advisory Committee determined that it would not be appropriate to propose a national rule at this time, but placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

Rule 6 (The Grand Jury)

In May 2020, the Advisory Committee formed a subcommittee to consider suggestions to amend Rule 6(e)'s provisions on grand jury secrecy. The formation of the subcommittee was prompted by two suggestions proposing the addition of an exception to the grand jury secrecy provisions to include materials of historical or public interest. Two additional suggestions have been submitted in light of recent appellate decisions holding that district courts lack inherent authority to disclose material not explicitly included in the exceptions listed in Rule 6(e)(2)(b). *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020); *see also Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (cert. granted July 2, 2020; case remanded with instructions to vacate the order below on mootness grounds, July 2, 2021) (presenting the question regarding the exclusivity of the Rule 6(e) exceptions). Additionally, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). 140 S. Ct. at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically

enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

The two most recent suggestions submitted in reaction to this line of cases include one from the DOJ suggesting an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings; however, some district courts have stopped issuing delayed disclosure orders in light of *McKeever*. Second, two district judges have suggested an amendment that would explicitly permit courts to issue redacted judicial opinions when there is potential for disclosure of matters occurring before the grand jury.

In April, the subcommittee held a day-long virtual miniconference to gather more information about the proposals to amend Rule 6 to add exceptions to the secrecy provisions. The subcommittee obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration.

The Advisory Committee has also referred to the subcommittee a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee plans to present its recommendations to the Advisory Committee at its fall meeting.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 106, 615, and 702 with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 would fix two problems with 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 opponent may require admission of a completing portion of the statement in order to correct the misimpression. The rule prevents juries from being misled by the selective introduction of portions of a written or recorded statement. The proposed amendment is intended to resolve two issues. First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. The proposed amendment clarifies that the completing portion is admissible over a hearsay objection. (The use to which the completing portion may be put – that is, whether it is admitted for its truth or only to prove that the completing portion of the statement was made – will be within the court's discretion.) Second, the current rule applies to written and recorded statements but not unrecorded oral statements leading many courts to allow for completion of such statements under another rule of evidence or under the common law. This is particularly problematic because Rule 106 issues often arise at trial when there may not be time for the court or the parties to stop and thoroughly research other evidence rules or the relevant common law. The proposed amendment would revise Rule 106 so that it would apply to all written or oral statements and would fully supersede the common law.

Rule 615 (Excluding Witnesses)

The proposed amendment to Rule 615 addresses two difficulties with the current rule. First, it addresses the scope of a Rule 615 exclusion order. Rule 615 currently provides, 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 typical simple and brief orders that courts issue under Rule 615 operate only to physically exclude witnesses from the courtroom, or whether they also prevent witnesses from learning about what happens in the courtroom while they are excluded. The proposed amendment would explicitly authorize judges to enter orders that go beyond a standard Rule 615 order to prevent witnesses from learning about what happens in the courtroom while they are excluded. This will clarify that any additional restrictions are not implicit in a standard Rule 615 order. The committee note observes that the rule, as amended, would apply to virtual trials as well as live ones.

Second, the proposed amendment clarifies the scope of the rule's exemption from exclusion for entity representatives. Under Rule 615, a court cannot exclude parties from a courtroom, and if one of the parties is an entity, that party can have an officer or employee in the courtroom. Some courts allow an entity-party to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. In the interests of fairness, the Advisory Committee proposes to amend the rule to make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. As with any party, an entity-party can seek an additional exemption from exclusion by arguing that one or more additional representatives are "essential to presenting the party's claim or defense" under current Rule 615(c) (which would become Rule 615(a)(3)).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendment to Rule 702 concerns the admission of expert testimony. Over the past several years the Advisory Committee has thoroughly considered Rule 702 and has determined that it should be amended 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 be based on sufficient facts or data and must be the product of reliable principles and methods, and the expert must have "reliably applied the principles and methods to the facts of the case." A proper reading of the rule is that a judge should not admit expert testimony unless the judge first finds by a preponderance of the evidence that each of these requirements is met. The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions. Many courts have treated these Rule 702 requirements as if they go merely to the testimony's weight rather than to its admissibility. For example, instead of asking whether an expert's opinion *is* based on sufficient data, some courts have asked whether *a reasonable jury could find* that the opinion is based on sufficient data. 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 the expert is relying on sufficient facts or data, and employing a reliable methodology that is reliably applied. The amendment would not change the law but would clarify the rule so that it is not misapplied.

The second issue addressed by the proposed amendment to Rule 702 is that of overstatement – 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. There had been significant disagreement among members of the Advisory Committee on this issue. The criminal defense bar felt strongly that the problem should be addressed by adding a new

subsection that explicitly prohibits this kind of overstatement. The DOJ opposed such an addition, pointing to its own internal processes aimed at preventing overstatement by its forensic experts and arguing that the problem with overstatement is caused by poor lawyering (i.e., failure to make available objections) rather than poor rules. The Advisory Committee reached a compromise position, which entails changing Rule 702(d)'s current requirement that "the expert has reliably applied the principles and methods to the facts of the case" to require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The committee note explains that this change to Rule 702(d) is designed to help focus judges and parties on whether the conclusions being expressed by an expert are overstated.

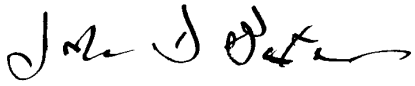
Information Items

The Advisory Committee met by videoconference on April 30, 2021. Discussion items included a possible new rule to set safeguards concerning juror questioning of witnesses and possible amendments to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) regarding the use of illustrative aids at trial; Rule 1006 (Summaries to Prove Content) to provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006; Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding admissibility of statements offered against a successor-in-interest; and Rules 407 (Subsequent Remedial Measures), 613 (Witness's Prior Statement), 804 (Hearsay Exceptions; Declarant Unavailable), and 806 (Attacking and Supporting the Declarant) to address circuit splits. The Advisory Committee discussed, and decided not to pursue, possible amendments to Rule 611(a) (to address how courts have been using that rule) and to Article X of the Evidence Rules (to address the best evidence rule's application to recordings in a foreign language).

OTHER ITEMS

An additional action item before the Standing Committee was a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard, that the Committee refresh and report on its consideration of strategic initiatives. The Committee was also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs. No members of the Committee suggested any changes to the proposed status report concerning the Committee's ongoing initiatives. Those initiatives include: (1) Evaluating the Rules Governing Disclosure Obligations in Criminal Cases; (2) Evaluating the Impact of Technological Advances; (3) Bankruptcy Rules Restyling; and (4) Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation. The proposed status report also includes the addition of one new initiative – the emergency rules project described above – which is linked to Strategy 5.1: Harness the Potential of Technology to Identify and Meet the Needs of Judiciary Users and the Public for Information, Service, and Access to the Courts. The Standing Committee did not identify any topics for discussion at future long-range planning meetings. This was communicated to Chief Judge Howard by letter dated July 13, 2021.

Respectfully submitted,



John D. Bates, Chair

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

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed new supplemental rules and supporting report excerpt)

Appendix D – Federal Rules of Criminal Procedure (proposed amendment and supporting report excerpt)

TAB 3

Minutes of the Spring 2021 Meeting of the

Advisory Committee on the Appellate Rules

April 7, 2021

Via Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, April 7, 2021, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, Judge Richard C. Wesley, and Lisa Wright. Acting Solicitor General Elizabeth Prelogar was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice. Judge Stephen Joseph Murphy III did not attend due to a power outage. Judges Watford and Wesley each missed different parts of the meeting because they were hearing oral arguments.

Also present were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Judge Bernice B. Donald, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Julie Wilson, Standing Committee on the Rules of Practice and Procedure and Rules Committee Acting Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Management Analyst, RCS; Kevin Crenny, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; Brittany Bunting, Administrative Analyst, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Daniel J. Capra, Reporter, Advisory Committee on the Rules of Evidence and Liaison to the CARES Act Subcommittees; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

I. Introduction

Judge Bybee opened the meeting, acknowledged the work of Committee members, and welcomed guests and observers. He noted that Judge Richard Wesley is a new member of the Committee, and he thanked Judge Stephen Murphy, whose term on the Committee ends in September, for his service.

II. Report on Meeting of the Standing Committee

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

III. Approval of the Minutes

The draft minutes of the October 10, 2020, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

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

Judge Bybee stated that the proposed amendment to Rule 42 had previously been published for public comment (in August of 2019) and been approved by this Committee but remanded by the Standing Committee. The Reporter added that the Standing Committee had been concerned about how the proposed amendment could interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. As reflected in the agenda book (page 96), a new paragraph (d) was added at the October 2020 meeting to deal with this concern. This addition met the concern of the Standing Committee, and a corresponding paragraph has since been added to the Committee Note.

The Committee approved the proposed amendment, recommending that the Standing Committee give final approval to the proposed amendment as it appears in the agenda book.

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

Judge Bybee stated that the proposed amendment to Rule 25 had been published for public comment (in August of 2020). No comment opposing the proposed amendment has been received.

Judge Bates suggested that the phrase "remote access" in the text of the proposed amendment and the phrase "electronic access" in the Committee Note both be replaced by the phrase "remote electronic access." After a discussion of the phrasing used in parallel provisions of other sets of rules, the Committee agreed with this suggestion.

With these changes, the Committee approved the proposed amendment, recommending that the Standing Committee give final approval to the proposed amendment.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendment to Rule 2—CARES Act

The Reporter presented the subcommittee's report regarding the CARES Act (Agenda book page 106). He stated that the discussion draft that this Committee had forwarded to the Standing Committee had two distinctive features. First, it empowered both the Judicial Conference and each court of appeals to declare a rules emergency, permitting the chief judge to act on behalf of the court of appeals. Second, if a rules emergency were declared, it permitted the court to suspend any provision of the rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2).

In large part due to the importance of uniformity, the Standing Committee preferred to vest the power to declare a rules emergency in the Judicial Conference alone. However, it seemed comfortable with the open-ended approach permitting the court to suspend nearly any rule once a rules emergency is declared. It also favored the inclusion of a sunset provision. Another concern the Standing Committee raised was that the discussion draft did not clearly state what happened once a rule was suspended.

The subcommittee incorporated this feedback into a new draft. The new draft vests the power to declare a rules emergency solely in the Standing Committee. It includes a sunset provision. And it makes explicit, using language from the existing Rule 2, that when a rule is suspended, the court may order proceedings as it directs. Some further stylistic changes were made in coordination with other advisory committees. (Agenda book page 122).

In response to a question from Mr. Byron, the Reporter clarified that the plan was to emerge from this meeting with a draft that this Committee would ask the Standing Committee to approve for publication for public comment.

A lawyer member noted that since the latest draft does not empower a chief judge to declare a rules emergency, the first reference to "the court" in 2(b)(1) should be to "a court." Professor Capra stated that this was a good catch. Mr. Byron noted that the singular would include the plural, and Professor Capra said that use of "a court" had gone through style on that point.

An academic member stated that his prior concerns about authority were largely addressed by this change in the rule. The Judicial Conference simply declares

the emergency exists. The court can then fall back on its preexisting power once the rules back off.

In response to a question from Judge Bybee, Professor Struve stated that under the current draft, no individual judge, including the chief judge, would have suspension power, but the full court, or in some circumstances a panel, would. The Reporter agreed that the current draft leaves it to the court; the default would be the full court, but as to matters within the authority of a panel, the panel would have authority.

Judge Bates observed that the court must mean the full court because a panel could not suspend a rule in all or part of a circuit. Judge Bybee stated that his court uses an executive committee, and he would not want to impair that. A judge member added that her court has the same thing and suggested a Committee Note stating that each court can choose how to implement this power, observing that sometimes something is so obvious that the chief does something subject to anyone objecting.

The Reporter agreed that Judge Bates was correct that the power under 2(b)(5)(A) to suspend in all or part of a circuit would not be the sort of power that could be exercised by a panel, but that the power under 2(b)(5)(B) to order proceedings as it directs might be. Judge Bybee stated that he was fond of the ambiguity.

An academic member suggested acting by local rule, or by a majority of active judges. Judge Bybee responded that he did not want to get involved with local rules rather than orders. A judge agreed with leaving the ambiguity and withdrew the suggestion of adding to the Committee Note. Professor Struve observed that Rule 47(b) provides that no disadvantage may be imposed on a litigant for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has notice of the requirement, so there is no risk of harm to litigants.

Mr. Byron drew attention to the distinctive requirement of the proposed Emergency Criminal Rule that no feasible alternative be available. The Reporter noted that there did not appear to be any objection to Criminal being different in this respect. Professor Capra added that Criminal is proud to be different.

With the one change noted above—"the court" to "a court"—the Committee agreed to recommend that the Standing Committee approve publication of the proposed amendment to Rule 2 for public comment.

The Reporter stated that the subcommittee had also coordinated with the Advisory Committee on the Federal Rules of Civil Procedure regarding the proposed Emergency Civil Rule 6. (Agenda book page 110). Emergency Civil Rule 6 would empower a district court to extend the time to file certain post-judgment motions. Coordination is necessary to be sure that extensions work appropriately with Federal

Rule of Appellate Procedure 4, which resets the time to appeal when certain post-judgment motions are filed.

The draft in the agenda book may be ambiguous whether the extension granted runs from when the period would otherwise have expired or from when the court grants the extension. From the perspective of this Committee, the choice doesn't seem to matter, so long as it is clear. In response to a question by Mr. Byron about why the maximum extension was 30 days rather than 28 days, Professor Struve stated that she had seen drafts both ways.

The Reporter stated that a substantial difficulty has been drafting the rule so that it works appropriately with motions under Civil Rule 60. That's because Appellate Rule 4 gives resetting effect to most of the relevant post-trial motions so long as they are timely filed under the Civil Rules. If an extension is granted under an Emergency Civil Rule and a motion is filed within the time as extended, it is timely under the Civil Rules. That doesn't work for Rule 60 motions, however, because Rule 60(b) motions need only be filed within a reasonable time, with some subject to an outside limit of one year. For that reason, existing Appellate Rule 4(a)(4)(A)(vi) grants resetting effect to Rule 60 motions if they are filed within 28 days of the judgment. Without some specific provision dealing with Rule 60, an extension granted under the Emergency Civil Rule would not result in resetting effect for a Rule 60 motion. Efforts are continuing to solve this problem; one possibility is to favor simplicity and not cover Rule 60 motions in the Emergency Civil Rule at all. From the perspective of this Committee, as long as the working of Emergency Civil Rule is clear, it does not seem to matter whether or not the Emergency Civil Rule covers Rule 60.

An academic member suggested that if drafting the Emergency Civil Rule to integrate with Appellate Rule 4 is so difficult, perhaps the problem could be solved by amending Appellate Rule 4(a)(4)(A)(vi) to refer to "the time for filing the above motions," or "the time to file motions under Rules 50, 52, and 59," rather than "28 days."

Mr. Byron stated that it is an appellate problem if Rule 60 motions are not covered. The existing treatment of Rule 60 motions is that appellate lawyers and courts don't have to worry about the proper characterization of motions; the benefit of the existing treatment of Rule 60 motions is that there is no need to fight about it. He urged that alignment of Rule 60 motions with other post-judgment motions be continued.

The Reporter noted that the problems should be less likely to arise if, as expected, most of the time an extension would be prompted by a motion and order in a particular case. In those circumstances, the litigant would have an order specifying which motion could be filed, making it less likely that a motion other than one authorized would be filed. Professor Struve added that sometimes there would be a district-wide extension order. She also clarified, in response to a question from Judge

Bybee, that the one-year outside limit for some Rule 60(b) motions does not affect the resetting of time to appeal.

Professor Struve indicated that the suggested change to Appellate Rule 4(a)(4)(A)(vi) appeared to work, as did Mr. Byron, who added that we should advise Civil to include Rule 60. The Reporter tentatively agreed.

A judge member thought that the suggested change to Appellate Rule 4(a)(4)(A)(vi) was confusing, and that judges recharacterize filings all the time. Another added that we need to step back from the expertise on this committee and into the shoes of a regular consumer of these rules. A lawyer member suggested explicitly referring to extensions under the Civil Emergency Rule. Professor Struve emphasized that relying on judges to recharacterize filings does not solve the litigant's problem who does not know whether or how a judge will recharacterize and therefore whether it resets appeal time. Two lawyer members stated that the suggested change to Appellate Rule 4(a)(4)(A)(vi) did not make the rule that much more complicated; the rule already refers to motions under various Civil Rules. Mr. Byron suggested that Appellate Rule 4(a)(4)(A)(vi) refer only to Rule 59(e).

A judge member suggested referring to any extension. Professor Struve responded that such a provision would suggest that extensions are more readily available than they are. Under the non-emergency rules, a district court can't extend these times, and if a court does so anyway, a litigant can't rely on the extension.

The Reporter suggested that a reference to Rule 59 would be sufficient, noting that it is more likely that a district court would grant an extension for a Rule 59 motion but not a Rule 50 motion than the other way around. Mr. Byron added that he is not so concerned about Rule 50 motions. A lawyer member agreed that a reference to Rule 59 is clearest.

Professor Capra noted that while he thinks Civil will ultimately advise an Emergency Rule, it is not committed to it. A judge member suggested keeping the existing 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) and adding the reference to Rule 59. This would give resetting effect to a motion "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered or within the time allowed for filing a motion under Rule 59," letting a litigant rely on the number of days without having to cross-reference the Civil Rules.

A lawyer member noted that Appellate Rule 4 requires a litigant to look to the Civil Rules anyway. Professor Struve added that including both 28 days and the time for filing a Rule 59 motion suggests that there is some daylight between the two. In non-emergencies, there isn't.

After a ten-minute break, the Reporter shared a screen with the relevant provisions of Rule 4 and reviewed how Rule 4(a)(4)(A) currently works. He suggested

that Rule 4(a)(4)(A)(vi) be amended to give resetting effect to a motion "for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59."

Judge Bybee noted that while most of the subdivisions of Civil Rule 59 have 28-day time limits, Rule 59(c) refers to 14 days. The Reporter noted that the 14-day requirement applies to opposing affidavits, not to motions.

After a brief discussion, no one was uncomfortable with a change from "no later than" to "within the time allowed."

An academic member noted that there might be extensions to file motions under Rule 50 or Rule 54, without an extension to file a motion under Rule 59. For example, there might be an issue about the admissibility of evidence that could result in judgment as a matter of law but not a new trial. And there might be a bench trial, with a motion under Rule 52. To account for these, Rule 4(a)(4)(A)(vi) could be amended to give resetting effect to a motion "for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing any of the above motions."

Mr. Byron stated that complications would arise under Rule 58; it is cleaner with just Rule 59. Professor Struve added that adding Rule 58 would lead to more analysis but unlikely it would operate to make the time limit more permeable. Referring to Rule 59 is simpler.

Judge Bates stated that if the goal is to capture extensions granted under the CARES Act, Rule 59 is the way to go. If the goal is broader than that, the broader language may be appropriate, but they have not been thought through. Changing 28 days to Rule 59 makes no substantive change (in how Rule 4 operates in a non-emergency).

Judge Bybee suggested keeping it simple. Referring to Rule 59 in (vi) keeps it parallel to the other romanettes. The proposed amendment to Rule 4(a)(4)(A)(vi) is as follows:

> "for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59."

The Committee agreed to recommend that the Standing Committee approve publication of the proposed amendment to Rule 4(a)(4)(A)(vi) for public comment.

B. Various Amendments Occasioned by CARES Act Review

The Reporter presented the report of the subcommittee regarding various amendments occasioned by the CARES Act review. (Agenda book page 113). He explained that early in the process called for by the CARES Act, the subcommittee reviewed every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies. That review led the subcommittee to present to the full Committee at the last meeting some minor amendments that might be appropriate in light of the experience of the pandemic without regard to a rules emergency. The subcommittee met again to review these possible minor amendments.

Upon further review, the subcommittee decided to not recommend any amendment to Rule 4(c), the prisoner mailbox rule. One concern is that an amendment providing additional time when an internal mail system is not available might be an invitation to inmates to contend that the mail system was not available to them because of their own individual circumstances. In response to a question, the Reporter explained that the idea for an amendment had not arisen from any sense that there is a problem, but rather from a CARES Act review of every Appellate Rule. Judge Bybee noted that the problem can be dealt with on an ad hoc basis under the existing rule.

The Committee agreed to propose no change to Rule 4(c).

The Reporter stated that the subcommittee did recommend a minor change to Rule 33, dealing with appeal conferences. The current rule states that conferences may be conducted "in person or by telephone"; the subcommittee suggested amending to allow conferences to be conducted "in person or remotely."

The Committee approved this minor amendment.

The Reporter presented the subcommittee's suggestion that Rule 34(b), dealing with oral argument, be amended to directly address remote arguments. In particular, the amended Rule 34 would continue to require the Clerk to inform the parties of the "place" of in-person argument, but require the Clerk, for an argument that was to be heard remotely in whole or in part, the "manner" in which the argument would be heard. He noted that one concern was, if an argument were partly remote because of the particular circumstances of a judge, that there was a risk of revealing the composition of the panel before the court would otherwise do so. Ms. Dwyer stated that there was no need for this change. Clerks let parties know what they need to know. If the argument is being held remotely, parties will know that the "place" of the argument can be their own home. Mr. Byron stated that it may be better to retain the flexibility of the existing rule.

The Reporter presented the subcommittee's suggestion that Rule 34(g), dealing with the use of physical exhibits at oral argument and requiring arrangements for placing them in the courtroom and removing them from the courtroom, be amended to deal only with in-person arguments. While a remote oral argument may involve exhibits, there is no need to arrange for placing them in and removing them from the courtroom. Ms. Dwyer stated that if an argument is held via Zoom, then Zoom is the courtroom.

The Committee agreed to propose no change to Rule 34.

The Reporter presented the subcommittee's suggestion that Rule 45, which requires that the clerk's office "must" be open with a clerk or deputy in attendance during business hours except for weekends and holidays, be amended to state that it "will" be open with a clerk or deputy in attendance at those times. The idea is to recognize that circumstances may prevent someone from being present. He noted that the Civil and Criminal Rules have similar provisions.

Mr. Byron noted that this change would require coordination with other Advisory Committees and would be on a slower track. Ms. Dwyer noted that "in attendance" could be read as "be available" and that the Clerk's Office has been available through remote work.

The Committee agreed to propose no change to Rule 45.

The Reporter then asked the Committee whether it was worth going forward with the only change of this group that the Committee had approved, the replacement of "by telephone" with "remotely" in Rule 33, dealing with appeal conferences. Judge Bybee said that it would depend on whether the word "telephone" appears in other rules. Ms. Dwyer noted that there will probably be lots of remote proceedings going forward. Mr. Byron noted that we should keep in mind that Rule 2 is available. Judge Bybee added that further coordination might be appropriate.

The Committee reconsidered its earlier decision and agreed to propose no change to Rule 45 at this time, leaving any possible change along these lines to the future.

The Committee took a short lunch break.

C. Proposed Amendments to FRAP 35 and 40—Rehearing (18-AP-A)

Professor Sachs presented the subcommittee's report regarding Rules 35 (dealing with hearing and rehearing en banc) and Rule 40 (dealing with panel rehearing). (Agenda book page 125). He noted that the Committee had been considering small changes to these rules, but the result was a spaghetti string of cross-references, leading to an effort at a comprehensive revision that abrogates Rule

35 and unites the two rules under Rule 40. The proposed comprehensive revision leaves some provisions in the same place they have been, preserves some provisions from the two rules where there are important differences, and creates mostly uniform provisions for matters such as timing, form, and length.

There are three issues addressed by the subcommittee.

First, should separate petitions for panel rehearing and rehearing en banc be permitted? The Fifth Circuit requires separate petitions by local rule, as current Rule 35 allows. The subcommittee draft requires a single petition unless a local rule provides otherwise.

Second, what happens if the panel acts and changes its decision while a petition for rehearing en banc is pending? Rather than address this situation in the text of the rule, the subcommittee draft has a Committee Note that explains that the petition for rehearing en banc remains pending until the en banc court deals with it. If a party thinks that a new petition is needed, either because the panel did not fix the problem or created a new problem, proposed Rule 40(d)(1) provides the time to file a new petition.

Third, what happens if the panel changes its decision and doesn't want to hear any more; should it be able to order that no further petitions for panel rehearing will be entertained? The subcommittee was loath to officially close those off. Instead, the Committee Note mentions the many tools available for dealing with this situation, including a short deadline for filing a new petition, a shorter time for issuing the mandate, or invoking Rule 2 to prevent a new petition. It also adds a note of caution because the court doesn't know what the parties would say in a new petition.

The subcommittee also moved the provision dealing with oral argument.

Rule 40(d)(4) states that "ordinarily" a petition will not be granted in the absence of a request for a response, leaving enough wriggle room for the court to act without a response where appropriate.

Rule 40(d)(5) simplifies the existing provision regarding what the court might do, eliminating somewhat dated language that is unneeded.

Judge Bybee stated that the subcommittee worked very hard, and that not everyone is uniformly in favor. Judges may have a different reaction. He reached out to the Chief Judge of the Fifth Circuit to ask how strongly that court is committed to its requirement of separate petitions but has not yet heard back, perhaps because that court just issued a 325-page decision.

A judge member commended the work of the subcommittee. She explained that she had thought that the two rules should not be consolidated. She provided the

subcommittee with lots of input from the Clerk. She does not plan to advocate against it. It's a big change, but it is now really clear and well done. She is not won over, because her court will get more en banc petitions, but has no objection. Judge Bybee added that this is a great compliment to the subcommittee.

While she did not feel strongly, she suggested adding a Committee Note about denying rehearing without a response where the lack of a need for rehearing is so clear. Judge Bybee emphasized that the rule provides that rehearing ordinarily won't be *granted* without requesting a response; "ordinarily' deals with situations where the need for a grant is obvious, such as an intra-circuit conflict.

[At this point, Judge Wesley joined the meeting and was welcomed. He had been delayed because he was hearing oral arguments.]

A lawyer member stated that she was not on the subcommittee and that the proposal looks very good. She had been bothered at the last meeting by the provision that panel rehearing is the "ordinary" means of reconsidering a panel decision, but the Committee Note takes care of that concern.

A judge member stated that his court allows combined petitions and has no objections to the proposal. Ms. Dwyer added that Clerk's office staff is also supportive.

After a discussion about the relative frequency of en banc proceedings in the various circuits, the Committee approved the proposal without objection.

The Reporter turned to a possible amendment to the table of page lengths in the appendix. This table should have been amended when the rules were amended to provide a length limit for responses, but the table was overlooked at the time. The subcommittee's proposed language is in the report. (Agenda book page 131). Competing language has been submitted as a separate suggestion by Dean Benjamin Spencer; his suggestion was designed to correct the prior oversight and does not make changes to reflect the proposed comprehensive revision of Rules 35 and 40.

Several members of the Committee indicated a preference for the language in the subcommittee report. Mr. Byron asked if the amendment to the table should go forward separately as a clarification. The Reporter thought not, because it would then have to be amended again to change the rule numbers in accordance with the proposed comprehensive revision of Rules 35 and 40.

The Reporter added that there was also a need for a conforming amendment to Rule 32(g) to accompany the comprehensive revision. Rule 32(g) contains cross-references to Rules 35 and 40 that need to be changed. A Committee member noted that the amendment language shared by the Reporter needed the word "or" added before the last listed rule.

With that change, the Committee approved the proposed amendments without objection.

D. Amicus Disclosures—FRAP 29 (21-AP-C)

Danielle Spinelli presented the report of the AMICUS subcommittee. (Agenda book page 133). She explained that in 2019 a bill was introduced in Congress that would institute a registration and disclosure system like the one that applies to lobbyists. It would apply to those who filed three or more amicus briefs per year but would not be tied to a specific amicus brief. The letters and article by Senator Whitehouse explain the rationale. Amicus briefs filed without meaningful disclosures can enable parties to evade the page limits on briefs and, if one or a small number of people with deep pockets fund multiple amicus briefs, can give the misleading impression of a broad consensus.

In October 2019, the AMICUS subcommittee was appointed. In February of 2021, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that this Committee had already established a subcommittee to do so.

There are important and complicated issues, some of which are within the purview of this Committee, and some of which are not. Public registration and fines are not within the purview of this Committee, but changes to the disclosure requirements of Rule 29 are. Current Rule 29 is based on a corresponding Supreme Court rule and requires disclosure of (i) whether a party's counsel authored an amicus brief; (ii) whether a party or a party's counsel contributed money intended to fund preparing or submitting the brief; and (iii) whether a person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparation or submission of the brief.

Some may construe the second requirement narrowly to cover only the printing and filing of the amicus brief, although that is not the way it is typically understood. Parties may also be able to evade the second requirement by giving money (which is fungible) to an organization without earmarking it for a particular amicus brief. In addition, parties who are members of an organization submitting an amicus brief could take advantage of the third requirement's exception for members of the amicus organization.

There are also broader concerns about the influence of "dark money" on the amicus process. The subcommittee would like some exploration by the full committee of whether this is a concern it should address before moving forward and, if so, what steps are appropriate.

The subcommittee has sketched out some language addressing some of the issues that the rules could address. (Agenda book page 140-41). This is not a suggestion of language to adopt, but rather a first step illustrating how some issues could be addressed.

To deal with the narrow construction of the second requirement, the word "drafting" is added, making clear that disclosure is required of contributions made for writing the brief, not just printing and filing it.

To deal with possible evasion by parties, a new provision is added requiring greater disclosure of contributions by a party to an amicus and changing the existing exception for members of an amicus to not apply to members who are parties or counsel to parties.

The subcommittee has not drafted any language addressing the issue of nonparties funding multiple amici.

Judge Bybee stated that the subcommittee had done a lot of work and that the principal author of the memo was Danielle Spinelli. Noting the connection between our rule and the Supreme Court rule, he noted that coordination would be necessary.

Ms. Spinelli stated that the subcommittee is looking for guidance from the full Committee; it would be helpful to get the full Committee's reaction to the underlying concerns. She noted that there are countervailing constitutional issues regarding the disclosure of the membership of an organization.

Judge Bybee stated that he was struck by the idea of requiring disclosures by those who file three or more amicus briefs; that's not the kind of thing we do. Ms. Spinelli added that the subcommittee envisions rules for all amici, not just those who file a certain number of amicus briefs.

An academic member stated that lobbying is not the same as filing an amicus brief. Lobbying is done in private. An amicus filing is made in public and can be responded to. An amicus brief is more like a billboard outside the courthouse paid for by "Citizens for Goodness and Wonderfulness." It is appropriate to guard against undue influence by the parties, and by those who claim to be independent of the parties but aren't. The language in romanette (ii), which is designed to avoid the narrow interpretation of that provision, and in romanette (iv), which would remove the exception for parties and their counsel who are members of an amicus organization, could go forward separately from the new romanette (iii). Trying to determine who counts as a direct or indirect parent can be difficult with corporate parents, and its application to LLCs even harder.

Ms. Spinelli posed more precise questions for the Committee. Should the focus remain on contributions by parties? Should the subcommittee think about

contributions by nonparties so that, for example, the court would know that ten amicus briefs were all paid for by one person? Because amicus briefs are more of an issue for the Supreme Court than for the courts of appeals, we should be in communication with the Supreme Court; should this Committee bless such communication? Anything else we should consider?

A judge member stated that the premise of the article and bill is that an amicus give someone a leg up. He used to be in the state legislature and has been lobbied. Lobbying is different than filing an amicus brief. We should not accept the premise that they are the same and should be careful not to be drawn into debate on those terms.

Judge Bates stated that we should not expect more guidance from the Supreme Court. We should touch base with the Clerk of the Supreme Court before moving forward, and Judge Bates should be included in any such discussions. But the hope is that this Committee and the rule making process will thoroughly examine the matter. We obviously must consider the NAACP case and keep an eye on the pending SCOTUS case.

Ms. Spinelli then turned attention to the language sketched out to deal with parties, an area clearly within our purview. Perhaps members could send any ideas about that language via email, as well as any thoughts about a broader disclosure rule and competing concerns.

Judge Bybee asked where the 10% threshold came from. Ms. Spinelli responded that it was drawn from the corporate disclosure rule (Rule 26.1). A judge member noted that this is like the discussion of disclosure of educational programs attended by judges. The perception of fairness and independence is important. The Code of Conduct Committee spent a long time dealing with those disclosures. Judges are not likely to be affected, but perceptions matter.

A lawyer member emphasized the importance of the perception that parties may be getting around the disclosure rules. The tricky question involves nonparties. A court can look very bad, even if not influenced, because it can look like the court was hoodwinked.

Ms. Spinelli asked if the full Committee thought that the subcommittee should continue its work regarding parties, as sketched out in the agenda book. Two judge members urged that we not start from a presumption of improper influence; the question is transparency. A judge member stated that the language in the agenda book was a good start regarding parties. In response to a question from Judge Bybee, Ms. Spinelli stated that the subcommittee did not deal with recusal issues.

The Reporter asked if anyone thought that the subcommittee should not consider dealing with nonparties. An academic member stated that he was hesitant

to require disclosure for nonparties when not intended to fund the brief. He understands the concern about non-circumvention, but some donors may not have influence. Consider the difference between someone who provides 3% of the revenue to the Chamber of Commerce and someone who wholly owns an organization. A disclosure rule can create all kinds of complications dealing with LLCs and other types of structures. Ms. Spinelli added that the corporate disclosure rule is designed for recusal purposes and that's why it is focused on public corporations. It is not easy to block all methods of circumvention.

Judge Bybee stated that it was clear that the subcommittee would continue its work. Ms. Spinelli agreed that the subcommittee would move forward and welcome input as it does.

E. IFP Standards—Form 4 (19-AP-C; 20-AP-D)

Ms. Wright presented the report of the subcommittee. (Agenda book page 193). She noted that Sai had submitted a suggestion regarding the standards for granting IFP status and for revising Form 4. A staff attorney from the Ninth Circuit joined the subcommittee meeting and provided insight into how the IFP process works in practice. She will survey other circuits to get information from them about the standard used, how Form 4 is used, and what parts of it are helpful.

Judge Bybee added that it was a very productive subcommittee meeting and asked if there were any other comments. The Reporter called the Committee's attention to an additional relevant submission from Sai.

F. Relation Forward of Notices of Appeal—Rule 4 (20-AP-A)

Tom Byron presented the report of the subcommittee. He explained that in prior discussions of this issue, one category of cases stood out: cases where an order could have been certified for immediate appeal under Civil Rule 54(b) but was not, a notice of appeal is filed, sometime later final judgment is entered, no new notice of appeal is filed, and the old notice of appeal does not ripen so the appeal is lost.

The problem arises because, even after a party files a notice of appeal, the case goes forward in the district court notwithstanding the notice of appeal. Perhaps this is due to unawareness of the significance of the notice of appeal. Or perhaps there is some other reason the case proceeds.

The question for the subcommittee is whether there is any way to do something about these situations. It has not identified a clear way to solve the problem—a problem that seems to be partly of a party's own making by failing to follow up on what it should do.

Professor Lammon suggests that all notices of appeal ripen once final judgment is entered. The subcommittee rejects that approach because it would encourage premature notices of appeal and cause more problems than it solves.

The subcommittee considered formalizing the process recognized in the *Behrens* case (*Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996)) that permits a district court to proceed despite a notice of appeal by certifying that the appeal is frivolous. But this doesn't seem to be effective for the problem identified, that is, that the party filing the notice of appeal seems to be unaware of its significance. There isn't an obvious trigger to invoke the process; the problem was the failure to seek a Rule 54(b) certification.

The bottom line is the subcommittee couldn't come up with a good solution and therefore is not recommending any action. However, the subcommittee is not ready to take the matter off the agenda. The subcommittee and the Reporter will look more closely at the circuit split, seeking to clarify whether there are clear splits between circuits as opposed to splits within circuits. The latter may reflect case specific outcomes.

In addition, the subcommittee will look more closely at another issue, one involving the denial of post-trial motions. The Reporter added that he will investigate the current rule's different treatment of post-trial motions in civil and criminal cases.

An academic member stated that splits within circuits, where some panels forgive and others don't, may be worse and more in need of a fix. He also noted that opposing parties can be blamed as well because they could raise the issue themselves. Perhaps they should forfeit the issue if they move to dismiss the appeal too late.

Ms. Spinelli stated that the subcommittee batted around several possible solutions, but none were satisfactory. Judge Bybee added that it may be muddled, that panels are making ad hoc decisions, and there may not be a good rule.

VI. Discussion of Matters Before Joint Subcommittees

The Reporter provided a brief update on the status of two matters before joint subcommittees.

First, the joint subcommittee considering the midnight deadline for electronic filing is continuing to gather information. The Federal Judicial Center is analyzing data on the time of day when filings are made, but a planned survey is on hold due to the pandemic. (Agenda book page 211).

Second, the joint subcommittee considering the final judgment rule in consolidated actions is continuing its study. Research by the Federal Judicial Center did not reveal significant problems and further research by the FJC does not seem

warranted at this point. (Agenda book page 213). However, problems may remain hidden, either because no one notices the issue or because by the time the issue is discovered it is too late to do anything about it.

VII. Discussion of Recent Suggestions

A. Amicus Briefs and Recusal—Rule 29 (20-AP-G)

The Reporter introduced the suggestion from Dean Alan Morrison. (Agenda book page 217). In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The Rule, however, does not provide any standards for when an amicus brief triggers disqualification. Dean Morrison suggests that this Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption. The Reporter suggested that this matter be referred to the AMICUS subcommittee. Ms. Spinelli, the chair of that subcommittee, agreed.

Judge Bybee noted that an important source of information regarding recusal is financial disclosures by judges and that these disclosures are open to the public. To the extent that a judge recuses because of a personal connection to a law firm, the firm itself should know that connection.

An academic member stated that this seems to be more of an issue for the Judicial Conference than for this Committee. It's really a question of interpretation of the recusal statute. A judge member noted that this is really an issue at the en banc stage because cases are screened for recusal issues at the panel stage.

A lawyer member suggested that the standard may be outside the purview of this Committee. Mr. Byron had some recollection that this issue had been canvassed before, and Professor Struve noted that we can try to dig that up. Mr. Byron also mentioned a related issue of the process for amicus briefing after the grant of rehearing. Ms. Dwyer noted that the Clerk's Office clears conflicts before ever sending a case to a panel. An academic member said that the issue is important, that the greatest need is at the en banc stage, and that it should be referred to the subcommittee.

The matter was referred to the AMICUS subcommittee.

B. Adding Time After Service of Judgment (21-AP-A)

The Reporter introduced the suggestion by Greg Patmythes that the rules explicitly provide for an extra three days after service of a judgment to file a motion that tolls the time to appeal under Rule 4(a)(4). He also suggests adding a provision

to Civil Rule 60 that would require Rule 60 motions to be made within 28 days to toll the time to appeal and deleting the 28-day provision from Appellate Rule 4(a)(4).

The Reporter recommended that this suggestion be removed from the agenda. Some time limits run from the date of service, but other time limits run from some other event. The extra three-day provision applies only to the former. The time to file motions that toll the time to appeal runs from the date of entry of the judgment, not the date of service. Changing any of the deadlines that run from entry of judgment to deadlines that run from service would be a major shift and require considerable reworking of various rules, and there does not seem to be reason to do so. The provision in Rule 4(a)(4) for Rule 60 motions is not designed to encourage Rule 60 motions to be brought within 28 days of judgment, but to treat Rule 60 motions filed within 28 days of judgment like other post-judgment motions.

The Committee agreed unanimously to remove this suggestion from the agenda.

C. IFP Forms (21-AP-B)

The Reporter introduced Sai's response to the IFP subcommittee's September 2020 report; the response has been docketed as a new suggestion. (Agenda book page 233). The Reporter suggested that it be referred to the IFP subcommittee, and this was done without objection.

VIII. Old Business

The Reporter stated that in April of 2018 the Committee had decided to table consideration of possible changes to appendices but revisit the matter in three years. (Agenda book page 245). The concern was that appendices were too long and included much irrelevant information. The hope was that technology would solve the problem. He suggested that the Committee had three options at this point: 1) Re-form a subcommittee to address the issue; 2) Wait longer to return to the issue, perhaps on the theory that it is better addressed once a new post-pandemic normal is reached; or 3) Remove the issue from the agenda.

An academic member reported that the frustration that practicing lawyers have with appendices has been raised on Twitter. Mr. Byron stated that he had advocated change in this area in the past but been dissuaded by the prior Clerk's representative on the Committee. Ms. Dwyer stated that the circuits have struggled with this for years. Some judges want an electronic brief; others want paper. The practice in the Fifth Circuit may be best. There, the district court produces an enormous PDF that is placed on a site at the court of appeals; parties are required to cite to that location with hyperlinks. It requires lots of cooperation by district courts.

In response to a question by a judge member, Ms. Dwyer said that the PDF is searchable.

A judge member stated that he loves electronic briefs with hyperlinks. It's a lot easier to carry his iPad than 45 pounds of paper. He has bench memos prepared with hyperlinks to the record. Older judges resist, but it's a matter of time.

Mr. Byron raised a slightly different issue: procedures for designating and producing the appendix. Well before electronic filing, practice in the Fifth Circuit involved a literal box of papers with deferred designation of the appendix. In the Sixth Circuit, citation is directly to the district court electronic record. There is a disuniformity problem; there will be resistance to changing from one's own way of doing things until we can abandon designation and simply use the electronic record. A technological fix can let us abandon the old ways. He suggested revisiting the issue in another three years.

Ms. Dwyer added that upgrades to ECF are being discussed. The practical problem is wild over-designation. The designation task should not be given to the lowest paid person in the office.

A judge member stated that in the Eleventh Circuit there is a full electronic record on appeal. One problem is getting the district courts to scan everything; things are missing, such as trial exhibits. And the different approaches by judges is not only age-based. Two new judges want paper versions.

A judge member stated that the transition to electronic records has been seamless in the Sixth Circuit. Judges who want paper were given printers and told to print.

Mr. Byron suggested that this should be considered with CACM, IT, and district judges.

The Committee agreed to revisit the issue again in another three years.

IX. Review of Impact and Effectiveness of Recent Rule Changes

The issue we have been watching is whether courts of appeals are still requiring proof of service despite the 2019 amendment to Rule 25(d) to no longer require proof of service for documents that are electronically filed. Mr. Byron stated that it is still happening. We will get a list from Mr. Byron of which courts continue to do so and figure out a course of action.

X. New Business

No member of the Committee presented any new business.

XI. Adjournment

Judge Bybee thanked the participants, stating that it was a long and productive day.

The next meeting will be held on October 7, 2021. The hope is that it will be in person in Washington D.C.

The Committee adjourned at 4:25 p.m.

TAB 4

TAB 4A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: CARES Act amendments

Date: September 9, 2021

In accordance with the CARES Act, the Advisory Committee considered what amendments, if any, would be appropriate to deal with future emergencies. The Committee concluded that the best approach for the Appellate Rules was to amend existing Federal Rule of Appellate Procedure 2. With the approval of the Standing Committee, this proposed amendment was published for public comment.

The Standing Committee also approved publication a proposed amendment to Appellate Rule 4 for public comment. This proposed amendment is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

The proposed amendments, as published, follow this memo. To date, we have received two comments, one favorable, the other not.

The favorable comment is from Louis Kerner, who wrote:

> I thought that these are entirely appropriate, well drafted, and even overdue.

The unfavorable comment is from Irvan Moritzky, who wrote:

> 1. I Oppose a rule granting the Judicial Conference exclusive power to declare or end Emergency. I oppose this entire rule making as impractical.
>
> 2. Supreme Court in Duncan v Kahanamoku, 327 U.S. 304 (1946) covered constitutional protection and guarantee of a fair trial. Leave issues to the local District Judges to decide appropriate rules to hold trials, summon jurors, examine witnesses, and run their courts.
>
> 3. If Walmart, Costco, Target, Giant, Safeway, Albertson's, Kroger, are open, let the local Judge run their courts.

4. The proposed One size fits all of the Judicial Conference means that no one fits.

5. See the Kahanamoku case attached.

6. The Courts have managed during the US Civil war, and wars before, and wars after.

7. If anyone abuses the law, there is always an appeal.

8. The proposed rules are not simple. You have a 327 page report styled as a preliminary draft. The Declaration of Independence is under 1400 words. The U.S. Constitution is 6 pages. Your rules will not advance respect, are not necessary, and are not effective.

The Committee might want to know that *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), involved civilians who were sentenced to prison by military tribunals in Hawaii. The Court held that both petitioners were entitled to be released from custody. *Id*.

TAB 4B

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

Rule 2. Suspension of Rules

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

(b) In an Appellate Rules Emergency.

(1) **Conditions for an Emergency.** The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court,

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

substantially impair the court's ability to perform its functions in compliance with these rules.

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

(A) designate the circuit or circuits affected; and

(B) be limited to a stated period of no more than 90 days.

(3) **Early Termination.** The Judicial Conference may terminate a declaration for one or more circuits before the termination date.

(4) **Additional Declarations.** Additional declarations may be made under Rule 2(b).

(5) **Proceedings in a Rules Emergency.** When a rules emergency is declared, the court may:

(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and

(B) order proceedings as it directs.

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court's ability

to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to "order proceedings as it directs," the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

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

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—

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

and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~within the time allowed for filing a motion under Rule 59.

* * * * *

Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal

from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed "within a reasonable time," and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that

emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase "if the motion is filed no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59."

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

TAB 5

TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Rules 35/40 Subcommittee

Re: Rules 35 & 40 Consolidation

Date: Sept. 10, 2021

At its June meeting, the Standing Committee expressed broad support for the proposed consolidation of Rules 35 and 40. It remanded the matter to this Committee with instructions to take a freer hand in clarifying and simplifying the language of the existing rules.

The Subcommittee has discussed revisions to the proposed language sent to the Standing Committee. (That language differs from the version approved at our April meeting only with respect to stylistic changes suggested by the style consultants.)

In particular, the minor revisions proposed by the Subcommittee are intended:

- to reiterate the authority of the en banc court to hear or rehear a case sua sponte, without waiting for a party's petition;
- to make clear that a conflict between a panel decision and a Supreme Court decision is a proper ground for en banc review; and
- to simplify the rules for parties filing petitions for panel rehearing as well as for rehearing en banc.

An annotated redline, comparing the text the Subcommittee is now recommending to that sent to the Standing Committee, is below. (Red text is added; blue text is deleted; green text is moved; gray highlighted text reflects comments.)

Clean versions of the proposed rules follow. For the sake of completeness, we also include redlined versions of the conforming amendments to Rule 32 and the length limits appendix, the text of which has not changed since being sent to the Standing Committee. Committee notes are added thereto.

* * *

Rule 35. En Banc Determination. ~~(Abrogated.)~~ (Transferred to Rule 40.)

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 ~~is abrogated, and~~ are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

There was some concern at the Standing Committee that abrogating Rule 35 might result in the loss of historical Committee Notes. While this concern was obviated in light of the availability of other sources for the Committee Notes, it was suggested that the Rule might be more appropriately described as "transferred" rather than "abrogated," as was done in the Federal Rules of Evidence for the residual exception to the hearsay rule. See FRE 803(24), 804(b)(5), 807.

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

The Subcommittee believes this title general enough to address both forms of rehearing (panel and en banc) and both forms of en banc determination (initial hearing and rehearing).

(a) A Party's Options. A party may seek rehearing of a decision through a petition for panel rehearing~~,~~ or a petition for rehearing en banc~~, or a petition for both~~. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision~~.~~, and ~~R~~rehearing en banc is not favored.

This language is intended to provide clear guidance to parties seeking both forms of rehearing, requiring the petitions to be filed as a single document while preserving the courts' authority to provide otherwise by local rule.

(b) ~~**Criteria;**~~ **Content of the Petition**s**.**

(1) Petition for Panel Rehearing. A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc must begin with a statement that ~~either~~:

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

(B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);

(C) the panel decision conflicts with ~~the~~ an authoritative decision~~s~~ of another United States court of appeals that ~~have~~ has addressed the issue (with citation to the conflicting case or cases); or

(D) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated ~~— for example, by asserting that the panel decision conflicts with the authoritative decisions of other United States courts of appeals that have addressed the issue~~.

This version identifies four distinct grounds for a petition for rehearing en banc, which are somewhat confusingly lumped into two categories in the current Rule 35(b)(1).

(c) When Rehearing En Banc May Be Ordered. On their own or in response to a party's petition, a ~~A~~ majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. Unless a judge calls for a vote, a ~~A~~ vote need not be taken to determine whether the case will be reheard en banc ~~unless a judge calls for a vote~~. Ordinarily, rehearing en banc will not be ordered unless~~:~~ one of the criteria in Rule 40(b)(2)(A)–(D) is met.

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

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

The current Rule 35(a) cites two grounds for hearing or rehearing en banc, which only somewhat overlap with the grounds required to be included in a party's petition. This version instead cites the same criteria for both purposes by cross-reference. In particular, it makes clear that a conflict with a Supreme Court decision may be a proper ground for en banc review, an issue that the Standing Committee

discussed at length. This language also emphasizes that a court may order rehearing en banc without waiting for a party's petition.

(d) Time to File; Form; Length; Response; Oral Argument.

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

(A) the United States;

(B) a United States agency;

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

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

(2) Form of the Petition. The petition must comply in form with Rule 32. Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case. ~~If a party seeks both panel rehearing and rehearing en banc, the party must file a single petition subject to the limits in (3), unless a local rule provides otherwise.~~

To assist parties and counsel, the requirement of a single document is announced up front, in the proposed Rule 40(a); the length limit is integrated with the other length limits in the proposed Rule 40(d)(3).

(3) Length. Except by the court's permission or by local rule, a petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc):

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

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

This language provides unified treatment of all petitions and documents containing petitions, subject to local rule.

(4) Response. Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)–(3) apply to the response.

(5) Oral Argument. Oral argument on whether to grant the petition is not permitted.

(e) ~~Court Action~~ If a Petition Is Granted. If a petition is granted, the court may do any of the following:

(~~A~~ 1) dispose of the case without further briefing or argument;

(~~B~~ 2) order additional briefing or argument; or

(~~C~~ 3) issue any other appropriate order.

(f) Panel's Authority After a Petition for Rehearing En Banc. The filing of a ~~A~~ petition for rehearing en banc of a panel decision does not limit the panel's authority to ~~grant relief~~ take action described under Rule 40(e).

Edits are made for clarity, as well as to avoid confusion with the sort of "relief" granted in a district court.

(g) Initial Hearing En Banc ~~For an Appeal or Other Proceeding~~. On its own or in response to a party's petition, a court may hear ~~A party may petition for~~ an appeal or other proceeding ~~to be heard~~ initially en banc. A party's ~~The~~ petition must be filed no later than the date when ~~the appellee's~~ its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)–(5) apply with respect to an initial hearing en banc~~, and those of (b)(2) and (d)(2)–(5) apply to a petition for one~~. ~~But an initial~~ Initial hearing en banc is not favored and ordinarily will not be ordered.

This language emphasizes that a court may order initial hearing en banc without waiting for a party's petition. It also shortens the time for an appellant's petition for an initial hearing en banc to the date when its principal brief is due. Some members of the Standing Committee had expressed surprise that the existing deadline (the due date for the appellee's brief) is so late. The Subcommittee believes that a party will generally know, by the time it files its principal brief, whether the

case is among the very few that might merit initial hearing en banc. If subsequent developments reveal a need for initial hearing en banc, the court can always pursue that course sua sponte.

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 ~~is abrogated, and~~ are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

Subdivision (a). The amendment makes clear that parties may seek panel rehearing~~,~~ or rehearing en banc~~, or both~~. It emphasizes that rehearing en banc is not favored and that rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine, but merely to stress ~~. The ordinariness of panel rehearing is only by way of contrast to~~ the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed. The amendment also preserves a party's ability to seek both forms of rehearing, requiring that both petitions be filed as a single document, but preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

Subdivision (b). Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the ~~criteria for and~~ required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with ~~those relating to~~ that of a petition for rehearing en banc (preserved from Rule 35(b)(1)).

Subdivision (c). The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

Subdivision (d). The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions ~~on~~ for responses to the petition and oral argument.

Time. The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, ~~on~~ for filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It

adds new language extending the same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

Form. The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended Rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing. ~~Finally, the amended Rule requires a party seeking both panel rehearing and rehearing en banc to file a single petition subject to the same length limitations as any other petition, preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.~~

Length. The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)). It also preserves the court's power (previously found in Rule 35(b)(3)) to provide by local rule for other length limits on combined petitions filed as a single document, and it extends this authority to petitions generally.

Response. The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. ~~It~~ The amended Rule also extends to rehearing en banc the existing ~~suggestion~~ statement (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

Oral argument. The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing~~, as opposed to oral argument on the reheard case~~.

Subdivision (e). The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended

language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari "may be a summary disposition on the merits").

Subdivision (f). The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc by, for example, amending its decision. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority.

A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

Subdivision (g). The amended Rule 40 largely preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is ~~retained; the~~ shortened, for an appellant, to the time for filing its principal brief. The other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered. ~~As above, the amendment's discussion of petitions for initial hearing en banc is not intended to diminish the court's existing power to order such hearing sua sponte, without any petition having been filed.~~

* * *

Rule 35. En Banc Determination. (Transferred to Rule 40.)

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

Rule 40. Rehearing; En Banc Determination.

(a) A Party's Options. A party may seek rehearing of a decision through a petition for panel rehearing or a petition for rehearing en banc. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision, and rehearing en banc is not favored.

(b) Content of the Petitions.

(1) Petition for Panel Rehearing. A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc must begin with a statement that:

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

(B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);

(C) the panel decision conflicts with an authoritative decision of another United States court of appeals that has addressed the issue (with citation to the conflicting case or cases); or

(D) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated.

(c) When Rehearing En Banc May Be Ordered. On their own or in response to a party's petition, a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be reheard en banc. Ordinarily, rehearing en banc will not be ordered unless one of the criteria in Rule 40(b)(2)(A)–(D) is met.

(d) Time to File; Form; Length; Response; Oral Argument.

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

(A) the United States;

(B) a United States agency;

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

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

(2) Form of the Petition. The petition must comply in form with Rule 32. Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.

(3) Length. Except by the court's permission or by local rule, a petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc):

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

(B) if handwritten or typewritten, must not exceed 15 pages.

(4) Response. Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)–(3) apply to the response.

(5) Oral Argument. Oral argument on whether to grant the petition is not permitted.

(e) If a Petition Is Granted. If a petition is granted, the court may do any of the following:

(1) dispose of the case without further briefing or argument;

(2) order additional briefing or argument; or

(3) issue any other appropriate order.

(f) Panel's Authority After a Petition for Rehearing En Banc. The filing of a petition for rehearing en banc of a panel decision does not limit the panel's authority to take action described under Rule 40(e).

(g) Initial Hearing En Banc. On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)–(5) apply with respect to an initial hearing en banc. Initial hearing en banc is not favored and ordinarily will not be ordered.

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

Subdivision (a). The amendment makes clear that parties may seek panel rehearing or rehearing en banc. It emphasizes that rehearing en banc is not favored and that rehearing by the panel is the ordinary means of reconsidering a panel

decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine, but merely to stress the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed. The amendment also preserves a party's ability to seek both forms of rehearing, requiring that both petitions be filed as a single document, but preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

Subdivision (b). Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with that of a petition for rehearing en banc (preserved from Rule 35(b)(1)).

Subdivision (c). The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

Subdivision (d). The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions for responses to the petition and oral argument.

Time. The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, for filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

Form. The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended Rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing.

Length. The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)). It also preserves the court's power (previously found in Rule 35(b)(3)) to provide by local rule for other length limits on combined petitions filed as a single document, and it extends this authority to petitions generally.

Response. The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. The amended Rule also extends to rehearing en banc the existing statement (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

Oral argument. The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing.

Subdivision (e). The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari "may be a summary disposition on the merits").

Subdivision (f). The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc by, for example, amending its decision. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority.

A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate

or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

Subdivision (g). The amended Rule 40 largely preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is shortened, for an appellant, to the time for filing its principal brief. The other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered.

* * *

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

* * * *

(g) Certificate of Compliance.

(1) Briefs and Papers That Require a Certificate. A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), ~~35(b)(2)(A),~~ or ~~40(b)(1)~~ 40(d)(3)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) Acceptable Form. Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Subdivision (g). Changes reflect the consolidation of Rules 35 and 40.

* * *

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

		* * *			
Rehearing and en banc filings	~~35(b)(2) & 40(b)~~ 40(d)(3)	• Petition for initial hearing en banc • Petition for panel rehearing; petition for rehearing en banc • Response if requested by the court	3,900	15	Not applicable

TAB 5B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: AMICUS Act Subcommittee

Re: AMICUS Act and Potential Amendments to Rule 29

Date: September 8, 2021

At the April 2021 meeting of the Advisory Committee, the subcommittee presented a memorandum with background and initial thoughts about the AMICUS Act and the concerns underlying it (the "April 2021 Memo"), noting that while some matters addressed by that Act are outside the purview of the Advisory Committee, issues relating to disclosure requirements for filers of amicus briefs called for further study and consideration by the Advisory Committee. See April 2021 Agenda Book 133.

The subcommittee has met and considered these issues in some depth. In addition, since the last meeting of the Advisory Committee, the Supreme Court decided *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (July 1, 2021), which held California's requirements for disclosure of contributors to charitable organizations facially unconstitutional. While the subcommittee is not at this point proposing any particular amendments to the Rules' current amicus disclosure provisions, it has drafted language to help guide the Committee's consideration of these issues.

Rule 29's Current Disclosure Requirements

Rule 29(a)(4)(E) currently provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "a statement that indicates whether":

> (i) a party's counsel authored the brief in whole or in part;
>
> (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
>
> (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

These provisions, modeled on Supreme Court Rule 37.6, were added in 2010. The Committee Note explains that the disclosure requirement "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" and "also

may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief."

Concerns Regarding the Current Disclosure Regime

The concerns that drove the introduction of the AMICUS Act and that the subcommittee has been asked to consider are set out in a February 23, 2021 letter from Senator Sheldon Whitehouse to Judge Bates (the "2021 Whitehouse Letter," attached as Exhibit C to the April 2021 Memo, agenda book at 153), which asked that the Committee on Rules of Practice and Procedure establish a working group "to address the problem of inadequate funding disclosure requirements for organizations that file amicus curiae briefs in the federal courts." They are also discussed at length in the April 2021 Memo.

The overarching concern expressed in the letter and embodied in the AMICUS Act is that the current disclosure requirements in Rule 29 are sufficiently weak and easily evaded that they have enabled "a massive, anonymous judicial lobbying program," undertaken through amicus briefs paid for by undisclosed persons or entities, that "systematically favors well-heeled insiders over the average citizen." 2021 Whitehouse Letter at 6.

As discussed in more detail in the April 2021 Memo, the letter makes the following specific points about the current disclosure rules (reorganized here, for clarity, to track the provisions of Rule 29):

1. *<u>Parties</u> could evade Rule 29's disclosure requirements and fund amicus briefs without disclosing it.*

- Rule 29(a)(4)(E)(ii) requires an amicus to disclose whether "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief."

- The letter suggests that rule is too narrowly drawn because, money being fungible, it still allows parties to fund amicus briefs through monetary contributions to the amicus organization that are not specifically earmarked "to fund preparing or submitting" a particular amicus brief.

- In fact, the letter suggests that the "preparing or submitting" language could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief."

- Moreover, because Rule 29(a)(4)(E)(iii) exempts "members" of an amicus from disclosing contributions they make to fund the preparation or

submission of an amicus brief, the letter suggests that parties who are members of an amicus organization can contribute to an amicus brief without disclosing it.

2. ***<u>Non-parties</u> who are not named amici could evade Rule 29's disclosure requirements and fund amicus briefs without disclosing it.***

- Rule 29(a)(4)(E)(iii) requires amici to disclose whether "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identif[y] each such person."

- Like the corresponding rule for parties in clause (ii), this rule requires disclosure only of contributions by non-parties "intended to fund preparing or submitting" the amicus brief. The letter suggests that it therefore still allows non-parties to fund amicus briefs anonymously through monetary contributions to the amicus organization that are not specifically earmarked "to fund preparing or submitting" a particular brief.

- Moreover, the rule expressly exempts from disclosure contributions by members of an amicus organization.

- As a result of these potential loopholes, the letter suggests that a single deep-pocketed person or entity could anonymously fund multiple amicus briefs (and potentially a party brief as well) in a single case, creating the misleading impression of widespread or grassroots support for a position that in reality lacks such support.

The letter concludes by noting that while "it would be salutary for the judicial branch to address these issues on its own," "a legislative solution" like the AMICUS Act "may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field." 2021 Whitehouse Letter at 8.

The AMICUS Act

The AMICUS Act (as introduced in 2019 and attached as Exhibit A to the April 2021 Memo, agenda book at 144) is discussed in more detail in the April 2021 Memo. The provisions most directly relevant here are the following:

> *Covered Amici*. The Act does not apply to all amici, but only to any "covered amicus," defined to mean "any person . . . that files not fewer than 3 total amicus briefs in any calendar year in the Supreme

Court of the United States and the courts of appeals of the United States." S. 1411, §2(a) (proposing new 28 U.S.C. §1660(a)).

Disclosure. The Act would require any covered amicus who files an amicus brief in the Supreme Court or courts of appeals to "list in the amicus brief the name of any person who—(A) contributed to the preparation or submission of the amicus brief; (B) contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or (C) contributed more than $100,000 to the covered amicus in the previous year." S. 1411, §2(a) (proposing new 28 U.S.C. §1660(b)(1)). It makes an exception for "amounts received by a covered amicus . . . in commercial transactions in the ordinary course of any trade or business conducted by the covered amicus or in the form of investments (other than investments by the principal shareholder in a limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the covered amicus." *Id.* (proposing new 28 U.S.C. §1660(b)(2)).[1]

Constitutional Concerns Associated with Disclosure

Since the last meeting of the Advisory Committee, the Supreme Court decided *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (July 1, 2021), which held California's charitable disclosure requirement to be facially unconstitutional. California had required charities that solicit contributions in California to disclose the identities of their major donors (donors who have contributed more than $5,000 or more than 2% of an organization's total contributions in a year) to the Attorney General.

To evaluate the constitutionality of the California disclosure requirement, the Court applied "exacting scrutiny," meaning that "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *See* Slip op. at 7 (cleaned up) (opinion of Roberts, C.J.).[2] "While exacting

[1] The AMICUS Act also contains registration requirements for covered amici, a prohibition on covered amici making gifts to court of appeals judges or Supreme Court justices, and civil fines for violations. These requirements are discussed in the April 2021 Memo. Because the consensus of the subcommittee is that only disclosure requirements are within our purview, this memo does not address those parts of the AMICUS Act.

[2] Of the six justices in the majority, three—Roberts, Kavanaugh, and Barrett—would have held that exacting scrutiny, rather than strict scrutiny, applies to all First Amendment challenges to compelled disclosure. Justice Thomas would have held that strict scrutiny applied, and Justices Alito and Gorsuch declined to decide because, in their view, California's law failed under either test. The dissenters addressed the California law under the exacting scrutiny standard and would have held it met that standard.

scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* at 9 (opinion of the Court). Moreover, the Court concluded that the narrow tailoring requirement is not limited to "laws that impose severe burdens," but is designed to minimize any unnecessary burden. *Id.* at 11.

The Court then found that California's disclosure regime did not satisfy the narrow tailoring requirement. *Id.* at 12. It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* But it found "a dramatic mismatch" between that interest and the state's disclosure requirements. *Id.* at 13. While California required every charity to disclose the names, addresses, and total contributions of their top donors, ranging from a few people to hundreds, it rarely if ever used this information to investigate or combat fraud. *Id.* Moreover, the state "had not even considered alternatives to the current disclosure requirement" that might be less burdensome. *Id.* at 14. The Court rejected arguments that the disclosure was not in fact particularly burdensome, finding that the disclosure requirement created "an unnecessary risk of chilling," "indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous." *Id.* at 17.

Potential Amendments to Rule 29

The subcommittee believes that the Rules should *not* establish a different disclosure regime for entities that file three or more amicus briefs per year (as the AMICUS Act would do). Rule 29's current disclosure requirements apply to all parties and amici, and any amendments to Rule 29 should likewise apply to all parties and amici.

On the other hand, the subcommittee is far from certain whether the disclosure requirements regarding the relationship between a party and an amicus should be the same as those regarding the relationship between a non-party and an amicus. Both the interests supporting required disclosure and the burdens counseling against required disclosure may be different. As a result, both the policy analysis and the constitutional analysis may be different. The subcommittee has not reached even a tentative conclusion on this question; the subcommittee would particularly welcome discussion of this issue by the full Advisory Committee. This memo presents identical language addressed to both situations to facilitate the Committee's discussion of this important question, not to suggest its resolution.

1. *Amendments related to disclosure of party funding of amicus briefs*

The subcommittee tends to think that it would be appropriate to make some amendments to the rule regarding disclosure of party funding of amicus briefs to ensure that the rule's purpose, as identified in the Committee Note—preventing

parties from evading the page limits by funding amicus briefs to support their position—is served.

Here is proposed language to guide discussion. For ease of exposition, a clean text is shown with noteworthy additions shown in red. A full redline follows this memo. Notes regarding the text and issues to be discussed are enclosed in brackets and shown in blue.

Rule 29. Brief of an Amicus Curiae

* * *

(4) **Contents and Form**. An amicus brief . . . must include the following:

* * *

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2) [the cross reference excuses the United States, its officer and agencies, as well as the States from these requirements], a statement that:

(i) indicates whether a party or its counsel—

- authored the brief in whole or in part;

- contributed money intended to fund drafting, preparing, or submitting the brief;

[The word "drafting" is added to the existing requirement to respond to the concern that the "preparing or submitting" language could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief." The subcommittee believes this addition serves to clarify what is generally if not universally understood and is not controversial.]

- has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae; or

[This would be wholly new. The idea is to create a relatively easy to administer rule to address the concern that a party could

influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief. Such a rule has the advantage of clarity regarding what must be disclosed, making it easier to comply with and administer, but because the 10% threshold is necessarily somewhat arbitrary, the fit between means and end is imprecise.

The language is based in part on the disclosure provisions of the AMICUS Act, with some differences.

- The AMICUS Act requires disclosure if a person "contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or … contributed more than $100,000 to the covered amicus in the previous year." Any such threshold figure or percentage is necessarily somewhat arbitrary, and the lower the figure or percentage the greater the burden of disclosure becomes. Current Rule 26.1, which governs corporate disclosure statements, uses 10%, and the subcommittee has borrowed that benchmark for discussion purposes.

- The AMICUS Act refers to the "previous calendar year"; the proposed language above changes that to "the twelve-month period immediately preceding the filing of the amicus brief." Focusing on the previous calendar year may miss important contributions, the ones most proximate to the amicus filing. While compiling the information based on the immediately prior twelve months may be slightly more burdensome than compiling information based on the previous calendar year, the burden is not likely to be great if the requirement is limited to parties.

- The exception for "amounts received in commercial transactions in the ordinary course of business" and for investments is also taken from the AMICUS Act, but the Act carves out of the exception "investments by the principal shareholder in a limited liability corporation," which must be disclosed. Since the subcommittee's proposed language above already requires disclosure of ownership interests in amici, the subcommittee did not think it was necessary to include that carve-out.]

● directly or indirectly, possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would, under the circumstances, attribute to the party or its counsel a significant influence over the amicus curiae with respect to the filing or content of the brief; and

[This would be wholly new. The idea is to create a standard to address the concern that a party could influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief. Compared to a rule (like the one immediately above) that would set a specific threshold percentage above which a contribution must be disclosed, such a standard would be less clear and more difficult to administer but would arguably provide a tighter fit between means and ends.

The subcommittee decided to include both the rule and the standard for the full Committee's consideration. The Committee might choose one over the other. It might choose to include both, with one serving as a backstop for the other, although this might create the risk that the percentage rule could be viewed as a safe harbor. (Or, the Committee might choose to include neither if it concludes that the goal of broadening disclosure of party contributions to amicus briefs is not worth the complexity.)]

(ii) identifies any person—except for the amicus, its counsel, and its members who are not parties or counsel to parties—who contributed money intended to fund drafting, preparing, or submitting the brief.

[The current Rule does not specifically address the relationship between the provision requiring a party (or its counsel) to disclose contributions to an amicus brief and this provision, which requires all persons to disclose such contributions but exempts members of amici curiae (as well as amici and their counsel). This amendment would make clear that a party (or its counsel) must disclose contributions to an amicus brief even if the party or counsel is a member of the amicus. It would also add the word "drafting" for the same reason that word is added above in clause (i).]

2. *Amendments related to disclosure of non-party funding of amicus briefs*

Rule 29's current disclosure regime treats monetary contributions to amici by parties identically to monetary contributions to amici by non-parties. Amici are required to disclose the identity of any person, whether a party or not (other than the amicus itself, its counsel, or its members) who "contributed money that was intended to fund preparing or submitting the brief." That said, as discussed above, the subcommittee thinks that expanding the disclosure requirements regarding non-parties presents more difficult issues than expanding the disclosure requirements regarding parties.

Accordingly, the subcommittee has drafted language amending current Rule 29(a)(4)(E)(iii), which governs disclosure of contributions by non-parties, that parallels the language above concerning disclosure of contributions by parties. That language follows. The blue, bracketed notes do not repeat the points made above regarding the same language in the context of disclosure of party contributions (although those points remain applicable), but instead focus on some of the differences between disclosure of party contributors and non-party contributors. The hope is that seeing the language laid out like this helps the Committee to decide whether the two situations should be treated the same way.

If the Committee ultimately concludes that the two situations should be handled the same way—or even if the Committee concludes that the two situations should not be handled the same way, but still decides to expand disclosure of non-party contributions beyond what is contained in Rule 29(a)(4)(E)(ii) above—the amended language for non-parties would be integrated into amended Rule 29(a)(4)(E)(ii) above.

Rule 29. Brief of an Amicus Curiae

* * *

(4) **Contents and Form**. An amicus brief . . . must include the following:

* * *

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that:

* * *

(iii) identifies any person—except for the amicus, its counsel[, and its members who are not parties or counsel to parties]—who:

- contributed money intended to fund drafting, preparing, or submitting the brief; or

- has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that are received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae; or

[This would be wholly new. As with the identical language above for party contributions, the idea is to create a rule to address the concern that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership in or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief.

A concern is that expanding the requirements regarding disclosure of non-party contributions in this way would impose a substantially greater burden on amici than a similar expansion of the requirement to disclose contributions by parties. That's because an amicus would *always* have to disclose major owners or contributors, not merely in the presumably unusual situation where a party is a major owner or contributor.

The subcommittee has discussed whether the exemption for members of the amicus in the current rule should be eliminated, on the ground that the distinction between a member and a contributor may be artificial in many situations. (Accordingly, it appears in brackets above.) However, that would involve not just tightening the current disclosure requirements regarding non-parties to ensure they are not evaded, but making a significant change to the existing disclosure regime, which does treat members differently. And it would further aggravate the burden on amici.]

- directly or indirectly, possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would, under the circumstances, attribute to

the party or its counsel a significant influence over the amicus curiae with respect to the filing or content of the brief.

[This would be wholly new. As with the identical language above for party contributions, the idea is to create a standard to address the concern that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief.

Again, expanding the disclosure requirements regarding non-parties in this way would impose a substantially greater burden on amici than expanding the disclosure requirements regarding parties. That's because an amicus would *always* have to disclose major owners or contributors, not merely in the presumably unusual situation where a party is a major owner or contributor.]

Constitutional Considerations Regarding These Possible Amendments

As discussed above, in *Americans for Prosperity Foundation*, the Supreme Court held unconstitutional a California law requiring charities that solicited in California to disclose their major contributors. While that decision is relevant to the analysis here, there are at least four significant differences between the possible amendments to Rule 29 discussed above and the California statute involved in *Americans for Prosperity Foundation*.

First, Rule 29 applies only to those seeking to influence a court by submitting an amicus brief, while the California statute applied broadly to charities soliciting funds in California. There can be little doubt that more disclosure requirements can be imposed on those who file briefs with a court than on charitable organizations generally.

Second, both Rule 29 and the Supreme Court Rules already require both parties and non-parties who make contributions "intended to fund the preparation or submission" of an amicus brief to have their identities publicly disclosed in the brief. Presumably the Court viewed those requirements as constitutional when it imposed them.

Third, disclosures required by Rule 29 appear in a publicly available brief, while the disclosures mandated by California law were supposed to be treated confidentially. The Court observed that "disclosure requirements can chill association even if there is no disclosure to the general public," and "while assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it." Slip op. at 16-17 (cleaned up).

Fourth, a 10% ownership or contribution threshold is higher than the 2% threshold involved (at least in some cases) in the California statute and will often be higher than the $5000 threshold in the California statute.

Any proposed amendments to FRAP 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. The governmental interest in allowing amicus briefs in the first place is to help a court decide cases properly. (The term, after all, is amicus curiae, not amicus partis.) What are the interests in disclosure by amici?

Relationship between amicus and party. According to the 2010 Committee Note, the disclosure of whether a party's counsel authored the brief and whether a party or a party's counsel contributed money to fund the brief "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs." While page limits might seem pedestrian, the idea that each party has a certain limited opportunity to makes its arguments and should not be able to exceed those limits by subterfuge is important to the fair functioning of an adversary system. More broadly, one could view this requirement as designed to prevent the court (and the public) from being misled into thinking that an amicus is independent of a party when it is not.

It might be thought that the only thing that matters is the persuasiveness of the arguments in an amicus brief. But the identity of the amicus and its interest in the case can also be important in evaluating those arguments. Indeed, Rule 29(a)(4)(D) already requires these disclosures as well. And sometimes a court will explicitly rely on the identity of an amicus. *See, e.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (stating that the dissent "suggests that the best way to help aliens is to rule against the alien before us" but "unsurprisingly neither Mr. Niz-Chavez nor any of the immigration policy advocates who have filed amicus briefs in this Court share that assessment") (cleaned up).

The problem with existing Rule 29 is that a party may have considerable influence over an amicus without authoring the brief or contributing money earmarked for the brief. If an amicus is a corporation, it must already disclose any parent corporation and any publicly held corporation that owns 10% or more of its stock. Rule 29(a)(4)(A) (incorporating the requirements of Rule 26.1.) But if a party that is a privately held corporation has an ownership interest in the amicus—and there are privately held corporations with billions in revenue—no similar disclosure is currently required. Or suppose a party has no ownership interest in the amicus—perhaps because the amicus is a nonprofit—but a party is its primary contributor, donating money that is used for the amicus's operations generally but not earmarked for the particular brief at issue. Existing Rule 29 does not require disclosure of that relationship.

A rule that required disclosure of ownership or contributions by a party at the 10% level would impose some burden on amici. It would take some time and effort to make the determination, although if the disclosure is limited to parties, the burden would be quite limited. That is, an amicus would not have to ascertain each one of its 10% owners or contributors, but only whether a party passed that threshold. Some might decline to submit an amicus brief to avoid disclosure. In some cases, that might be a good thing, if the amicus realized that its relationship with the party would lead a court to discount its arguments. In other cases, if the amicus concluded that confidentiality was more important than filing the brief, the burden on the amicus would be greater.

It is difficult to be confident that 10% is the right threshold to closely match the government purpose. The lower the threshold, the greater the burden. And the lower the threshold, the greater the risk of requiring disclosure of owners and contributors with no substantial influence over the amicus. For current purposes, the 10% threshold is borrowed from the corporate disclosure requirement of Rule 26.1 (for comparison, the AMICUS Act threshold is 3%).

Using a standard rather than a rule to set the disclosure requirement arguably makes the requirement a closer fit with the purpose. By setting the standard at the ownership interest or contribution level at which a reasonable person would attribute to the party or its counsel a significant influence over the amicus curiae, the fit between means and end is quite close. But because a standard would require an exercise of judgment rather than a mechanical calculation, it would be considerably more burdensome for amici and their counsel, who would have to determine for themselves what the "reasonable person" standard would be. Such a malleable standard could also potentially lead to different amici interpreting the standard in very different ways, leading some amici to disclose much and others little, and thus making the disclosures less useful for the court.

As discussed above, because there are benefits and detriments associated with either a rule or a standard, the subcommittee has drafted potential language for each.

Relationship between amicus and nonparty. According to the 2010 Committee Note, the disclosure of whether a nonparty—other than the amicus itself, its members, or its counsel—contributed money to fund the brief "may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief." So understood, the government interest is in ascertaining whether the amicus is truly committed to speaking for itself or is instead simply willing to serve as a paid mouthpiece for someone else.

Alternatively, the government's interest in disclosure might be viewed as a broad interest in transparency, permitting the court—and the public—to know who is truly speaking in each amicus brief, so that, for example, it is possible to spot whether someone is funding multiple amici, thereby creating the illusion of broad

support for a position. Just as a party may have considerable influence over an amicus without contributing money earmarked for the brief, so too might a nonparty.

Again, some might think that the only thing that matters is the persuasiveness of the arguments in an amicus brief. But just as the identity of an amicus may matter, so too may the number of amici. In *American for Prosperity* itself, the Court highlighted both:

> The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as amici curiae in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California.[3]

A rule that required disclosure of ownership or contributions by a nonparty at the 10% level would impose more of a burden on amici than one limited to parties. That's because an amicus would have to ascertain each one of its 10% owners or contributors, not only whether a party passed that threshold. Under such a rule, each one of the hundreds of amici who submitted briefs in *Americans for Prosperity* arguing against the constitutionality of California's disclosure requirement would have to determine whether any of its owners or contributors passed the threshold and, if so, either disclose them or decline to file. And rather than worrying that the government might not live up to its assurance of confidentiality, each amicus would know that its disclosure would be publicly available as part of its brief. On the other hand, the burden imposed would be less than the burden involved in *Americans for Prosperity* because fewer amici would have owners or contributors who meet that threshold than would meet the $5000 (or, in some cases, 2%) threshold, and because it would apply only to those seeking to file amicus briefs.

For the same reasons, a standard set at the ownership interest or contribution level at which a reasonable person would attribute to a person a significant influence

[3] Slip op. at 17-18. And at oral argument, Justice Barrett asked, "So we're at 250 organizations who filed briefs in support of the Petitioners here, arguing that the disclosure mandate would harm their rights. Is that enough for a facial challenge? I gather your position is no. So I'm wondering how many would it take?"

over the amicus curiae would also be more burdensome that the same standard limited to parties.

If the government interest in disclosure of the relationship between an amicus and a nonparty is to determine whether the amicus is truly committed to speaking for itself or is instead simply willing to serve as a paid mouthpiece for someone else, an expansion of the disclosure requirements might be justified as an anti-evasion measure. That is, to protect against the possibility that an amicus might be influenced by a major nonparty contributor who does not earmark the contribution for the brief, disclosure of the contribution might be warranted.

But if one is trying to distinguish between an amicus who is truly committed to speaking for itself and one who is simply willing to serve as a paid mouthpiece for someone else, it is necessary to figure out what it means for an amicus to speak for itself. An amicus with members speaks for those members, or put somewhat differently, members of an amicus speak through that amicus. So understood, there may be no need to require disclosure of major contributions by members because when speaking for its members, an amicus is speaking for itself. (Presumably that is at least part of the reason that the current Rule does not require disclosure of contributions by members.)

The current Rule treats contributions by non-members differently. But some might think that an amicus speaks for its contributors and that its contributors speak through the amicus. From this perspective, any distinction between member contributors and nonmember contributors is artificial. *Americans for Prosperity* involved contributors. It relied on *NAACP v. Patterson*, 357 U. S. 449 (1958), which involved members, and *Shelton v. Tucker*, 364 U. S. 479 (1960), which involved members and contributors.

If this is right, then the current Rule regarding the relationship between an amicus and a non-party may be the best approach. If a person is a member of an amicus or a general contributor to an amicus, a court can reasonably believe that the amicus is speaking for itself (including its members and contributors). But if a person is not willing to become a member of the amicus and makes a contribution that is ear-marked for an amicus brief, a court may have reason to question whether the views expressed in that amicus brief are as aligned with the declared identity and statement of interest of the amicus as would otherwise appear.

On the other hand, if the government's interest in disclosure is viewed more broadly than articulated in the 2010 Committee Note, then broadening the disclosure requirement regarding the relationship between an amicus and a nonparty might be more appropriate. If the governmental interest is a broad interest in transparency, permitting the court and the public to know who is behind each amicus and be able to spot whether someone is funding multiple amici, thereby creating the illusion of

broad support for a position, then the existing disclosure Rule might be viewed as inadequate to serve that interest.

Under the dissent's view in *Americans for Prosperity*, a broad disclosure requirement with exceptions for those who fear some harm would be sufficient, but the majority rejected any requirement of showing such a burden before evaluating for narrow tailoring. A less restrictive alternative might simply be a reminder to the courts to be careful when counting the number of amici on a side, to not assume that amici are acting independently of each other, and to be aware when reviewing the statement of identity of the amicus and its interest in the case that the court has no way of knowing the extent to which the filing and content of that brief has been influenced by an unidentified owner or donor if such influence was accomplished by means other than through direct funding of that particular brief.

* * *

There is another governmental interest in amicus disclosures: informing the recusal decisions of judges. The subcommittee has not yet addressed the suggestion that standards for recusal based on amicus filings be developed.

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

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

* * * * *

(4) **Contents and Form**. An amicus brief * * * must include the following:

* * * * *

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that ~~indicates whether~~:

~~(i) a party's counsel authored the brief in whole or in part;~~

~~(ii) a party or a party's counsel contributed money that was~~

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

~~intended to fund preparing or submitting the brief; and~~

~~(iii) a person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;~~

(i) indicates whether a party or its counsel—

- authored the brief in whole or in part;
- contributed money intended to fund drafting, preparing, or submitting the brief;

- has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of

the business of the amicus curiae; or

- directly or indirectly, possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would, under the circumstances, attribute to the party or its counsel a significant influence over the amicus curiae with respect to the filing or content of the brief; and

(ii) identifies any person—except for the amicus, its counsel,

and its members who are not parties or counsel to parties—who contributed money intended to fund drafting, preparing, or submitting the brief.

* * * * *

TAB 5C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Relation Forward Subcommittee

Date: September 10, 2021

The Advisory Committee has been considering a suggestion to deal with premature notices of appeal. It considered this issue about a decade ago but did not find an appropriate solution, apparently because of a concern with inviting more premature notices of appeal.

At the last meeting of the Advisory Committee, the subcommittee reported that it had not identified a good solution but was not yet ready to suggest taking the matter off the agenda. Instead, it would examine two issues. First, it wanted to look more closely at the circuit split, seeking to clarify whether there are clear splits between circuits as opposed to splits within circuits. Second, it wanted to look more closely at the current rule's different treatment of post-trial motions in civil and criminal cases.

Circuit Conflicts

The subcommittee thinks that the most sympathetic cases for permitting relation forward of notices of appeal are cases where the notice of appeal is filed from an order that would have been appealable if certified under Civil Rule 54(b) but was not so certified. It therefore focused on circuit conflicts regarding that category of cases.

The relevant rule is Rule 4(a)(2), which provides:

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

The core situation to which Rule 4(a)(2) is addressed is where a court orally announces an appealable decision, a party files a notice of appeal, and then the court reduces that decision to writing and it is entered on the docket.

The leading Supreme Court precedent interpreting Rule 4(a)(2) is *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269, 270 (1991). There, the Court held that a notice of appeal filed after the district court announced from the bench that it intended to grant summary judgment, but before entry of judgment, related forward under Rule 4(a)(2). It added:

> This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction

> order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment. . . . In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment.

FirsTier, 498 U.S. at 276.

Focusing on notices of appeal from orders that would have been appealable if certified under Civil Rule 54(b), it appears that there is a fairly clean conflict between the Eighth Circuit (which does not allow relation forward) and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits (which do). The Federal Circuit is harder to classify; its decisions seem more ad hoc.

The conflict is not perfectly clean. The Fifth Circuit has one published decision (and a couple of nonprecedential pro se cases that follow it) that appears to be inconsistent with the rest of the circuit's precedent. And the Eighth Circuit has what appears to be an outlier decision that seems to be inconsistent with the rest of its precedent.

The subcommittee is hesitant to recommend amending the Rule to attempt to resolve the circuit conflict. The Supreme Court might resolve the conflict, and it might be best to wait and see whether and how it does.

In addition, the agreement among most of the circuits on this result masks a conflict about how to reach that result. One approach reaches this result based on the court's reading of Rule 4(a)(2) and the Supreme Court's decision in *FirsTier*. Then-judge Roberts' opinion for the D.C. Circuit is emblematic of this approach:

> The test articulated in *FirsTier* asks hypothetically whether the nonfinal decision from which an appeal was noted would be appealable if immediately followed by the entry of judgment. Although the hypothetical judgment in *FirsTier* was identical to the kind of judgment eventually entered, nothing in *FirsTier* requires that the hypothetical judgment considered in applying its test be the same type as the one actually entered. So Outlaw's premature notice of appeal is treated, under Rule 4(a)(2) and *FirsTier*, as if filed on the date of and after entry of judgment in this case.

Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 162 (D.C. Cir. 2005) (cleaned up). Notice that under this interpretation, Rule 4(a)(2) reaches well beyond the core situation to which it is addressed.

Other courts do not rely on an interpretation of Rule 4(a)(2) but on a line of cases that predate *FirsTier*—a line of cases that allows relation back more broadly. *See, e.g.*, *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 184 (3d Cir. 1983).

This conflict is closely related to a second one: whether case law that predates Rule 4(a)(2) and *FirsTier* survives. Any proposed amendment would immediately pose this same question again. If an amendment did not displace case law allowing for broader relation forward, circuit conflicts would persist. If it did displace case law allowing for broader relation forward, particular care in drafting would be necessary to avoid displacing some areas where there seems to be consensus among the courts of appeals that have addressed the issue. *See* 16A Wright & Miller, Federal Practice and Procedure § 3950.5 (5th ed.) (referring to cases where a notice of appeal was filed after the announcement of a contingent decision but before the expiration of the contingency period and cases with a belated Rule 54(b) certification).

Further complicating matters is the scope of the appeal. Under the logic of relation forward—particularly the language of Rule 4(a)(2) which treats the premature notice of appeal as if it had been filed after judgment—it might seem that the notice of appeal would allow review of anything reviewable on appeal from that judgment. But a number of courts have held otherwise: Although a subsequent order may ripen a notice of appeal of a nonfinal order, the notice confers jurisdiction over only those orders in existence at the time it was filed.[1]

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[1] The possibility that a notice of appeal encompasses decisions not yet announced may arise in connection with the pending amendment to Rule 3, scheduled to take effect (absent Congressional action) on December 1, 2021. One might argue that the pending amendment, in some circumstances, allows a notice of appeal to encompass orders not yet announced at the time the notice of appeal was filed.

Suppose P sues D, asserting 2 claims. At Time T1 the court dismisses Claim 1 for failure to state a claim. P then files a notice of appeal designating the order dismissing claim 1. After discovery, at Time T2, the court grants D summary judgment on Claim 2 and enters judgment. No new notice of appeal is filed.

New Rule 3(c)(7) says that "An appeal must not be dismissed * * * for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment." The Committee Note says that one should apply Rule 4(a)(2) when interpreting "filed after entry of the judgment." Some circuits would apply Rule 4(a)(2) to permit the notice of appeal to relate forward to the later entry of judgment. So even though P filed the notice of appeal before the motion for summary judgment was even filed, one could argue that for purposes of Rule 3(c)(7) that notice was "filed after entry of judgment."

And there is at least one other issue to consider. Some courts of appeals have refused to allow (or at least voiced concerns about allowing) a voluntary dismissal without prejudice to effect the ripening of a premature notice of appeal.

Given these complications, the Committee might decide to do nothing rather than risk unintended consequences.

On the other hand, there might be value in limiting *mandatory* relation forward to the core situation addressed by existing Rule 4(a)(2)—where a court orally announces an appealable decision, a party files a notice of appeal, and then the court reduces that decision to writing and it is entered on the docket—while explicitly authorizing *discretionary* relation forward in other situations.

An amended Rule along those lines might look something like this:

> A notice of appeal filed after the court announces a judgment ~~decision~~ or appealable order—but before the entry of that ~~the~~ judgment or appealable order—is treated as filed on the date of and after the entry. In any other situation, when a party files a premature notice of appeal,

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The Committee Note says that "[i]n this situation, a court should act as if the notice had properly designated the judgment." New Rule 3(c)(4) says that "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." And new Rule 3(c)(6) says that "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

Putting these together, one could argue that the notice's designation of the order dismissing Claim 1 at T1 should be read as a designation of the judgment at T2. And since the notice designates the judgment, the notice also encompasses all orders that merge into that judgment, including summary judgment on Claim 2. And Rule 3(c)(6) tells us that though the notice mentioned only the order dismissing the complaint, that's okay because the notice didn't expressly state that the notice was limited to that order.

This situation should arise rarely, and courts are likely to resist this result, precisely because of a reluctance to conclude that a notice of appeal can encompass a decision that was not yet even orally announced. But if the Committee goes forward with any amendment dealing with relation forward, it might consider a provision that limits the scope of an appeal to decisions that were at least announced prior to the time the notice of appeal was in fact filed.

a court of appeals may treat the notice of appeal as filed on the date of and after the entry of a final judgment.

Such a provision would mandate relation forward in the core scenario where it is most clearly justified, while enabling a court of appeals to exercise discretion to allow later developments to cure a premature notice of appeal in other circumstances. The subcommittee contemplates that a court of appeals would consider a wide range of factors—including whether allowing relation back would prejudice the appellee, how obviously premature the notice of appeal was, and whether the appellee did anything to put the appellant on notice of the prematurity of the notice of appeal—in these other situations.

Civil v. Criminal

Rule 4 treats the need to file a new or amended notice of appeal after disposition of a motion that resets appeal time differently in civil and criminal cases. A new or amended notice is needed in civil cases, but not in criminal cases.

Rule 4(a)(4)(B), dealing with civil cases, provides:

> (i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.
>
> (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

By contrast, Rule 4(b)(3), dealing with criminal cases, provides, in relevant part:

> (B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:
>
> (i) the entry of the order disposing of the last such remaining motion; or
>
> (ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

If the subcommittee were writing on a blank slate, it might be inclined to avoid this disparate treatment of civil and criminal appeals. But the current Rule is clear, and the subcommittee is not aware of any problem that it is causing.

The subcommittee has not determined why the disparate treatment was adopted in the first place. It does not appear to have been inadvertent. Both provisions were adopted simultaneously. *See* 507 U.S. 1063, 1066 (1992) ("A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measure from the entry of the order disposing of the last such motion outstanding.") (Rule 4(a), civil); *id*. at 1067 ("Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions.") (Rule 4(b), criminal).

Some might find it troubling in a civil case to allow a notice of appeal filed prior to a decision on a post-verdict motion to empower an appellate court to direct judgment against the verdict winner. In denying a Civil Rule 50(a) motion, the trial court commits no error. If the verdict loser does not file a notice of appeal after a decision on the Civil Rule 50(b) motion, what error is he complaining of? Recall that there are cases holding that while a subsequent order may ripen a notice of appeal of a nonfinal order, the notice confers jurisdiction over only those orders in existence at the time it was filed. If the Advisory Committee is interested in pursuing the possibility further, additional research into the availability of appellate review in 1791 might be necessary in order to be confident that allowing such an appeal is consistent with the re-examination clause of the Seventh Amendment.

In criminal cases, things are quite different. While Criminal Rule 29(a) allows a defendant to move for a judgment of acquittal prior to verdict, and Criminal Rule 29(b) permits a trial judge to reserve decision on that motion and submit the case to the jury, "[a] defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge." Criminal Rule 29(c)(3). And of course, the government in a criminal case cannot make a motion for judgment in its favor as a matter of law.

Plus if Appellate Rule 4(b) governing criminal appeals were like Appellate Rule 4(a) governing civil appears, and defense counsel in a criminal case failed to file a new or amended notice of appeal, there would be a serious ineffective assistance claim.

For these reasons, the subcommittee does not recommend eliminating this difference between criminal and civil appeals.

TAB 5D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: IFP

Date: September 10, 2021

The IFP subcommittee has been awaiting the results of a survey of courts of appeals. Preliminary results have just been received.

The subcommittee will review those preliminary results (and any follow up) with the expectation of reporting to the Advisory Committee at the spring 2022 meeting.

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Midnight filing deadline (19-AP-E))

Date: September 12, 2021

The project looking into whether to propose any change to the midnight deadline for electronic filing is still in the information gathering phase. The Federal Judicial Center is continuing its study.

TAB 6B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: *Hall v. Hall*

Date: September 11, 2021

The Joint Civil-Appellate Subcommittee has been considering whether any rule amendments would be appropriate in response to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In that case, the Court held that consolidated cases retain their separate identity for appeal purposes—so that complete disposition of one such case is immediately appealable.

Research by the Federal Judicial Center initially focused on reviewing district court dockets in an effort to determine how frequently district courts fully decide one case that was consolidated with another case while that other case remained undecided. That research did not yield a sizable number of such instances.

Research then turned to looking at the issue from the other end: examining appellate court dockets looking for appeals in cases where the district court had entered consolidation orders. The joint subcommittee has not yet analyzed the results of this research.

Some problems may remain hidden from this kind of docket research. For example, an appeal may not be taken at all if an attorney belatedly realizes that the time to appeal from the disposition of one consolidated case ran long ago. Considerable attorney time might be spent in analyzing whether or not a decision in consolidated cases finally resolves one of those consolidated cases. And uncertainty may arise where claims or parties are added after consolidation.

The joint subcommittee will analyze the research and consider whether either revealed problems or the possibility of hidden problems is enough to warrant a rule amendment.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Costs on Appeal (21-AP-D)

Date: September 10, 2021

In April of 2021, Alan Morrison noted that the Supreme Court was considering a case involving Rule 39 dealing with costs on appeal. He suggested that the Rule was unclear and that the Advisory Committee should see what it can do to make it clearer.

In May, the Court decided *City of San Antonio v. Hotels.com*, No. 334 (May 27, 2021). It held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. (A copy of the opinion follows.)

Stated that simply, the result may seem untroubling. But while typical costs on appeal are modest, such as the appellate docket fee and the costs of printing the briefs and appendix, Rule 39(e)(3) includes as taxable costs the premium paid for a bond to preserve rights pending appeal, traditionally known as a supersedeas bond. Such a bond is posted by a defendant so that a money judgment is not enforceable pending appeal; the bond protects the ability of a plaintiff to collect if the plaintiff prevails on appeal. The cost of securing such a bond can be high. In *Hotels.com*, the bill of costs was for more than $2.3 million, most of which was the premium for the bond.

Under Rule 39, the district court taxes these costs because they were incurred in the district court, but the court of appeals (not the district court) has discretion to apportion those costs. One possible difficulty is that neither the parties nor the court of appeals may be focused on the high cost of a bond premium to be taxed in the district court when the court of appeals is deciding whether to depart from the default rule that costs are taxed against the appellee if a judgment is reversed.

The Court responded to the concern that its holding would mean that parties would be unable to obtain review of their objections to Rule 39(e) costs by stating

> We agree that the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals, but this does not lead to the conclusion that a district court can reallocate those costs.

Slip op. at 13.

I suggest that a subcommittee be formed to explore possible rule amendments to "specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." The Court suggested that a simple motion under Rule 27 should suffice, but there may be complications if the issue comes to the fore after the mandate has issued.

The Court also relied on the district court's approval of the bond in the first place, but it is not obvious that the district court would care about the premium paid for the bond so long as the face amount is sufficient to cover the judgment and the bond issuer sufficiently creditworthy to pay if that proves necessary.

TAB 7B

From: Alan Morrison
Sent: Tuesday, April 13, 2021 6:03 PM
To: Catherine T Struve
Subject: FRAP 39

Cathie

Hope you are well as the semester is winding down.

I am writing because the Sup Ct has a case, City of San Antonio v Hotels.com, No. 20-334, to be argued soon. I am doing a moot court for one of the lawyers and the issue is FRAP 39, specifically which court, district or appeals, should decide whether certain taxable costs are excessive or should be denied for another reason. I have no dog in the fight, but it seems to me that the Rule is unclear, largely because the drafters did not envision a situation as presented in this case. The Court will decide this case, but I think that the FRAP committee ought to take a look at the Rule and see what it can do to make it clearer.

Several months ago I wrote to suggest that the committee or perhaps the FJC come up with some standards for when circuit judges should recuse based on participation by an amicus or its counsel. The issue has become more significant now that courts of appeals can, sua sponte, reject an amicus brief based on possible recusals. Is that proposal going anywhere?

Thanks, Alan

TAB 7C

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF SAN ANTONIO, TEXAS, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED TEXAS MUNICIPALITIES *v.* HOTELS.COM, L. P., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20–334. Argued April 21, 2021—Decided May 27, 2021

The City of San Antonio—acting on behalf of a class of 173 Texas municipalities—was awarded a multi-million dollar judgment in Federal District Court against a number of popular online travel companies (OTCs) over the calculation of hotel occupancy taxes. To prevent execution on that judgment pending appeal, the OTCs obtained supersedeas bonds securing the judgment. See Fed. Rule Civ. Proc. 62. On appeal, the Court of Appeals determined that the OTCs had not underpaid on their taxes. In accordance with Federal Rule of Appellate Procedure 39(d), the OTCs filed with the circuit clerk a bill of costs seeking appellate docketing fees and printing costs, which were taxed without objection. The OTCs then filed a bill of costs in the District Court seeking more than $2.3 million in costs—primarily for premiums paid on the supersedeas bonds that are listed in Rule 39(e) as "taxable in the district court for the benefit of the party entitled to costs." San Antonio objected and urged the District Court to exercise its discretion to decline to tax all or most of those costs. The District Court held that it had no discretion to deny or reduce those costs under Circuit precedent. The Court of Appeals affirmed, reasoning that the District Court lacked discretion to deny or reduce appellate cost awards.

Held: Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. Pp. 5–14.

(a) Rule 39 creates a cohesive scheme for taxing appellate costs that gives discretion over the allocation of appellate costs to the courts of appeals. Rule 39(a) sets out default rules for cost allocation based on

Syllabus

the outcome of an appeal and provides that these default rules apply unless the court "orders otherwise." Nothing in the broad language of Rule 39(a) suggests that a court of appeals may not divide up costs in such an order. Quite the opposite, Rule 39(a)(4) suggests that a court of appeals may apportion costs based on each party's relative success when the results of the appeal are something other than complete affirmance or reversal. Rule 39(e) points in the same direction; it addresses appellate costs taxable in the district court for the benefit of "the party entitled to costs" under the rule (not to a party entitled to seek costs). The court of appeals' determination that a party is "entitled" to a certain percentage of costs would mean little if the district court could take a second look at the equities. San Antonio contends that the plain text of subsection (e) providing for costs "taxable in the district court" vests district courts with discretion over cost allocations, but that interpretation reads too much into the term "taxable" and ignores the history of the Rule. The real work done by the phrase "taxable in the district court" is in specifying the court in which these costs are to be taxed. Pp. 5–9.

(b) The Court is not persuaded that applying the plain text of Rule 39 will create the problems that San Antonio envisions. First, awarding costs incurred prior to appeal is different from taxing appellate costs. Limiting a district court's discretion to allocate appellate costs will not cause confusion with the equitable discretion district courts exercise with respect to certain costs incurred in the district court that are customarily taxed under Federal Rule of Civil Procedure 54(d). Second, there is no evidence to suggest that appellate courts have struggled to allocate appellate costs due to factual disputes better handled by the district court. And nothing in the Court's decision should be read to cast doubt on the approach taken by some courts of appeals to delegate this responsibility to the district court. See, *e.g., Emmenegger* v. *Bull Moose Tube Co.,* 324 F. 3d 616, 626. Third, it makes sense for the district court to tax the costs in Rule 39(e) because those costs relate to events in that court. This process requires more than a "ministerial order," as San Antonio would have it, because the district court will ensure that the amount of appellate costs requested is "correct," 28 U. S. C. §1924, and that the cost submissions otherwise comply with the relevant rules and statutes. Finally, that the current rules and relevant statutes could specify more clearly the procedure that a party should follow to obtain review of their objections to Rule 39(e) costs in the court of appeals does not mean that a district court can reallocate those costs. A simple motion "for an order" under Rule 27 should suffice to seek an order under Rule 39(a), and the Court does not foreclose parties from raising their arguments through other procedural vehicles. Pp. 9–13.

Syllabus

959 F. 3d 159, affirmed.

ALITO, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 20–334

CITY OF SAN ANTONIO, TEXAS, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED TEXAS MUNICIPALITIES, PETITIONER *v.* HOTELS.COM, L. P., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 27, 2021]

JUSTICE ALITO delivered the opinion of the Court.

Civil litigation in the federal courts is often an expensive affair, and each party, win or lose, generally bears many of its own litigation expenses, including attorney's fees that are subject to the so-called American Rule. *Baker Botts L. L. P.* v. *ASARCO LLC*, 576 U. S. 121, 126 (2015). But certain "costs" are treated differently. Federal Rule of Appellate Procedure 39 governs the taxation of appellate "costs," and the question in this case is whether a district court has the discretion to deny or reduce those costs. We hold that it does not and therefore affirm the judgment below.

I

A

There is a longstanding tradition of awarding certain costs other than attorney's fees to prevailing parties in the federal courts. *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 377, and n. 3 (2013); see, *e.g., Winchester* v. *Jackson*, 3 Cranch 514 (1806). Today, Federal Rule of Appellate Procedure 39 sets out the procedure for assessing and taxing

costs relating to appeals. Subdivision (a) provides a series of default rules that govern "unless the law provides or the court orders otherwise." Under these default rules:

> "(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
>
> "(2) if a judgment is affirmed, costs are taxed against the appellant;
>
> "(3) if a judgment is reversed, costs are taxed against the appellee;
>
> "(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders."

The remaining subdivisions of the Rule deal with related issues. Subdivision (b) limits costs for or against Federal Government litigants to those "authorized by law." Subdivision (c) directs the courts of appeals to fix a maximum rate for taxing the costs of briefs, appendices, and (where applicable) the original record. Subdivision (d) provides the procedure for seeking certain appellate costs, filing objections to those costs, and preparing an itemized statement of costs for insertion in the mandate. And subdivision (e) lists four categories of "costs on appeal" that "are taxable in the district court for the benefit of the party entitled to costs under this rule."

This case concerns one of the categories of costs that are taxable in the district court under subdivision (e): "premiums paid for a bond or other security to preserve rights pending appeal." Fed. Rule App. Proc. 39(e)(3). These costs arise because the Federal Rules of Civil Procedure generally stay the execution or enforcement of a district court judgment for only 30 days after its entry. Fed. Rule Civ. Proc. 62(a). Unless a further stay is granted, the prevailing party can attempt to execute on that judgment while an appeal is pending. See 12 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Moore's Federal Practice §62.02 (3d

ed. 2020). To prevent complications arising from pre-appeal enforcement of judgments, Federal Rule of Civil Procedure 62(b) provides that a party "may obtain a stay by providing a bond or other security." These bonds are often called supersedeas bonds, tracking the name of a traditional writ that was used to stay the execution of a legal judgment. See, *e.g., Hardeman* v. *Anderson*, 4 How. 640, 642 (1846) (issuing a "writ of supersedeas to stay execution on the judgment"). "A supersedeas bond is a contract by which a surety obligates itself to pay a final judgment rendered against its principal under the conditions stated in the bond." 13 A Cyclopedia of Federal Procedure §62.19 (3d ed. Supp. 2021).

B

The cost dispute before us arises out of litigation between the city of San Antonio—acting on behalf of a class of 173 Texas municipalities—and a number of popular online travel companies (OTCs). In 2006, San Antonio alleged that the OTCs had been systematically underpaying hotel occupancy taxes by calculating them using the wholesale rate that the OTCs negotiated with hotels rather than the retail rate that consumers paid for hotel rooms. After a jury trial, the District Court entered a judgment of approximately $55 million in favor of the class.

The OTCs quickly sought to secure supersedeas bonds to stay the judgment. They negotiated with San Antonio over the terms of the bonds, and the city ultimately supported the OTCs' efforts to stay the judgment with supersedeas bonds totaling almost $69 million, an amount that was calculated to cover the judgment plus 18 months of interest and further taxes. The District Court approved the bonds, which were subsequently increased at San Antonio's urging to cover what grew to be an $84 million judgment after years of post-trial motions.

The OTCs eventually appealed, and the Court of Appeals

held that the OTCs had not underpaid the hotel occupancy taxes. Its mandate stated: "[T]he judgment of the District Court is vacated and rendered for OTCs." App. 100. In accordance with Federal Rule of Appellate Procedure 39(d), the OTCs filed a bill of costs with the Circuit Clerk and requested $905.60 to cover the appellate docket fee and the cost of printing their briefs and appendix. App. to Pet. for Cert. 28a–30a. These items were taxed without objection. See Rule 39(d)(2).[1]

Back in the District Court, the OTCs filed a bill of costs for more than $2.3 million. The lion's share of these costs were supersedeas bond premiums. San Antonio objected, urging the District Court to exercise its discretion and decline to tax all or most of those costs. The city argued, among other things, that the OTCs should have pursued alternatives to a supersedeas bond and that it was unfair for San Antonio to bear the costs for the entire class rather than just its proportional share of the judgment. The District Court thought San Antonio had made "some persuasive arguments." App. to Pet. for Cert. 16a. But based on Circuit precedent, the court held that it lacked discretion "regarding whether, when, to what extent, or to which party to award costs of the appeal" and that "its sole responsibility [was] to ensure that only proper costs are awarded." *Id.*, at 17a (internal quotation marks omitted). The court ultimately taxed costs of just over $2.2 million.

San Antonio appealed, and this time the Court of Appeals affirmed. 959 F. 3d 159 (CA5 2020). It reasoned that its earlier decision had "reversed" the District Court's judgment within the meaning of Rule 39(a)(3) and that it had not departed from the default allocation under that Rule.

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[1] Rule 39 has been amended since the Court of Appeals issued its first decision in this case. The changes are not material for our purposes here, so for simplicity we cite the current version of the Federal Rules of Appellate Procedure unless otherwise noted.

Id., at 164–165.[2] And the Court of Appeals held that the District Court was compelled to award the disputed costs to the OTCs. *Id.*, at 166–167.

San Antonio sought this Court's review. We granted certiorari, 592 U. S. ___ (2021), and now affirm.

II

We hold that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule.

A

Rule 39 creates a cohesive scheme for taxing appellate costs. As noted, it sets out default rules that are geared to five potential outcomes of an appeal: dismissal, affirmance, reversal, affirmance in part and reversal in part, and vacatur. Each of these default rules tracks the "venerable presumption that prevailing parties are entitled to costs." *Marx*, 568 U. S., at 377.

These default rules give way, however, when "the court orders otherwise." Rule 39(a). The parties agree that this reference to "the court" means the court of appeals, not the district court, see Brief for Petitioner 17–18; Brief for Respondents 20–21, and we agree with that interpretation. In the Rules of Appellate Procedure, which "govern procedure in the United States courts of appeals," Rule 1(a)(1), references to a "court" are naturally read to refer to a court of appeals unless the text or context clearly indicates otherwise.

The parties do not agree, however, on what the court of appeals has the power to "orde[r]." San Antonio thinks that the appellate court may say "*who* can receive costs (party A, party B, or neither)" but lacks "authority to divide up costs." Reply Brief 5. So, the city argues, the district court

[2] San Antonio does not challenge these features of the court's decision, see, *e.g.*, Brief for Petitioner 8, n. 2, and we do not address them.

must have the discretion to do that. By contrast, the OTCs argue that the appellate court has the discretion to divide up the costs as it deems appropriate and that a district court cannot alter that allocation. The OTCs have the better of the argument.

The text of subdivision (a) cuts decisively in their favor. That provision states that the court of appeals need not follow the default rules, which allocate costs based on the outcome of the appeal, but can "orde[r] otherwise." This broad language does not limit the ways in which the court of appeals can depart from the default rules, and it certainly does not suggest that the court of appeals may not divide up costs.

On the contrary, the authority of a court of appeals to do just that is strongly supported by the relationship between the default rules and the court of appeals' authority to "order otherwise." For example, under Rule 39(a)(4), if a district court judgment is affirmed in part and reversed in part, "costs are taxed only as the court [of appeals] orders." The most natural meaning of this provision is that a court of appeals may apportion costs in accordance with the parties' relative success, so that if, for example, the appellant wins what is essentially a 75% victory, the appellant can be awarded 75% of its costs.[3] It would be strange to read this provision to mean that the court of appeals' only option where a reversal is not complete is to award the appellant all its costs or no costs at all. Similarly, in cases that fall under subdivisions (a)(2) and (a)(3), where the default rules allocate 100% of the costs to the winning party, it is natural

[3] Both parties recognize the familiar practice of awarding some proportion of the costs to the winning party. See Tr. of Oral Arg. 15, 44, 76; see, *e.g., Massachusetts Eye & Ear Infirmary* v. *QLT Phototherapeutics, Inc.*, 552 F. 3d 47, 75 (CA1 2009); *In re New Times Securities Servs., Inc.*, 371 F. 3d 68, 88 (CA2 2004); *Burrell* v. *Star Nursery, Inc.*, 170 F. 3d 951, 957 (CA9 1999); *Quaker Action Group* v. *Andrus*, 559 F. 2d 716, 719 (CADC 1977) (*per curiam*).

to understand the court of appeals' authority to "order otherwise" to include the authority to make a different allocation.

Subdivision (e), which concerns appellate costs that are taxed in the district court, points in the same direction. It refers to "the party *entitled* to costs under this rule." Rule 39(e) (emphasis added). Thus, if a party is awarded costs under subdivision (a), it is "entitled" to those costs—*i.e.*, has a right to obtain them and not merely to seek them—when a proper application is made in the district court. See Black's Law Dictionary 626 (rev. 4th ed. 1968) ("In its usual sense, to entitle is to give a right or title"); see also *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 477 (1992) ("Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies").

Read properly, then, Rule 39 gives discretion over the allocation of appellate costs to the courts of appeals. With that settled, it is easy to see why district courts cannot exercise a second layer of discretion. Suppose that a court of appeals, in a case in which the district court's judgment is affirmed, awards the prevailing appellee 70% of its costs. If the district court, in an exercise of its own discretion, later reduced those costs by half, the appellee would receive only 35% of its costs—in direct violation of the court of appeals' directions. Or suppose that the court of appeals, believing that the decision below was plainly wrong, awards the prevailing appellant 100% of its costs. It would subvert that allocation if the district court declined to tax costs or substantially reduced them because it thought that there was at least a very strong argument in favor of the decision that the court of appeals had reversed—which, of course, was the district court's own decision. In short, the court of appeals' determination that a party is "entitled" to costs would mean little if, as San Antonio believes, the district court could take a second look at the equities.

San Antonio nonetheless maintains that the plain text of subdivision (e) vests district courts with discretion over cost allocations. That provision lists costs that "are *taxable* in the district court for the benefit of the party entitled to costs under this rule." Rule 39(e) (emphasis added). As San Antonio notes, the word "taxable" can be used to describe something that may, but need not necessarily, be taxed. See, *e.g.*, Random House Dictionary of the English Language 1947 (2d ed. 1987) (defining "taxable" as "capable of being taxed"); Webster's Third New International Dictionary 2345 (1976) (same). And San Antonio argues that the use of this "permissive" term shows that the district court has discretion to refuse to award costs on equitable grounds. Brief for Petitioner 15.

San Antonio reads too much into the term "taxable." The use of that term does suggest that the costs in question are not automatically or necessarily taxed when the case returns to the district court, but that may mean no more than that the party seeking those costs will not get them unless it submits a bill of costs with the verification specified by statute and complies with any other procedural requirements that the local rules of the court in question impose. See 28 U. S. C. §§1920, 1924.

This modest understanding of the use of the term "taxable" is reinforced by the circumstances under which the term was added to Rule 39. Before 1998, subdivision (e) did not provide that the listed costs "are taxable in the district court," but instead stated that those costs "shall be taxed in the district court." Rule 39(e) (1994). The language of Rule 39 was changed in 1998 as part of a general "restyling" of the Rules of Appellate Procedure, and the Advisory Committee's Note stated that the changes made as part of this project were "intended to be stylistic only." 28 U. S. C. App., p. 804 (1994 ed., Supp. IV); see also C. Wright, A. Miller, & C. Struve, Federal Practice and Procedure, Introduction,

§3946.1 (5th ed. Supp. 2021) (1998 restyling was "not intended to make substantive changes").

The real work done by the phrase "taxable in the district court" is the specification of the court in which these costs are to be taxed—that is, in the district court. Assigning this work to the district court makes good sense. Under Rule 39, costs incurred in the court of appeals, such as the fee for docketing the case in that court and the cost of printing the party's briefs and appendices, are taxed in the court of appeals. See Rule 39(d). And the costs incurred in the district court—that is, the costs listed in subdivision (e)—are taxed in the district court. These are the costs attributable to "the preparation and transmission of the record," "the reporter's transcript, if needed to determine the appeal," "premiums paid for a bond or other security to preserve rights pending appeal," and "the fee for filing the notice of appeal."

The nature of these costs makes it fitting for them to be taxed in the district court. The first enumerated cost—the cost of "the preparation and transmission of the record"—relates to the district court clerk, who has the responsibility of performing those tasks. See Fed. Rule App. Proc. 11(b)(2). The second category, the cost of "the reporter's transcript," concerns work done in the district court. See Rule 10(b). The third category, "premiums paid for a bond or other security to preserve rights pending appeal," relates to a matter previously approved by the district court. See Fed. Rule Civ. Proc. 62(b). And the last category, "the fee for filing the notice of appeal," is an amount that was paid to the district court clerk. See 28 U. S. C. §1917.

For the reasons set out above, we hold that courts of appeals have the discretion to apportion all the appellate costs covered by Rule 39 and that district courts cannot alter that allocation.

B

San Antonio offers a variety of practical arguments why

district courts should have the discretion to alter the allocation of appellate costs, but each of these arguments falls away upon inspection.

First, San Antonio argues that any limits on a district court's discretion are incompatible with the equitable discretion district courts exercise with respect to certain costs incurred in the district court. *Those* costs are customarily taxed under Federal Rule of Civil Procedure 54(d), which "gives courts the discretion to award costs to prevailing parties." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U. S. 560, 565 (2012); see also 28 U. S. C. §1920 ("A judge or clerk of any court of the United States *may* tax as costs the following . . . " (emphasis added)).[4] In San Antonio's view, it will create confusion if a district court acting under Appellate Rule 39(e) lacks the discretion it exercises under Civil Procedure Rule 54(d).

We do not see why our interpretation will lead to confusion. District courts have discretion in awarding costs incurred prior to appeal, but when they tax appellate costs, they perform a different function. This interpretation quite sensibly gives federal courts at each level primary discretion over costs relating to their own proceedings. See this Court's Rule 43; Fed. Rule App. Proc. 39; Fed. Rule Civ. Proc. 54.

Second, San Antonio contends that appellate courts are not well-positioned to make cost allocations under Rule 39(a). In its view, decisions about appellate costs might turn on factual disputes that district courts are better able

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[4] As the United States points out, see Brief for United States as *Amicus Curiae* 19, n. 4, we have interpreted Rule 54(d) to provide for taxing only the costs already made taxable by statute, namely, 28 U. S. C. §1920. See *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 441–442 (1987). Supersedeas bond premiums, despite being referenced in Appellate Rule 39(e)(3), are not listed as taxable costs in §1920. San Antonio has not raised any argument that Rule 39 is inconsistent with §1920 in this respect. We accordingly do not consider this issue.

to resolve. For example, a party might suggest that taxing costs against it would be unjust because of its precarious financial position, and an opposing party might dispute that contention on factual grounds. San Antonio also contends that it will be difficult to allocate appellate costs equitably before the amount of those costs is known.

These concerns are overblown. Most appellate costs are readily estimable, rarely disputed, and frankly not large enough to engender contentious litigation in the great majority of cases. We recognize that supersedeas bond premiums are a bit of an outlier in that they can grow quite large. See, *e.g., The Exxon Valdez* v. *Exxon Mobil Corp.*, 568 F. 3d 1077 (CA9 2009) (more than $60 million). But the underlying supersedeas bonds will often have been negotiated by the parties, as happened here. They will in any event have been approved by the district court, see Fed. Rule Civ. Proc. 62(b), and their premiums will have been paid by one of the parties to the appeal. There is no reason to think that litigants and courts will be forced to operate without any sense of the magnitude of the costs at issue. Indeed, San Antonio admits that it was largely aware of the costs of the bonds in this case when they were approved, see Tr. of Oral Arg. 18.

Nor is there reason to think that factual disputes will pose a recurring problem. Experience proves the point. Rule 39's basic structure has been in place for more than 50 years. Compare Fed. Rule App. Proc. 39 with Rule 39 (1968). And the courts of appeals resolve tens of thousands of cases each year. Admin. Office of the U. S. Courts, Statistical Tables for the Federal Judiciary, Table B–1 (Dec. 31, 2020) (counting 46,788 appeals terminated in 2020). Yet San Antonio has not identified any substantial number of cases where cost allocations under Rule 39(a) have imposed real difficulties. In sum, we see no evidence that appellate courts have struggled to allocate costs in the past, and we have no reason to anticipate new problems in the future.

In all events, if a court of appeals thinks that a district court is better suited to allocate the appellate costs listed in Rule 39(e), the court of appeals may delegate that responsibility to the district court, as several Courts of Appeals have done in the past. See, *e.g., Emmenegger* v. *Bull Moose Tube Co.*, 324 F. 3d 616, 626 (CA8 2003); *Guse* v. *J. C. Penney Co.*, 570 F. 2d 679, 681–682 (CA7 1978). The parties agree that this pragmatic approach is permitted. See Tr. of Oral Arg. 15, 44. And nothing we say here should be read to cast doubt on it. See Rule 39(a) (imposing no direct limitations on the court's ability to "orde[r] otherwise"); Rule 41(a) (the mandate includes "any direction about costs").

Third, San Antonio contends that there would be no reason for Rule 39(e) costs to be taxed in the district court, as opposed to the court of appeals, if the district court was simply required to enter "a ministerial order." Brief for Petitioner 17. But it makes sense for these costs to be taxed in the district court because they relate to events in that court, and the district court's responsibility is not ministerial. The district court will ensure that the amount requested for the appellate costs in question is "correct." 28 U. S. C. §1924. In addition, the district court will consider whether the costs were "necessarily" incurred, §1924, to the extent that the costs in question are taxable only if they were needed for the appeal or to stay the district court's judgment pending appeal. See Rule 39(e)(2) (cost of reporter's transcript taxable only "if needed to determine the appeal"). Other costs taxable in the district court under Rule 39(e) are either fixed (subdivision (e)(4): the fee for filing the notice of appeal); calculated by the district court clerk (subdivision (e)(1): preparation and transmission of the record); or concern a matter already approved by the district court (subdivision (e)(3): supersedeas bond premiums; see Fed. Rule Civ. Proc. 62(b)).

San Antonio, however, asked the District Court to do much more. It implored the court to exercise a free-ranging

form of equitable discretion that would directly conflict with the equitable discretion of the Court of Appeals. See Brief for Petitioner 20, n. 5 (outlining a wide range of equitable considerations). And it invited the District Court to deny or reduce for equitable reasons the bona fide costs that the OTCs had paid as premiums for supersedeas bonds that were known and negotiated by San Antonio and were approved by the District Court without objection under Rule 62. The lower courts were correct to hold that the District Court lacked the authority to entertain San Antonio's broad, equitable arguments.

Finally, San Antonio worries that parties will be unable to obtain review of their objections to Rule 39(e) costs if the district court cannot provide relief after the matter returns to that court. We agree that the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals, but this does not lead to the conclusion that a district court can reallocate those costs.

Rule 27 sets forth a generally applicable procedure for seeking relief in a court of appeals, and a simple motion "for an order" under Rule 27 should suffice to seek an order under Rule 39(a). Compare Fed. Rule App. Proc. 39(a) ("The following rules apply unless . . . the court orders otherwise") with Rule 27(a) ("An application for an order . . . is made by motion unless these rules prescribe another form"). The OTCs also identify instances where parties have raised their arguments through other procedural vehicles, including merits briefing, see Rule 28, objections to a bill of costs, see Rule 39(d)(2), and petitions for rehearing, see Rule 40. Brief for Respondents 42, nn. 9–11. We do not foreclose litigants from raising their arguments in any manner consistent with the relevant federal and local Rules.

In short, we are not persuaded that applying the plain text of Rule 39 will create the practical problems that San Antonio envisions.

* * *

The judgment of the Court of Appeals is affirmed.

It is so ordered.

TAB 7D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Electronic Filing by Pro Se Litigants (21-AP-E)

Date: September 10, 2021

In October of 2020, the Committee considered a suggestion to make electronic filing more widely available to pro se litigants. It decided to table the matter, pending consideration by the Civil Rules Committee.

The Committee has now received another suggestion to broaden pro se litigants' access to electronic filing.

I would suggest the Committee take one of the following three actions:

1) Table this as well, waiting for action by the Civil Rules Committee.

2) Seek the formation of a joint subcommittee to address the suggestions.

3) Form a subcommittee to explore whether the courts of appeals might expand pro se electronic filing even if district courts do not, perhaps on the theory that there are far fewer filings in a court of appeals case.

TAB 7E

Dear Committee on Federal Rules of Civil Procedure —

I've submitted a proposal to amend FRCP 4(i) for more efficient summons on the Government. I note that it almost exclusively benefits those who can *initiate* a case through CM/ECF.

As the Committee may recall from my in-person testimony at the Nov. 2016 FRCP hearing, where I was the only person to speak about the proposed change to Rule 5, I strongly oppose the current Rule 5(d)(3). It acts as a total bar to CM/ECF case initiation for *pro se* litigants.

The Committee based its denial of my counter-proposal, *attached*, entirely on

1. a desire to put prior restraint on certain speech by a class that the Committee disfavors
2. to prevent harms that are implausible, remediable *post hoc*, or actually Constitutional rights
3. based on speculative hypotheticals unsupported by evidence, but rooted in a paternalistic and sometimes hostile view of *pro se* litigants as a class.

I had considered asking you to at least conduct a test run, so you'd see your fears were unfounded. Fortunately — to the sad extent that such a word can be applied to a pandemic — many courts have been forced to conduct that experiment by intervening circumstances. So instead, I now ask you to:

1. submit my counter-proposal[1], together with the full record[2], as a new suggestion;
2. survey the courts that have accepted electronic *pro se* case initiation (e.g. by email); and
3. pass my proposal based on the empirical evidence (i.e. if indeed the sky *hasn't* fallen[3]).

[1] Version dated Feb. 15, 2017, "Comments re proposed changes to CM/ECF filing rules for pro se litigants".
[2] *Attached*, including transcript of my testimony, and all substantive Committee discussion of the iterations.
[3] Please specifically compare to the scenarios claimed in opposition to my proposal: in *case initiation* filings, has there been an *unusually* high rate of: porn? libel? improper participation in others' cases? large filings, e.g. from *Meads* style OPCALs? bad docketing? ...? I doubt it, but if the facts are against me, I'll freely admit error. Please do likewise.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[4]
President, Fiat Fiendum, Inc.
sai@fiatfiendum.org
April 14, 2021

[4] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Standing Committee and Advisory Committees on Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure
Rebecca A. Womeldorf, Secretary
Rules_ Support@ao.uscourts.gov

Comments re proposed changes to CM/ECF filing rules for *pro se* litigants

As the proponent of 15-AP-E, 15-BK-I, 15-CR-D, 15-CV-EE, and 15-CV-GG, which are in part to be discussed at the upcoming hearings, I submit these comments on the proposed amendments, in opposition to the proposed language that would require *pro se* litigants to obtain leave of court before being allowed to use CM/ECF, and proposing alternative rules that avoid these problems while accomplishing the legitimate objectives raised by the committees.

First, however, I would like to point out a problem of representation. While attorneys and judges are very well represented on the Committee — both as commenters and members — there are few if any proponents of the rights of *pro se* litigants. This is a structural problem; among other things, *pro se* litigants are mostly unaware of the judicial rulemaking process, are not invited to contribute, and (unlike other participants, like class action lawyers) have no organization.

As far as I can tell from the committee notes and minutes on this matter, not a single *pro se* litigant, except for myself and one brief commenter[1], has been involved in this rulemaking. Comments have been from people with a quasi-adversarial relationship with *pro se* litigants, such as having to manage difficult cases — resulting in a patronizing, limiting perspective that does not adequately weigh the impacts on the affected *pro se* litigants. I urge the Committee to take serious consideration of the one-sided nature of advocacy on this matter.

While I recognize that there are difficulties with *pro se* litigants, and have had some myself, these are not sufficient reasons for a rule that would presumptively treat all *pro se* litigants as vexatious, and impair their Constitutional rights to *equal* access to the courts.

Respectfully submitted,
/s/ Sai
legal@s.ai

[1] *See* suggestion of Dr. Robert Miller, 15-AP-H / 15-CR-EE / 15-CV-JJ.

A. Summary of proposed changes

The proposed changes below alter the Committee's proposal to:

1. Remove the presumptive prohibition on *pro se* use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
2. Treat *pro se* status as a rebuttably presumed good cause for nonelectronic filing.
    a. For *pro se* prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
3. Require courts to allow *pro se* CM/ECF access on par with attorney filers, prohibiting any restriction merely for being *pro se* or a non-attorney, and prohibiting registration fees.
4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.
5. Change the "signature" paragraph for the reasons stated in my comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.
6. Conform the signature paragraph in the FRCrP version to the location used in the other rules.

B. Proposed rules

The Committees have proposed the following parallel rule changes. On the left are the committee's proposed changes; on the right are my proposed alternatives. Differences marked in **bold**; ~~strikeout~~ is used only in the notes, so as to not conflict with strikeout of prior rule. Italics are additions to the prior rule.

I. F. R. Appellate P. — Rule 25. Filing and Service

A. …
1. …
2. Filing: Method and Timeliness.
a) ...
b) ~~...~~
Electronic Filing and Signing
(1) By a Represented Person— Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.
(2) By an Unrepresented Person— When Allowed or Required. A person not represented by an attorney:
(a) may file electronically only if allowed by court order or by local rule; and
(b) may be required to file electronically only by court order, or by a local rule that includes

II. F. R. Appellate P. — Rule 25. Filing and Service

A. …
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(2) Exceptions. A person may file nonelectronically if:
*(a) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**, or***
(b) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.
(i) No court may require a prisoner not represented by an attorney

reasonable exceptions.

(3) Signing. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

to file electronically.

(3) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(a) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

(4) Signing. ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) …

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(**iv**) …

Rule 25(a)(2)(B)(iii). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on

electronic filing. Such prohibitions may be modified by superceding order.

Rule 25(a)(2)(B)(iii)(a). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

III. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. …

2. *Electronic* Filing *and Signing* ~~by Electronic Means.~~

a) *By a Represented Entity—Generally Required; Exceptions.* ~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~ *An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.* ~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~

b) *By an Unrepresented Individual— When Allowed or Required. An individual not represented by an attorney:*

(1) may file electronically only if allowed by court order or by local rule; and

(2) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

c) *Signing. The user name*

IV. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. …

2. *Electronic* Filing *and Signing* ~~by Electronic Means.~~

a) ~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person may file nonelectronically if:***

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**, or***

(2) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.

(a) No court may require a prisoner not represented by an attorney to file electronically.

c) ***Prohibition. A person must not file electronically if***

and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) *Signing.* ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic

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A *pro se* litigant enjoys a rebuttable presumption (and for a *pro se* prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate

filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.	electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission**; this rule change requires that permission be given on the same terms as any other filer**. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.
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V. F. R. Civil P. — Rule 5. Serving and Filing Pleadings and Other Papers

A. …

D. Filing.

1. …

3. Electronic Filing~~,~~ *and* Signing~~,~~ ~~or Verification~~. ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

a) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

b) By an Unrepresented Person—When Allowed or Required. A person not represented by an attorney:

(1) may file electronically only if allowed by court order or by local rule; and

(2) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

c) Signing. The user name and password of an attorney of record, together with the attorney's name on

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3. Electronic Filing~~,~~ *and* Signing~~,~~ ~~or Verification~~. ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

a) ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person*** *may* ***file nonelectronically if:***

*(1) nonelectronic filing is allowed by the court for good cause****,*** *or is allowed or required by local rule****, or***

(2) ***the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.***

(a) ***No court may require a prisoner not represented by an attorney to file electronically.***

c) ***Prohibition. A person must not file electronically if prohibited, for good cause, by court order.***

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(1) ***No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.***

d) Signing. ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

Rule 5 is amended to reflect the widespread transition to electronic filing and service. Almost all filings by represented parties are now made with the court's electronic-filing system.

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Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties,

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A *pro se* litigant enjoys a rebuttable presumption (and for a *pro se* prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. ~~Filings by a person not represented by an attorney are treated separately.~~ It is not

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Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e- filing in collateral proceedings by pro se prisoners.

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Rule 5(d)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to

prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 5(d)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

VII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

A. Service on a Party.

1. …

3. Service by Electronic Means.

a) Using the Court's Electronic Filing System. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

b) …

4. …

B. Filing.

1. …

2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature. A paper filed electronically is written or in writing under these rules.

b) …

3. Means Used by Represented and Unrepresented Parties.

VIII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

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3. Service by Electronic Means.

*a) Using the Court's Electronic Filing System. **A registered user** may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney **is not required to do so unless otherwise required** by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.*

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B. Filing.

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2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. A paper filed electronically is written or in writing under these rules.

b) …

3. Electronic filing and signing

a) Generally Required. Unless an exception or prohibition applies, every person must file electronically.

b) Exceptions. A person may file nonelectronically if:

a) Represented Party. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

b) Unrepresented Party. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

4. …

C. Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

D. …

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**,***

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(a) No court may require a prisoner not represented by an attorney to file electronically.

c) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) Signing. Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.

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D. …

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

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Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

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Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

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Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

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Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system ~~and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature~~. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

necessary.

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Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

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Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

necessary.

…

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used~~, depending upon whether the party is represented by an attorney~~. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but **subsection (b)(3)(B)** provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B)**(ii)(a) prohibits restriction on pro se prisoners' right to file nonelectronically** ~~requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule~~**.** ~~This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where e~~**E**lectronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

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Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

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The rule provides that nonparties~~, like unrepresented parties,~~ may use the court's electronic-filing system ~~only when permitted to do so by court order or local rule~~ **on the same terms as any other person**.

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Rule 49(b)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 49(b)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

C. Introduction

My name is Sai[2]. I do many things, but relevant here is my legal advocacy work[3] and, to some extent, my disabilities. I have no formal training in law.

After being the victim of a series of abuses by the Transportation Security Administration (TSA) at airport checkpoints, I filed formal Rehabilitation Act complaints and Federal Tort Claims Act (FTCA) claims. This was followed by a variety of Freedom of Information Act (FOIA) and Privacy Act requests aimed both at investigating what happened to me and exposing TSA's secret policies and procedures.

When my efforts were met only by agency stonewalling, I sued — first under FOIA / Privacy Act, then under the APA / Rehabilitation Act. After a year of litigation in the latter, I prevailed and obtained an injunction[4], and was subsequently awarded prevailing party status and costs.[5]

These cases were my introduction to litigation; I learned by doing. To paraphrase another, I am too sensible of my defects not to realize that I committed many errors. No civil procedure text is adequate preparation, when compared to experience.

I have been *pro se* not from pride or lack of attempt to get counsel, but because I am both poor and principled. I was unable to obtain counsel without submitting my IFP affidavit on public record, 149 F. Supp. 3d 99, 126-28, in violation of my rights to privacy, which I refused to do.

My cases are not frivolous, and I am not vexatious — just poor, unwilling to give up my civil rights, and unable to find *pro bono* counsel to handle my primary litigation.

Despite the Supreme Court's assumptions in *Kay v. Ehrler*, 499 US 432, 437 (1991) as to "the overriding statutory concern is the interest in obtaining independent counsel for victims of civil

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[2] I am mononymic; Sai is my full legal name. I prefer to be addressed or referred to without any title (e.g. no "Mr.") and with gender-neutral language / pronouns (e.g. "they/their" or "Sai/Sai's").

[3] *See* https://s.ai/work/legal_resume.pdf

[4] *Sai v. DHS et al.,* 149 F. Supp. 3d 99, 110-21 (D. D.C. 2015)

[5] *Id.,* ECF No. 93 (April 15, 2016)

rights violations" — and indeed the general prejudice that equates "*pro se*" with "frivolous" — it is still true that "some civil rights claimants with meritorious cases [are] unable to obtain counsel". *Bradshaw v. Zoological Soc. of San Diego*, 662 F. 2d 1301, 1319 (9th Cir. 1981).

This category of meritorious plaintiffs unable to obtain a lawyer and forced to proceed *pro se* includes me and many others like me. Even when not facing a Hobson's choice between privacy and access to counsel, *In re Boston Herald, Inc. v John J. Connolly, Jr.*, 321 F.3d 174, 188 (1st Cir. 2003), the financial and structural barriers to obtaining counsel are often insurmountable.

These barriers are compounded by inequities in accessing the courts *pro se*. Not only do I not have the skill and training of my opponents from the Department of Justice, I do not have access to a legal research staff, Lexis, WestLaw, or a law library. Due to my disabilities, I face further difficulties dealing with non-electronic documents. CM/ECF helps, and I use it regularly.

The Committee's proposed rule would worsen this situation — creating a presumptive *de facto* sanction akin to those applied to vexatious litigants — when instead it should be improved, by allowing *pro se* litigants fully equal access to CM/ECF and the many benefits thereof.

D. Argument

1. The proposed rule[6] confuses permission with requirement

The official committee notes on the proposed rule, and the final committee comments, make clear that the intent of the rule is to protect *pro se* filers from the electronic filing mandate that the rules change would otherwise impose on represented plaintiffs.

I fully support this motivation, so far as it goes.[7] It is indeed true that many *pro se* filers may not have the skills, equipment, Internet access, electronic document creation and redaction software, etc. that are required to fully participate in CM/ECF. This is particularly acute, as the FRCrP committee points out, for *pro se* prisoners, whose institutions may severely limit their access to email, computers, Internet, and other critical resources.

The proposed rule, for represented parties, permits non-electronic filing on a showing of good cause. In effect — and in my proposed alternative — *pro se* filers should be given a rebuttable presumption of this same good cause, permitting them to file non-electronically without first seeking leave of court. *Pro se* prisoners should be given an *irrebuttable* presumption, in consideration of their much more restrictive and sometimes unpredictable situations.

However, the proposed rule goes much farther: it does not merely permit non-electronic filing by *pro se* litigants (prisoners and otherwise). Rather, it *requires* non-electronic filing — *prohibiting* electronic filing — without a first showing of good cause.

This requirement imposes a wide array of seriously prejudicial, costly, and unequal effects on those *pro se* litigants who *are* capable of using electronic filing and desire to do so.

[6] Because the proposed changes to the FRAP, FRBP, FRCrP, and FRCvP are essentially equivalent, I treat them as a single 'rule', noting differences only where applicable.

[7] Prior committee minutes and comments make clear that there are in fact other motivations for the proposed rule that go beyond protection to prohibition. I oppose and address those below.

2. The proposed rule is overbroad, and ignores its procedural implications.

The proposed rule requires that a litigant obtain leave of court, *in each specific case*, to file electronically. Even if they have used CM/ECF before — indeed, even if they are currently a CM/ECF filer in the *same court* — they must obtain leave in each new case. The rule as drafted would even prohibit *attorneys* who are members of the court's bar from electronic filing if they appear *pro se*, i.e. without being "represented by" someone else.

Because leave of court cannot be obtained in a case before that case even exists on the docket, the procedural implication is that *pro se* filers — even those who would easily obtain leave of court — can *never* file case initiation by CM/ECF.

An attorney filer can simply fill out a form (often online), check their consent and agreement to the terms of use, possibly go through an online CM/ECF tutorial, and proceed — initiating the case electronically and having immediate NEFs of all proceedings.

A *pro se* filer must read the local rules (and CM/ECF guidelines) in detail, draft their own motion and affidavit noting every specific requirements of each court, file it by mail, and hope for the best. The rules give no form motion for this, and courts vary in their requirements. A response might come by mail or email, perhaps weeks later (if approved at all).

3. Harms from not allowing CM/ECF by *pro se* filers

Litigants have the right to appear pro se in all court proceedings. 28 U.S. Code § 1654.[8] This right is Constitutionally backed in multiple aspects: the 6th Amendment right to refuse counsel; substantive and procedural due process rights under the 14th Amendment; Constitutional rights of action, such as 42 U.S. Code § 1983 / Bivens; and the per se right to equal access to the courts.[9]

The proposed rule impairs these rights by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants. It does so without any particularized determination that a given pro se litigant, contrary to their presumptive desire to opt in[10], should

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[8] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[9] I am aware of only one case that has analyzed differential CM/ECF rules for *pro se* litigants: *Greenspan v. Administrative Office of U.S. Courts*, No. 5:14-cv-02396 (N.D. CA. Dec. 4, 2014) at *13-14 (upholding CAND L.R. 5-1(b), which prohibits *pro se* electronic filing without leave of court, under rational basis review). However, Greenspan did not raise, and that court did not consider, the arguments presented here; the case was principally about whether Greenspan could represent his corporation *pro se*.

Even there, the court's reasoning ("a number of *pro se* litigants lack access to a computer … or the skills needed to maneuver through the electronic case filing system", *id*. at *14) only supports a permissive rule exempting *pro se* litigants from otherwise-mandatory electronic filing (i.e. allowing them to file either way).

It does not indicate any rational basis for going further and *forbidding* all members of the class of *pro se* litigants from using electronic filing until leave of court is obtained, merely because some members of the class may not wish to, or may not be able to, take advantage of it.

This argument is especially weak when applied to to *pro se* litigants who actively wish to opt in. If, given access, someone can file a case initiation — perhaps the most complex single docket entry in the CM/ECF system — it would surely be hard to find any rational basis to assume that they are *not* able to use CM/ECF. If they are not able to, no harm is done in allowing them to try.

[10] I assume here that the *pro se* litigant in question would, if permitted, sign up for CM/ECF online and file everything electronically — but for a rule requiring them to first obtain leave of court. If they file on paper voluntarily, these harms are still present, but are at least consented to.

The alternative rule I proposed above would protect *pro se* litigants who can be presumed to have good cause not to use CM/ECF, by allowing them to continue to file by paper unless the

be barred from CM/ECF usage.[11]

a. Total ban on pro se CM/ECF case initiation

Because a case must be initiated before a motion for CM/ECF access can even be filed and an order issued, any requirement to first obtain permission means all *pro se* case initiation must be filed on paper. No CM/ECF permission order, no matter how timely granted, can cure this.

The types of harms this causes are detailed below — but case initiation is unique.

The exact filing time can be dispositive, as when there is a statute of limitations or other jurisdictional deadline. This is especially so if the deadline is over a weekend or other time when the court is physically closed, or if the situation precludes the luxury of additional time to file.

In cases seeking PI/TRO relief — particularly an emergency *ex parte* TRO — case initiation delays can cause a winnable issue to be mooted, or exacerbate an irreparable harm. While TROs are only rarely merited, a plaintiff is no less entitled to such relief merely for being *pro se*.

Case initiation documents may be larger than other motions — particularly now, when cautious plaintiffs may feel forced to provide extensive affidavits or exhibits upfront to avoid an *Iqbal* challenge. Especially when courts require multiple duplicates of case initiation documents for service, chambers, etc., the printing and mailing costs are higher than for other filings.

All *pro se* litigants are irreparably harmed by a rule that requires post-initiation CM/ECF permission. In at least some situations, this alone can make or break a case.

b. Delays

Filing on paper imposes numerous delays.

CM/ECF access is directly linked to receiving notices of electronic filing (NEFs). Where a

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court makes a particularized determination overcoming this presumption.

[11] For instance, a court might determine that a given litigant is vexatious; that they do not appear to receive adequate notice by email, and should be served by mail instead; or that for some reason their CM/ECF usage is so severely impaired or abusive, where their paper filings would *not* be, that they should be prohibited from using CM/ECF.

CM/ECF filer receives immediate notice of every filing by email, a non-electronic filer must wait for physical mail to arrive (and possibly to be forwarded, scanned, etc) before even being aware of the filing.[12] For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks.

This is just to *receive* filings; one must also respond.

Whereas CM/ECF allows *immediate* filing and docketing, paper filings must first be printed, mailed, processed by the court's mailroom, processed by the court's clerk, and docketed.

Depending on the location of the litigant and court, the price paid for printing & mailing services, and other factors, this can routinely take about a week to complete.

In most situations, paper filing cannot be completed at all on weekends or after business hours. Where a CM/ECF filer might stay up late to finish a brief, realize that it won't be done in time, and timely file a motion for extension at 11:50 pm that is nearly certain to be granted, it would be impossible for a paper filer to do the same.

If a dispositive motion is pending, such as MTD or MSJ, then the court could rule on the "unopposed" motion, against the *pro se* litigant — dismissing their case before their motion for extension even has the chance to reach the courthouse.

Due to these delays, a *pro se* litigant is impaired should they seek to file a timely *amicus curiae* brief or to intervene in a case.

People who can afford lawyers are not the only ones who can or should be friends of the court. “An amicus brief should normally be allowed” when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cmty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. WA. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)). Presumptive CM/ECF prohibition imposes another unnecessary burden on would-be *amici* who

[12] Alternatively, they must check PACER on a daily basis, incurring fees that NEF recipients do not while also incurring a different burden on their work habits.

do not have the resources to hire a lawyer. These burdens cause the courts lose the voices of many who have "unique information or perspective" to proffer. As with so many parts of our justice system, this systemically and selectively silences people and groups with less money.[13]

Seeking leave to intervene in a case is hardly a sign of a frivolous filing. Motions to intervene as a member of the press, in order to challenge seal or protective order, is part of the "long-established legal tradition [of] the presumptive right of the public to inspect and copy judicial documents and files". *In re Knoxville News Sentinel Co.*, 723 F.2d 470, 473-74 (6th Cir. 1983), *citing* *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978).[14] In today's era of

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[13] Recently, the Language Creation Society (a non-profit organization I founded) filed an *amicus* brief in *Paramount v. Axanar*, No. 2:15-cv-09938 (C.D. CA., *amicus filed* April 27, 2016) (re copyrightability of the Klingon language). *See* http://conlang.org/axanar.

Fortunately, we were able to obtain the services of an excellent First Amendment lawyer *pro bono*. Without his generosity, we could not have afforded counsel, and I would likely have drafted and filed the *amicus* myself. Within the LCS, I had the best combination of legal and linguistic expertise to present the court with "unique information or perspective" on an issue — whether or not languages can be copyrighted — that the parties only touched on in passing.

In an entirely different context, I have done similarly on behalf of another nonprofit I founded — opposing a poorly crafted FEC advisory opinion request on Bitcoin based campaign finance contributions. The proposal was backed by both an extremely experienced campaign finance lawyer and the Bitcoin Foundation, but I had the unique perspective on the *intersection* of law and technology needed to point out many severe loopholes in the plan. My opposition was successful (FEC deadlocked 3-3) — as was my later alternative proposal (approved 6-0). *See* https://www.makeyourlaws.org/fec/bitcoin/caf and https://www.makeyourlaws.org/fec/bitcoin/.

I recognize that this may seem like an attempt to brag, but it is not. I am perhaps unique in my particular combination of skills, but so is everyone. That is the whole point of *amici*: to encourage third parties to contribute their unique perspectives to courts' decisionmaking. This purpose is not served by discouraging *amici* who cannot afford a lawyer.

[14] The circuits are *unanimous* that third parties may permissively intervene for the specific purpose of accessing judicial records. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

citizen journalism, it is not only large media organizations who can afford lawyers that need to exercise this right. Independent journalists do too — and must file a *pro se* intervention to do so.

This inequity in access and delays results in two procedurally different systems. In one, a litigant can routinely work right up to the deadline, and quickly make last-minute filings if necessary. In the other, a litigant faces a *de facto* one week reduction of all their drafting times, and a total bar to last-minute filings.[15]

This inequity goes beyond mere convenience. If non-consensual, it is a substantial burden added to *every part* of litigating a case — from reducing the time one has to draft filings and access for independent journalists all the way to being dispositive of certain causes of action or barring some critical forms of relief, like last-minute extensions on dispositive motions, altogether.

c. Costs

Filing electronically, if one has the computer and Internet access needed to participate in CM/ECF, costs nothing. The entire cost of making, transferring, and serving PDFs, even hundreds of pages' worth (a few megabytes at most), amounts to not barely one *milli*-cent.[16]

By contrast, printing costs about 10-20¢ per page, and mailing an average sized motion via certified mail costs about $5. Paper filers must print and mail copies of every filing to the court and to all other parties. Court rules often require multiple copies for the court itself.[17]

This is on top of any cost or time required to get to a print shop or post office in the first place.

For litigants who are overseas or disabled, and therefore unable to access a U.S. post office in person in order to send certified mail, this creates additional costs and other barriers — requiring the use of online print and mail services, depending on friends, etc.

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[15] *Pro se* litigants are given no special consideration for procedural standards such as filing times.
[16] *See* e.g. https://aws.amazon.com/s3/pricing/ (storage and transfer costs ~2¢ per *gigabyte*).

[17] *See e.g.* Ninth Circuit Rule 25-5(f), FRAP 27(d)(3) (ordinarily requiring no paper copies of motions for CM/ECF users — but for paper filers, requiring one 'original' plus three 'copies' for the court).

With each filing costing about $5-20, and dozens of filings per case, these costs can easily accumulate to hundreds of dollars.

This is especially harmful for *pro se* litigants proceeding *in forma pauperis* ("IFP"), 28 U.S.C. § 1915. While IFP plaintiffs are excused from court fees, they are *not* protected from such costs. A court that requires a *pro se* IFP litigant to file on paper effectively imposes unnecessary extra costs on them — costs that their represented opponents do not bear. This goes directly against the intent of the IFP statute.

Even if the *pro se* IFP litigant is successful, and has the skill and awareness to file a motion for costs, such motions can generally only be filed after final judgment. In the meantime, the litigant must incur potentially hundreds of dollars — even though a court granting IFP status has already determined that its filing fee, ~$400, is more than they can reasonably bear.

These costs also hinder equality on the merits. A *pro se* litigant without CM/ECF access may easily be deterred from filing evidence, such as exhibits or affidavits, that could make the critical difference to whether a case survives *Iqbal* (or 28 USC § 1915(e)(2)(B)) review.

d. Accessibility and presentability

Properly made electronic PDFs are dramatically more accessible than scanned paper. CM/ECF normally generates the former; a "non-electronic filing" necessarily generates the latter.

For people with disabilities such as blindness, this difference is critical. Modern optical character recognition (OCR) technology is very inaccurate; a scanned and OCR'd document is functionally inaccessible to adaptive technology such as screen readers — whereas the electronic document from which it was printed is likely to be largely accessible.[18]

Electronic documents are better for everyone than scanned paper. They are more readable on a

[18] *Full* accessibility is more complicated, and requires paying attention to preserve structural metadata such as headers, as well adding metadata for some information, such as images. *See e.g.* the U.S. Access Board's new regulations under the Rehabilitation Act § 508: https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule

screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.

These benefits are not only for the filer. Other parties' counsel may have disabilities[19], as may the judge[20]. Even for those without disabilities, very routine operations — for instance, copying a citation into a search engine, or pasting a quote into a draft response or opinion — are far easier with electronic documents, but can pose significant barriers with scanned paper documents.

Receiving paper filings hinders the litigant's own access to court documents.

Being required to file on paper hinders *everyone's* access to the litigant's filings, making them less likely to be read as carefully or treated as seriously as they might otherwise be — and creating yet another subtle but significant bias against the *pro se* litigant.[21]

e. Tracking cases of interest

Although not a formal part of the CM/ECF rules, part of how the current CM/ECF system works is that CM/ECF filers — but not ordinary PACER users — can track "cases of interest". This allows someone to receive the same NEFs as parties do (aside from certain sealed filings), for more or less any case in a court for which the person has CM/ECF access.

This is not merely a frivolous convenience. Cases of interest may be ones in which someone may wish to file an amicus or intervention. They frequently present similar issues to those one is litigating, and thereby give awareness of arguments to crib from or prepare against, evidence found by other litigants, or even intervening authority that may justify an FRAP 28(j) letter or a

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[19] *See e.g.* http://www.blindlawyer.org/

[20] For instance, Ninth Circuit Judge Ronald M. Gould, a widely respected and active jurist, has advanced multiple sclerosis. Although I do not know what specific tools Judge Gould uses, screen readers are a common adaptive technology for MS. *See e.g.*:
http://www.uscourts.gov/news/2013/12/16/focus-what-you-can-do-advises-judge-ms
http://www.gatfl.gatech.edu/tflwiki/images/5/59/UGA_-_AAC_DND_2014_Fall_Presentation.pdf

[21] *See* e.g. Judge Alex Kozinski, *The Wrong Stuff* (discussing ways to annoy a judge and thereby lose one's case — including through the format of briefs).

motion for reconsideration. They may be of journalistic interest, where immediate notification of developments is critical to presenting timely news to one's audience.

There is no good reason to restrict this functionality — but as is, non-attorneys cannot routinely and readily get access to this extremely useful tool unless they are first granted CM/ECF access in a particular court.

4. Concerns particular to prisoners

As the FRCrP committee correctly noted in comments on its version of the proposed rule, prisoners are often unable to obtain or maintain reliable access to the basic tools needed to use CM/ECF. Prisons may prohibit access to email, Internet, or even word processing software, and this access may vary if a prisoner is transferred or subjected to administrative punishments.

Where most *pro se* litigants should be presumed to have good cause not to use CM/ECF, a *pro se* prisoner should get an *irrebuttable* presumption of good cause. The court, and indeed the prisoner, may not always know or be able to predict when their access will be impaired. To the extent that the prisoner wants and is able to participate in CM/ECF, it should still be allowed, for all the above reasons. However, prisoners should *always* have the option of filing by paper, even if they are otherwise CM/ECF participants, without needing to seek any leave of court. The prisoner is in the best position to determine which option is best for them at any given time.

While it is true that the 6th Amendment *per se* only protects the right to participate *pro se* in criminal proceedings. However, prisoners have just as much right to participate *pro se* in other matters as anyone else, including under 28 U.S.C. § 1654.

The Supreme Court has explicitly "reject[ed] the … claim that inmates are ill-equipped to use the tools of the trade of the legal profession", *Bounds v. Smith*, 430 US 817, 826 (1977) (internal quotations omitted). CM/ECF is the modern "tool of the trade", and denying access to it would impair prisoners' "fundamental constitutional right of access to the courts", *id.* at 828, just as much in matters such as civil rights complaints as in criminal proceedings.

Filing accommodations that protect prisoners' rights to access the courts must therefore be made across *all* the rules of procedure, not just the criminal rules. My proposed alternative does so.

Further, not all *pro se* participants in criminal proceedings are prisoners. Some will be out on bail pending trial, or participating due to some post-release criminal proceeding. These *pro se* participants must have their 6th Amendment rights protected, and will often face the similar barriers to *pro se* IFP litigants, but do not have the concerns specific to the prison context.

5. Concerns raised in committee minutes not expressed in the final proposed note

The minutes of the committees discussing *pro se* access to CM/ECF demonstrate a range of concerns about possible abuse of the system. I believe it is clear that these concerns are the real reason — unexpressed in the final proposed note — for why the proposed rule goes beyond merely not requiring *pro se* CM/ECF use, to prohibiting it unless permission is first obtained.

As an initial matter, the Administrative Procedure Act, which applies to this rulemaking proceeding, does not permit such covert purposes. The official notes and comments simply do not support the extra step of a presumptive prohibition on *pro se* CM/ECF use; they only justify an exception from the CM/ECF requirement otherwise imposed on attorney filers.

If the Committee does wish to go this extra step, it must plainly justify its reasons, on the record.

I do not believe that any of the previously expressed concerns justify the proposed rule. In essence, it constitutes a presumptive sanction — equating "*pro se*" with "presumed vexatious".

Like all forms of prior restraint, this is anathema in our legal system.

The expressed concerns do not justify impairing the entire class of *pro se* litigants for the sins of a few; those sins are in some cases imaginary, or are even protected rights; and even for those few people who may abuse the system, a presumptive limitation on CM/ECF use *per se* either would not cure the issue or is not the appropriate remedy.

By analogy, suppose that an executive agency undergoing public APA notice & comment had a rule allowing lawyers to submit comments electronically immediately visible to everyone — but requiring that all others submit comments on paper, citing a concern that some citizens might file abusive content. That rule would surely be struck down on court challenge, as a clear example of First Amendment prior restraint.

This proposed rule is not exempt from the same inquiry, and the Committee should apply the same scrutiny it would apply to any other attempt at a prior restraint on speech.

With that said, let us examine the specific concerns raised.[22]

a. Not having the capability to use CM/ECF

Certainly many *pro se* litigants, particularly prisoners, will not have the ability to use CM/ECF — either due to lack of skill or comfort with the CM/ECF system itself, or lack of Internet and computer access, or some other such impediment.

First off, this concern only justifies an exemption, not a prohibition. Each individual litigant is the person who should decide their own capabilities and comfort, and opt in or out of CM/ECF as they see fit.

I hope that the Committee does not believe that *pro se* litigants are presumptively so incapable of judging for themselves whether or not they can use CM/ECF, receive email dependably enough, satisfactorily complete whatever CM/ECF training is available, etc. — even where they can be required, like any registrant, to fill out online forms and agreements stating otherwise — that courts should paternalistically take this decision away from the entire *class* of *pro se* litigants.

This of course in no way prevents a court from making an *individualized* determination about a specific *pro se* litigant, based on good cause — either that they are sophisticated enough that they should be required to file electronically like an attorney, or that they are so bad at using CM/ECF that they should be ordered to only file on paper. Such orders can be contingent (e.g. on completing some training), limited to a given case, or applied presumptively for *all* future filings (as with vexatious litigant orders prohibiting filing in general without permission, but particular to electronic filing).

My proposed alternative rule permits courts to make such determinations. It simply requires that they be made on a case by case basis, giving the *pro se* litigant the benefit of an initial presumption of good cause.

[22] I have not cited specific sources for each, as I do not wish to embarrass any individual Committee member. All can be found in the minutes and reports of committees' consideration of the proposed CM/ECF rules, except for one which was raised to me in person by a member of the FRCP committee following my testimony at the December 2016 hearing.

b. Filing pornographic or defamatory content

It is possible, though surely more apocryphal[23] than descriptive, that a *pro se* litigant may file pornographic or otherwise inappropriate material on the record.[24] But courts have wide powers to issue orders to show cause and create tailored sanctions for inappropriate behavior in court, including for abusive filings.[25]

When used as a direct part of litigation filings, e.g. as a legal tactic, what would otherwise be defamation is protected by absolute litigation privilege.[26] It may be unwise or uncouth, but courts routinely permit *pro se* litigants to attempt all kinds of unwise arguments. Should it stray outside the bounds of what is privileged, the defamed party has their usual remedies.

It is improper for courts to filter filings because they will publicly appear on PACER and *might* contain inappropriate content. A document merely being filed and available on PACER does not imply any imprimatur of approval by the court. Even so, courts are free to strike or seal filings, or to sanction litigants, if there is cause to do so.

Curtailing individual CM/ECF access does not even prevent this issue. Litigants can trivially post anything they would post in a filing in a blog or other website, outside the court's control.

In short, this concern is nearly a textbook definition of prior restraint, with the textbook response: apply tailored sanctions only afterwards, when and if they are appropriate punishment.

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[23] The legal humor site Lowering the Bar provides at least a couple examples, e.g.:
https://loweringthebar.net/2015/04/to-f-this-court.html
https://loweringthebar.net/2011/12/note-catholic-beast-is-not-a-legal-term-of-art.html

However, considering the huge number of *pro se* filings and tiny number of examples found even by such dedicated collectors as Kevin Underhill, this seems to be a case of the exception proving the rule.

[24] This assumes that the material is in fact inappropriate. There are surely some equally rare cases for which such material is entirely appropriate and necessary evidence.

[25] Lowering the Bar's case law hall of fame helpfully provides a florid example: *Washington v. Alaimo*, 934 F.Supp. 1395 (S.D. Ga. 1996).

[26] *See e.g.* http://www.abi.org/abi-journal/the-boundaries-of-litigation-privilege (collecting cases and noting several exceptions).

c. Improper docketing

Novice CM/ECF users may docket filings improperly — e.g. listing the wrong action or relief, joining separate motion documents in a single filing, misusing the 'emergency' label, failing to upload exhibits, etc. Some amount of this is simply part of learning the system.[27] Even in cases between giant corporations with very experienced counsel, one regularly sees docket clerk annotations of filing deficiencies or correcting docketing errors.

In non-electronic filing, the clerk must scan incoming documents, decide which sections are separate documents, exhibits, etc., and do all the docketing. Sometimes they too can get this wrong, e.g. attaching an affidavit as an exhibit to the wrong motion.

Even if someone is a somewhat inept CM/ECF user, docket clerks routinely screen incoming filings and will correct clear deficiencies or errors. Doing so based on at least the litigant's first pass attempt at classifying their own filing is surely easier than doing it whole cloth — and over time, *pro se* litigants will learn to avoid making the same mistakes.

If the litigant is truly so grossly incompetent and unable to improve that their use of CM/ECF filing is a serious burden to the court's clerks where their paper filings would not be, the court can of course determine that there is good cause to forbid CM/ECF use — presumably after first taking less drastic remedial measures, such as providing the litigant with learning materials, or ordering them to certify that they have completed online CM/ECF training.

This concern is inappropriately paternalistic, and does not justify the harms caused by lacking access to CM/ECF.

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[27] As a personal example: recently, when attempting to file a large number of exhibits for an MSJ opposition, I received a strange ECF error. I was stumped — as was the court's ECF help desk.

After discussion with the ECF coordinator, it turned out that ECF fails if attachments take more than 20 minutes to upload. The solution: split the filing into two separate docket events to limit the upload time per event, and tag the second using the special 'additional large files' event.

To my knowledge, this is not covered by the court's CM/ECF guidance. As I discovered when I first started to use it, the same is true for many other aspects of the system.

d. Improper participation in others' cases

Pro se litigants might make filings in others' cases. But as discussed above re *amicus* briefs and interventions, this is not presumptively improper. The CM/ECF system already has the functionality to limit users to certain types of filings or certain cases.

Pro se litigants — and indeed all CM/ECF users — could properly be limited to initiatory actions (e.g. motions for leave to file and replies thereto) in cases for which they are not participants. Improper filings can be summarily denied or, if necessary, sanctioned.

e. Filing large documents

Pro se litigants, like any other, may occasionally make voluminous filings.

Some judges have their chambers automatically print all documents filed in their cases, but this is their own choice. They could instead choose not to print documents over a certain size, and either deal with them electronically or order the filer to mail a chambers copy where necessary.

Preventing *pro se* litigants from accessing CM/ECF does not prevent them from making voluminous filings, nor is it presumptively appropriate to do so. Sometimes relevant exhibits simply are voluminous. Cross-motions in a copyright dispute can easily be a thousand pages in total. Again, this should be dealt with on a case by case basis — not by a presumptive bar to accessing CM/ECF.

f. Sharing access credentials with others

If a litigant shares their access credentials with someone else, the other person can file for them. They are just as responsible for this — and might have the same needs — as in the situation where an attorney shares access credentials with their paralegal.[28]

[28] I believe this is an inappropriate practice for security reasons, yet it is currently the mandated approach. *See* comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.

6. Conclusion

Electronic filing comes with many benefits both to the filer and to all other participants. By the same token, any *prohibition* on electronic filing — including a requirement to first obtain leave of court — comes with many harms.

Pro se litigants should be allowed to make their own choice between paper and electronic filing, without having to seek any leave of court. In particular, they should be allowed full access to CM/ECF case initiation and case tracking. To do otherwise is to impose an unjustified, presumptive sanction on the entire class of *pro se* litigants, putting them at an unfair and unconstitutional disadvantage in exercising their rights to equal access to the courts.

Where a court makes an *individualized* determination of good cause, it should be permitted to require or prohibit a *pro se* litigant's use of CM/ECF — with the exception of prisoners, whose special situation requires protecting their absolute right to access the court, by paper if necessary.

My proposed alternative rule does all of the above. The proposed rule does not, and for the reasons detailed above, I oppose it.

I again urge the Committee to bear in mind both the standards that it would apply to any other governmental prior restraint on such fundamental rights as participation in the legal system, and the one-sided and unrepresentative nature of its own makeup and deliberation. There is an ironic dearth of zealous advocates of the rights of *pro se* litigants — and the Committee has its own biases, from habitually viewing *pro se* litigants as opponents or as problems to manage.

Pro se litigants' participation in the legal system presents many special challenges. From my own perspective as a flawed but successful *pro se* litigant, one of the biggest is in obtaining some semblance of equality with represented parties. At every step, we face numerous and systemic obstacles to the right of equality, yet are expected to keep pace with our represented opponents.

Before the law sit many gatekeepers. Let this not be one of them.

Respectfully submitted,
/s/ Sai

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

…

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

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…

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necessary.

…

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

…

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

necessary.

…

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used~~, depending upon whether the party is represented by an attorney~~. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but **subsection (b)(3)(B)** provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B)**(ii)(a) prohibits restriction on pro se prisoners' right to file nonelectronically** ~~requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where e~~**E**lectronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

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Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

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The rule provides that nonparties~~, like unrepresented parties,~~ may use the court's electronic-filing system ~~only when permitted to do so by court order or local rule~~ **on the same terms as any other person**.

…

Rule 49(b)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 49(b)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

C. Introduction

My name is Sai[2]. I do many things, but relevant here is my legal advocacy work[3] and, to some extent, my disabilities. I have no formal training in law.

After being the victim of a series of abuses by the Transportation Security Administration (TSA) at airport checkpoints, I filed formal Rehabilitation Act complaints and Federal Tort Claims Act (FTCA) claims. This was followed by a variety of Freedom of Information Act (FOIA) and Privacy Act requests aimed both at investigating what happened to me and exposing TSA's secret policies and procedures.

When my efforts were met only by agency stonewalling, I sued — first under FOIA / Privacy Act, then under the APA / Rehabilitation Act. After a year of litigation in the latter, I prevailed and obtained an injunction[4], and was subsequently awarded prevailing party status and costs.[5]

These cases were my introduction to litigation; I learned by doing. To paraphrase another, I am too sensible of my defects not to realize that I committed many errors. No civil procedure text is adequate preparation, when compared to experience.

I have been *pro se* not from pride or lack of attempt to get counsel, but because I am both poor and principled. I was unable to obtain counsel without submitting my IFP affidavit on public record, 149 F. Supp. 3d 99, 126-28, in violation of my rights to privacy, which I refused to do.

My cases are not frivolous, and I am not vexatious — just poor, unwilling to give up my civil rights, and unable to find *pro bono* counsel to handle my primary litigation.

Despite the Supreme Court's assumptions in *Kay v. Ehrler*, 499 US 432, 437 (1991) as to "the overriding statutory concern is the interest in obtaining independent counsel for victims of civil

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[2] I am mononymic; Sai is my full legal name. I prefer to be addressed or referred to without any title (e.g. no "Mr.") and with gender-neutral language / pronouns (e.g. "they/their" or "Sai/Sai's").

[3] *See* https://s.ai/work/legal_resume.pdf

[4] *Sai v. DHS et al.,* 149 F. Supp. 3d 99, 110-21 (D. D.C. 2015)

[5] *Id.,* ECF No. 93 (April 15, 2016)

rights violations" — and indeed the general prejudice that equates "*pro se*" with "frivolous" — it is still true that "some civil rights claimants with meritorious cases [are] unable to obtain counsel". *Bradshaw v. Zoological Soc. of San Diego*, 662 F. 2d 1301, 1319 (9th Cir. 1981).

This category of meritorious plaintiffs unable to obtain a lawyer and forced to proceed *pro se* includes me and many others like me. Even when not facing a Hobson's choice between privacy and access to counsel, *In re Boston Herald, Inc. v John J. Connolly, Jr.*, 321 F.3d 174, 188 (1st Cir. 2003), the financial and structural barriers to obtaining counsel are often insurmountable.

These barriers are compounded by inequities in accessing the courts *pro se*. Not only do I not have the skill and training of my opponents from the Department of Justice, I do not have access to a legal research staff, Lexis, WestLaw, or a law library. Due to my disabilities, I face further difficulties dealing with non-electronic documents. CM/ECF helps, and I use it regularly.

The Committee's proposed rule would worsen this situation — creating a presumptive *de facto* sanction akin to those applied to vexatious litigants — when instead it should be improved, by allowing *pro se* litigants fully equal access to CM/ECF and the many benefits thereof.

D. Argument

1. The proposed rule[6] confuses permission with requirement

The official committee notes on the proposed rule, and the final committee comments, make clear that the intent of the rule is to protect *pro se* filers from the electronic filing mandate that the rules change would otherwise impose on represented plaintiffs.

I fully support this motivation, so far as it goes.[7] It is indeed true that many *pro se* filers may not have the skills, equipment, Internet access, electronic document creation and redaction software, etc. that are required to fully participate in CM/ECF. This is particularly acute, as the FRCrP committee points out, for *pro se* prisoners, whose institutions may severely limit their access to email, computers, Internet, and other critical resources.

The proposed rule, for represented parties, permits non-electronic filing on a showing of good cause. In effect — and in my proposed alternative — *pro se* filers should be given a rebuttable presumption of this same good cause, permitting them to file non-electronically without first seeking leave of court. *Pro se* prisoners should be given an *irrebuttable* presumption, in consideration of their much more restrictive and sometimes unpredictable situations.

However, the proposed rule goes much farther: it does not merely permit non-electronic filing by *pro se* litigants (prisoners and otherwise). Rather, it *requires* non-electronic filing — *prohibiting* electronic filing — without a first showing of good cause.

This requirement imposes a wide array of seriously prejudicial, costly, and unequal effects on those *pro se* litigants who *are* capable of using electronic filing and desire to do so.

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[6] Because the proposed changes to the FRAP, FRBP, FRCrP, and FRCvP are essentially equivalent, I treat them as a single 'rule', noting differences only where applicable.

[7] Prior committee minutes and comments make clear that there are in fact other motivations for the proposed rule that go beyond protection to prohibition. I oppose and address those below.

2. The proposed rule is overbroad, and ignores its procedural implications.

The proposed rule requires that a litigant obtain leave of court, *in each specific case*, to file electronically. Even if they have used CM/ECF before — indeed, even if they are currently a CM/ECF filer in the *same court* — they must obtain leave in each new case. The rule as drafted would even prohibit *attorneys* who are members of the court's bar from electronic filing if they appear *pro se*, i.e. without being "represented by" someone else.

Because leave of court cannot be obtained in a case before that case even exists on the docket, the procedural implication is that *pro se* filers — even those who would easily obtain leave of court — can *never* file case initiation by CM/ECF.

An attorney filer can simply fill out a form (often online), check their consent and agreement to the terms of use, possibly go through an online CM/ECF tutorial, and proceed — initiating the case electronically and having immediate NEFs of all proceedings.

A *pro se* filer must read the local rules (and CM/ECF guidelines) in detail, draft their own motion and affidavit noting every specific requirements of each court, file it by mail, and hope for the best. The rules give no form motion for this, and courts vary in their requirements. A response might come by mail or email, perhaps weeks later (if approved at all).

3. Harms from not allowing CM/ECF by *pro se* filers

Litigants have the right to appear pro se in all court proceedings. 28 U.S. Code § 1654.[8] This right is Constitutionally backed in multiple aspects: the 6th Amendment right to refuse counsel; substantive and procedural due process rights under the 14th Amendment; Constitutional rights of action, such as 42 U.S. Code § 1983 / Bivens; and the per se right to equal access to the courts.[9]

The proposed rule impairs these rights by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants. It does so without any particularized determination that a given pro se litigant, contrary to their presumptive desire to opt in[10], should

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[8] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[9] I am aware of only one case that has analyzed differential CM/ECF rules for *pro se* litigants: *Greenspan v. Administrative Office of U.S. Courts*, No. 5:14-cv-02396 (N.D. CA. Dec. 4, 2014) at *13-14 (upholding CAND L.R. 5-1(b), which prohibits *pro se* electronic filing without leave of court, under rational basis review). However, Greenspan did not raise, and that court did not consider, the arguments presented here; the case was principally about whether Greenspan could represent his corporation *pro se*.

Even there, the court's reasoning ("a number of *pro se* litigants lack access to a computer … or the skills needed to maneuver through the electronic case filing system", *id*. at *14) only supports a permissive rule exempting *pro se* litigants from otherwise-mandatory electronic filing (i.e. allowing them to file either way).

It does not indicate any rational basis for going further and *forbidding* all members of the class of *pro se* litigants from using electronic filing until leave of court is obtained, merely because some members of the class may not wish to, or may not be able to, take advantage of it.

This argument is especially weak when applied to to *pro se* litigants who actively wish to opt in. If, given access, someone can file a case initiation — perhaps the most complex single docket entry in the CM/ECF system — it would surely be hard to find any rational basis to assume that they are *not* able to use CM/ECF. If they are not able to, no harm is done in allowing them to try.

[10] I assume here that the *pro se* litigant in question would, if permitted, sign up for CM/ECF online and file everything electronically — but for a rule requiring them to first obtain leave of court. If they file on paper voluntarily, these harms are still present, but are at least consented to.

The alternative rule I proposed above would protect *pro se* litigants who can be presumed to have good cause not to use CM/ECF, by allowing them to continue to file by paper unless the

be barred from CM/ECF usage.[11]

a. Total ban on pro se CM/ECF case initiation

Because a case must be initiated before a motion for CM/ECF access can even be filed and an order issued, any requirement to first obtain permission means all *pro se* case initiation must be filed on paper. No CM/ECF permission order, no matter how timely granted, can cure this.

The types of harms this causes are detailed below — but case initiation is unique.

The exact filing time can be dispositive, as when there is a statute of limitations or other jurisdictional deadline. This is especially so if the deadline is over a weekend or other time when the court is physically closed, or if the situation precludes the luxury of additional time to file.

In cases seeking PI/TRO relief — particularly an emergency *ex parte* TRO — case initiation delays can cause a winnable issue to be mooted, or exacerbate an irreparable harm. While TROs are only rarely merited, a plaintiff is no less entitled to such relief merely for being *pro se*.

Case initiation documents may be larger than other motions — particularly now, when cautious plaintiffs may feel forced to provide extensive affidavits or exhibits upfront to avoid an *Iqbal* challenge. Especially when courts require multiple duplicates of case initiation documents for service, chambers, etc., the printing and mailing costs are higher than for other filings.

All *pro se* litigants are irreparably harmed by a rule that requires post-initiation CM/ECF permission. In at least some situations, this alone can make or break a case.

b. Delays

Filing on paper imposes numerous delays.

CM/ECF access is directly linked to receiving notices of electronic filing (NEFs). Where a

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court makes a particularized determination overcoming this presumption.

[11] For instance, a court might determine that a given litigant is vexatious; that they do not appear to receive adequate notice by email, and should be served by mail instead; or that for some reason their CM/ECF usage is so severely impaired or abusive, where their paper filings would *not* be, that they should be prohibited from using CM/ECF.

CM/ECF filer receives immediate notice of every filing by email, a non-electronic filer must wait for physical mail to arrive (and possibly to be forwarded, scanned, etc) before even being aware of the filing.[12] For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks.

This is just to *receive* filings; one must also respond.

Whereas CM/ECF allows *immediate* filing and docketing, paper filings must first be printed, mailed, processed by the court's mailroom, processed by the court's clerk, and docketed.

Depending on the location of the litigant and court, the price paid for printing & mailing services, and other factors, this can routinely take about a week to complete.

In most situations, paper filing cannot be completed at all on weekends or after business hours. Where a CM/ECF filer might stay up late to finish a brief, realize that it won't be done in time, and timely file a motion for extension at 11:50 pm that is nearly certain to be granted, it would be impossible for a paper filer to do the same.

If a dispositive motion is pending, such as MTD or MSJ, then the court could rule on the "unopposed" motion, against the *pro se* litigant — dismissing their case before their motion for extension even has the chance to reach the courthouse.

Due to these delays, a *pro se* litigant is impaired should they seek to file a timely *amicus curiae* brief or to intervene in a case.

People who can afford lawyers are not the only ones who can or should be friends of the court. “An amicus brief should normally be allowed” when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cmty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. WA. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)). Presumptive CM/ECF prohibition imposes another unnecessary burden on would-be *amici* who

[12] Alternatively, they must check PACER on a daily basis, incurring fees that NEF recipients do not while also incurring a different burden on their work habits.

do not have the resources to hire a lawyer. These burdens cause the courts lose the voices of many who have "unique information or perspective" to proffer. As with so many parts of our justice system, this systemically and selectively silences people and groups with less money.[13]

Seeking leave to intervene in a case is hardly a sign of a frivolous filing. Motions to intervene as a member of the press, in order to challenge seal or protective order, is part of the "long-established legal tradition [of] the presumptive right of the public to inspect and copy judicial documents and files". *In re Knoxville News Sentinel Co.*, 723 F.2d 470, 473-74 (6th Cir. 1983), *citing* *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978).[14] In today's era of

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[13] Recently, the Language Creation Society (a non-profit organization I founded) filed an *amicus* brief in *Paramount v. Axanar*, No. 2:15-cv-09938 (C.D. CA., *amicus filed* April 27, 2016) (re copyrightability of the Klingon language). *See* http://conlang.org/axanar.

Fortunately, we were able to obtain the services of an excellent First Amendment lawyer *pro bono*. Without his generosity, we could not have afforded counsel, and I would likely have drafted and filed the *amicus* myself. Within the LCS, I had the best combination of legal and linguistic expertise to present the court with "unique information or perspective" on an issue — whether or not languages can be copyrighted — that the parties only touched on in passing.

In an entirely different context, I have done similarly on behalf of another nonprofit I founded — opposing a poorly crafted FEC advisory opinion request on Bitcoin based campaign finance contributions. The proposal was backed by both an extremely experienced campaign finance lawyer and the Bitcoin Foundation, but I had the unique perspective on the *intersection* of law and technology needed to point out many severe loopholes in the plan. My opposition was successful (FEC deadlocked 3-3) — as was my later alternative proposal (approved 6-0). *See* https://www.makeyourlaws.org/fec/bitcoin/caf and https://www.makeyourlaws.org/fec/bitcoin/.

I recognize that this may seem like an attempt to brag, but it is not. I am perhaps unique in my particular combination of skills, but so is everyone. That is the whole point of *amici*: to encourage third parties to contribute their unique perspectives to courts' decisionmaking. This purpose is not served by discouraging *amici* who cannot afford a lawyer.

[14] The circuits are *unanimous* that third parties may permissively intervene for the specific purpose of accessing judicial records. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

citizen journalism, it is not only large media organizations who can afford lawyers that need to exercise this right. Independent journalists do too — and must file a *pro se* intervention to do so.

This inequity in access and delays results in two procedurally different systems. In one, a litigant can routinely work right up to the deadline, and quickly make last-minute filings if necessary. In the other, a litigant faces a *de facto* one week reduction of all their drafting times, and a total bar to last-minute filings.[15]

This inequity goes beyond mere convenience. If non-consensual, it is a substantial burden added to *every part* of litigating a case — from reducing the time one has to draft filings and access for independent journalists all the way to being dispositive of certain causes of action or barring some critical forms of relief, like last-minute extensions on dispositive motions, altogether.

c. Costs

Filing electronically, if one has the computer and Internet access needed to participate in CM/ECF, costs nothing. The entire cost of making, transferring, and serving PDFs, even hundreds of pages' worth (a few megabytes at most), amounts to not barely one *milli*-cent.[16]

By contrast, printing costs about 10-20¢ per page, and mailing an average sized motion via certified mail costs about $5. Paper filers must print and mail copies of every filing to the court and to all other parties. Court rules often require multiple copies for the court itself.[17]

This is on top of any cost or time required to get to a print shop or post office in the first place.

For litigants who are overseas or disabled, and therefore unable to access a U.S. post office in person in order to send certified mail, this creates additional costs and other barriers — requiring the use of online print and mail services, depending on friends, etc.

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[15] *Pro se* litigants are given no special consideration for procedural standards such as filing times.
[16] *See* e.g. https://aws.amazon.com/s3/pricing/ (storage and transfer costs ~2¢ per *gigabyte*).

[17] *See e.g.* Ninth Circuit Rule 25-5(f), FRAP 27(d)(3) (ordinarily requiring no paper copies of motions for CM/ECF users — but for paper filers, requiring one 'original' plus three 'copies' for the court).

With each filing costing about $5-20, and dozens of filings per case, these costs can easily accumulate to hundreds of dollars.

This is especially harmful for *pro se* litigants proceeding *in forma pauperis* ("IFP"), 28 U.S.C. § 1915. While IFP plaintiffs are excused from court fees, they are *not* protected from such costs. A court that requires a *pro se* IFP litigant to file on paper effectively imposes unnecessary extra costs on them — costs that their represented opponents do not bear. This goes directly against the intent of the IFP statute.

Even if the *pro se* IFP litigant is successful, and has the skill and awareness to file a motion for costs, such motions can generally only be filed after final judgment. In the meantime, the litigant must incur potentially hundreds of dollars — even though a court granting IFP status has already determined that its filing fee, ~$400, is more than they can reasonably bear.

These costs also hinder equality on the merits. A *pro se* litigant without CM/ECF access may easily be deterred from filing evidence, such as exhibits or affidavits, that could make the critical difference to whether a case survives *Iqbal* (or 28 USC § 1915(e)(2)(B)) review.

d. Accessibility and presentability

Properly made electronic PDFs are dramatically more accessible than scanned paper. CM/ECF normally generates the former; a "non-electronic filing" necessarily generates the latter.

For people with disabilities such as blindness, this difference is critical. Modern optical character recognition (OCR) technology is very inaccurate; a scanned and OCR'd document is functionally inaccessible to adaptive technology such as screen readers — whereas the electronic document from which it was printed is likely to be largely accessible.[18]

Electronic documents are better for everyone than scanned paper. They are more readable on a

[18] *Full* accessibility is more complicated, and requires paying attention to preserve structural metadata such as headers, as well adding metadata for some information, such as images. *See e.g.* the U.S. Access Board's new regulations under the Rehabilitation Act § 508: https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule

screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.

These benefits are not only for the filer. Other parties' counsel may have disabilities[19], as may the judge[20]. Even for those without disabilities, very routine operations — for instance, copying a citation into a search engine, or pasting a quote into a draft response or opinion — are far easier with electronic documents, but can pose significant barriers with scanned paper documents.

Receiving paper filings hinders the litigant's own access to court documents.

Being required to file on paper hinders *everyone's* access to the litigant's filings, making them less likely to be read as carefully or treated as seriously as they might otherwise be — and creating yet another subtle but significant bias against the *pro se* litigant.[21]

e. Tracking cases of interest

Although not a formal part of the CM/ECF rules, part of how the current CM/ECF system works is that CM/ECF filers — but not ordinary PACER users — can track "cases of interest". This allows someone to receive the same NEFs as parties do (aside from certain sealed filings), for more or less any case in a court for which the person has CM/ECF access.

This is not merely a frivolous convenience. Cases of interest may be ones in which someone may wish to file an amicus or intervention. They frequently present similar issues to those one is litigating, and thereby give awareness of arguments to crib from or prepare against, evidence found by other litigants, or even intervening authority that may justify an FRAP 28(j) letter or a

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[19] *See e.g.* http://www.blindlawyer.org/

[20] For instance, Ninth Circuit Judge Ronald M. Gould, a widely respected and active jurist, has advanced multiple sclerosis. Although I do not know what specific tools Judge Gould uses, screen readers are a common adaptive technology for MS. *See e.g.*:
http://www.uscourts.gov/news/2013/12/16/focus-what-you-can-do-advises-judge-ms
http://www.gatfl.gatech.edu/tflwiki/images/5/59/UGA_-_AAC_DND_2014_Fall_Presentation.pdf

[21] *See* e.g. Judge Alex Kozinski, *The Wrong Stuff* (discussing ways to annoy a judge and thereby lose one's case — including through the format of briefs).

motion for reconsideration. They may be of journalistic interest, where immediate notification of developments is critical to presenting timely news to one's audience.

There is no good reason to restrict this functionality — but as is, non-attorneys cannot routinely and readily get access to this extremely useful tool unless they are first granted CM/ECF access in a particular court.

4. Concerns particular to prisoners

As the FRCrP committee correctly noted in comments on its version of the proposed rule, prisoners are often unable to obtain or maintain reliable access to the basic tools needed to use CM/ECF. Prisons may prohibit access to email, Internet, or even word processing software, and this access may vary if a prisoner is transferred or subjected to administrative punishments.

Where most *pro se* litigants should be presumed to have good cause not to use CM/ECF, a *pro se* prisoner should get an *irrebuttable* presumption of good cause. The court, and indeed the prisoner, may not always know or be able to predict when their access will be impaired. To the extent that the prisoner wants and is able to participate in CM/ECF, it should still be allowed, for all the above reasons. However, prisoners should *always* have the option of filing by paper, even if they are otherwise CM/ECF participants, without needing to seek any leave of court. The prisoner is in the best position to determine which option is best for them at any given time.

While it is true that the 6th Amendment *per se* only protects the right to participate *pro se* in criminal proceedings. However, prisoners have just as much right to participate *pro se* in other matters as anyone else, including under 28 U.S.C. § 1654.

The Supreme Court has explicitly "reject[ed] the … claim that inmates are ill-equipped to use the tools of the trade of the legal profession", *Bounds v. Smith*, 430 US 817, 826 (1977) (internal quotations omitted). CM/ECF is the modern "tool of the trade", and denying access to it would impair prisoners' "fundamental constitutional right of access to the courts", *id.* at 828, just as much in matters such as civil rights complaints as in criminal proceedings.

Filing accommodations that protect prisoners' rights to access the courts must therefore be made across *all* the rules of procedure, not just the criminal rules. My proposed alternative does so.

Further, not all *pro se* participants in criminal proceedings are prisoners. Some will be out on bail pending trial, or participating due to some post-release criminal proceeding. These *pro se* participants must have their 6th Amendment rights protected, and will often face the similar barriers to *pro se* IFP litigants, but do not have the concerns specific to the prison context.

5. Concerns raised in committee minutes not expressed in the final proposed note

The minutes of the committees discussing *pro se* access to CM/ECF demonstrate a range of concerns about possible abuse of the system. I believe it is clear that these concerns are the real reason — unexpressed in the final proposed note — for why the proposed rule goes beyond merely not requiring *pro se* CM/ECF use, to prohibiting it unless permission is first obtained.

As an initial matter, the Administrative Procedure Act, which applies to this rulemaking proceeding, does not permit such covert purposes. The official notes and comments simply do not support the extra step of a presumptive prohibition on *pro se* CM/ECF use; they only justify an exception from the CM/ECF requirement otherwise imposed on attorney filers.

If the Committee does wish to go this extra step, it must plainly justify its reasons, on the record.

I do not believe that any of the previously expressed concerns justify the proposed rule. In essence, it constitutes a presumptive sanction — equating "*pro se*" with "presumed vexatious".

Like all forms of prior restraint, this is anathema in our legal system.

The expressed concerns do not justify impairing the entire class of *pro se* litigants for the sins of a few; those sins are in some cases imaginary, or are even protected rights; and even for those few people who may abuse the system, a presumptive limitation on CM/ECF use *per se* either would not cure the issue or is not the appropriate remedy.

By analogy, suppose that an executive agency undergoing public APA notice & comment had a rule allowing lawyers to submit comments electronically immediately visible to everyone — but requiring that all others submit comments on paper, citing a concern that some citizens might file abusive content. That rule would surely be struck down on court challenge, as a clear example of First Amendment prior restraint.

This proposed rule is not exempt from the same inquiry, and the Committee should apply the same scrutiny it would apply to any other attempt at a prior restraint on speech.

With that said, let us examine the specific concerns raised.[22]

a. Not having the capability to use CM/ECF

Certainly many *pro se* litigants, particularly prisoners, will not have the ability to use CM/ECF — either due to lack of skill or comfort with the CM/ECF system itself, or lack of Internet and computer access, or some other such impediment.

First off, this concern only justifies an exemption, not a prohibition. Each individual litigant is the person who should decide their own capabilities and comfort, and opt in or out of CM/ECF as they see fit.

I hope that the Committee does not believe that *pro se* litigants are presumptively so incapable of judging for themselves whether or not they can use CM/ECF, receive email dependably enough, satisfactorily complete whatever CM/ECF training is available, etc. — even where they can be required, like any registrant, to fill out online forms and agreements stating otherwise — that courts should paternalistically take this decision away from the entire *class* of *pro se* litigants.

This of course in no way prevents a court from making an *individualized* determination about a specific *pro se* litigant, based on good cause — either that they are sophisticated enough that they should be required to file electronically like an attorney, or that they are so bad at using CM/ECF that they should be ordered to only file on paper. Such orders can be contingent (e.g. on completing some training), limited to a given case, or applied presumptively for *all* future filings (as with vexatious litigant orders prohibiting filing in general without permission, but particular to electronic filing).

My proposed alternative rule permits courts to make such determinations. It simply requires that they be made on a case by case basis, giving the *pro se* litigant the benefit of an initial presumption of good cause.

[22] I have not cited specific sources for each, as I do not wish to embarrass any individual Committee member. All can be found in the minutes and reports of committees' consideration of the proposed CM/ECF rules, except for one which was raised to me in person by a member of the FRCP committee following my testimony at the December 2016 hearing.

b. Filing pornographic or defamatory content

It is possible, though surely more apocryphal[23] than descriptive, that a *pro se* litigant may file pornographic or otherwise inappropriate material on the record.[24] But courts have wide powers to issue orders to show cause and create tailored sanctions for inappropriate behavior in court, including for abusive filings.[25]

When used as a direct part of litigation filings, e.g. as a legal tactic, what would otherwise be defamation is protected by absolute litigation privilege.[26] It may be unwise or uncouth, but courts routinely permit *pro se* litigants to attempt all kinds of unwise arguments. Should it stray outside the bounds of what is privileged, the defamed party has their usual remedies.

It is improper for courts to filter filings because they will publicly appear on PACER and *might* contain inappropriate content. A document merely being filed and available on PACER does not imply any imprimatur of approval by the court. Even so, courts are free to strike or seal filings, or to sanction litigants, if there is cause to do so.

Curtailing individual CM/ECF access does not even prevent this issue. Litigants can trivially post anything they would post in a filing in a blog or other website, outside the court's control.

In short, this concern is nearly a textbook definition of prior restraint, with the textbook response: apply tailored sanctions only afterwards, when and if they are appropriate punishment.

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[23] The legal humor site Lowering the Bar provides at least a couple examples, e.g.:
https://loweringthebar.net/2015/04/to-f-this-court.html
https://loweringthebar.net/2011/12/note-catholic-beast-is-not-a-legal-term-of-art.html

However, considering the huge number of *pro se* filings and tiny number of examples found even by such dedicated collectors as Kevin Underhill, this seems to be a case of the exception proving the rule.

[24] This assumes that the material is in fact inappropriate. There are surely some equally rare cases for which such material is entirely appropriate and necessary evidence.

[25] Lowering the Bar's case law hall of fame helpfully provides a florid example: *Washington v. Alaimo*, 934 F.Supp. 1395 (S.D. Ga. 1996).

[26] *See e.g.* http://www.abi.org/abi-journal/the-boundaries-of-litigation-privilege (collecting cases and noting several exceptions).

c. Improper docketing

Novice CM/ECF users may docket filings improperly — e.g. listing the wrong action or relief, joining separate motion documents in a single filing, misusing the 'emergency' label, failing to upload exhibits, etc. Some amount of this is simply part of learning the system.[27] Even in cases between giant corporations with very experienced counsel, one regularly sees docket clerk annotations of filing deficiencies or correcting docketing errors.

In non-electronic filing, the clerk must scan incoming documents, decide which sections are separate documents, exhibits, etc., and do all the docketing. Sometimes they too can get this wrong, e.g. attaching an affidavit as an exhibit to the wrong motion.

Even if someone is a somewhat inept CM/ECF user, docket clerks routinely screen incoming filings and will correct clear deficiencies or errors. Doing so based on at least the litigant's first pass attempt at classifying their own filing is surely easier than doing it whole cloth — and over time, *pro se* litigants will learn to avoid making the same mistakes.

If the litigant is truly so grossly incompetent and unable to improve that their use of CM/ECF filing is a serious burden to the court's clerks where their paper filings would not be, the court can of course determine that there is good cause to forbid CM/ECF use — presumably after first taking less drastic remedial measures, such as providing the litigant with learning materials, or ordering them to certify that they have completed online CM/ECF training.

This concern is inappropriately paternalistic, and does not justify the harms caused by lacking access to CM/ECF.

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[27] As a personal example: recently, when attempting to file a large number of exhibits for an MSJ opposition, I received a strange ECF error. I was stumped — as was the court's ECF help desk.

After discussion with the ECF coordinator, it turned out that ECF fails if attachments take more than 20 minutes to upload. The solution: split the filing into two separate docket events to limit the upload time per event, and tag the second using the special 'additional large files' event.

To my knowledge, this is not covered by the court's CM/ECF guidance. As I discovered when I first started to use it, the same is true for many other aspects of the system.

d. Improper participation in others' cases

Pro se litigants might make filings in others' cases. But as discussed above re *amicus* briefs and interventions, this is not presumptively improper. The CM/ECF system already has the functionality to limit users to certain types of filings or certain cases.

Pro se litigants — and indeed all CM/ECF users — could properly be limited to initiatory actions (e.g. motions for leave to file and replies thereto) in cases for which they are not participants. Improper filings can be summarily denied or, if necessary, sanctioned.

e. Filing large documents

Pro se litigants, like any other, may occasionally make voluminous filings.

Some judges have their chambers automatically print all documents filed in their cases, but this is their own choice. They could instead choose not to print documents over a certain size, and either deal with them electronically or order the filer to mail a chambers copy where necessary.

Preventing *pro se* litigants from accessing CM/ECF does not prevent them from making voluminous filings, nor is it presumptively appropriate to do so. Sometimes relevant exhibits simply are voluminous. Cross-motions in a copyright dispute can easily be a thousand pages in total. Again, this should be dealt with on a case by case basis — not by a presumptive bar to accessing CM/ECF.

f. Sharing access credentials with others

If a litigant shares their access credentials with someone else, the other person can file for them. They are just as responsible for this — and might have the same needs — as in the situation where an attorney shares access credentials with their paralegal.[28]

[28] I believe this is an inappropriate practice for security reasons, yet it is currently the mandated approach. *See* comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.

6. Conclusion

Electronic filing comes with many benefits both to the filer and to all other participants. By the same token, any *prohibition* on electronic filing — including a requirement to first obtain leave of court — comes with many harms.

Pro se litigants should be allowed to make their own choice between paper and electronic filing, without having to seek any leave of court. In particular, they should be allowed full access to CM/ECF case initiation and case tracking. To do otherwise is to impose an unjustified, presumptive sanction on the entire class of *pro se* litigants, putting them at an unfair and unconstitutional disadvantage in exercising their rights to equal access to the courts.

Where a court makes an *individualized* determination of good cause, it should be permitted to require or prohibit a *pro se* litigant's use of CM/ECF — with the exception of prisoners, whose special situation requires protecting their absolute right to access the court, by paper if necessary.

My proposed alternative rule does all of the above. The proposed rule does not, and for the reasons detailed above, I oppose it.

I again urge the Committee to bear in mind both the standards that it would apply to any other governmental prior restraint on such fundamental rights as participation in the legal system, and the one-sided and unrepresentative nature of its own makeup and deliberation. There is an ironic dearth of zealous advocates of the rights of *pro se* litigants — and the Committee has its own biases, from habitually viewing *pro se* litigants as opponents or as problems to manage.

Pro se litigants' participation in the legal system presents many special challenges. From my own perspective as a flawed but successful *pro se* litigant, one of the biggest is in obtaining some semblance of equality with represented parties. At every step, we face numerous and systemic obstacles to the right of equality, yet are expected to keep pace with our represented opponents.

Before the law sit many gatekeepers. Let this not be one of them.

Respectfully submitted,
/s/ Sai

TAB 7F

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Time Frame to Rule on Habeas Corpus (21-AP-F)

Date: September 10, 2021

Gary Peel suggests that a rule be adopted to mandate a time frame for ruling on habeas corpus matters. He notes that his appeal was "opened by the Seventh Circuit on 8-9-18" but he is still waiting for a decision.

He emphasizes that he is not seeking any intervention in his appeal, but rulemaking to deal with the problem of delays in deciding habeas corpus cases.

My sense is that the Advisory Committee has been quite reluctant to use the rulemaking process to control a court's decisional timeline or to set priorities among cases. The question for the Committee is whether petitions for habeas corpus might call for unique treatment.

TAB 7G

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208

April 28, 2021

Ms. Rebecca A. Womeldorf
Rules Committee Chief Counsel
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment Federal Rules of Criminal Procedure
Former Agenda Item 18-CR-D

Dear Ms. Womeldorf;

Under date of April 17, 2019, I had communicated with you concerning a suggestion to amend the Federal Rules of Criminal Procedure to mandate a time frame for ruling on habeas corpus motions. A copy of my April 17, 2019 letter is attached for your convenience. You were kind enough to address this issue, and in a response to me the Rules Committee felt that a new Criminal Rule wasn't needed, but that perhaps the courts could address the issue via local rules.

Despite the passage of two and a half (2-1/2) years since my letter to you, the U.S. Court of Appeals still has made no substantive ruling on my habeas corpus appeal. I have made five (5) semi-annual requests for a status report only to receive responses suggesting that the habeas appeal is proceeding as the court's docket permits and that a dispositive Order would be forthcoming "as soon as the court's docket permits." [Seventh Circuit Order of 4-13-21, docket No. 18-2732].

However, according to the Seventh Circuit's government website, http://www.ca7.uscourts.gov/opinions-and-oral-arguments/opinions-arguments.htm, as of 7:00 p.m. on 3-18-21 the Seventh Circuit had rendered at least 888 opinions, dissents, rulings, or corrected opinions in cases that were filed ***AFTER*** **mine [18-2732] was docketed**, to wit:

Appellate Case Numbers 18-2735 through 18-2799 =	20
Appellate Case Numbers 18-2803 through 18-2899 =	29
Appellate Case Numbers 18-2905 through 18-2993 =	16
Appellate Case Numbers 18-3000 through 18-3737 =	166
Appellate Case Numbers 19-1004 through 19-3534 =	537
Appellate Case Numbers 20- 1006 through 20-8005 =	120
Total	= 888

Facing the frustration of two and a half (2-1/2) years with no decision on the Seventh Circuit's own Order to show cause, with no brief filed by the government/respondent/appellant and no dispositive order on the habeas appeal, I resigned myself to filing a Petition for Writ of Mandamus with the Supreme Court to

compel some action, any action, by the seventh circuit. My mandamus, filed on 3-23-21 was summarily denied on 4-26-21. See Supreme Court Docket No. 20-7597.

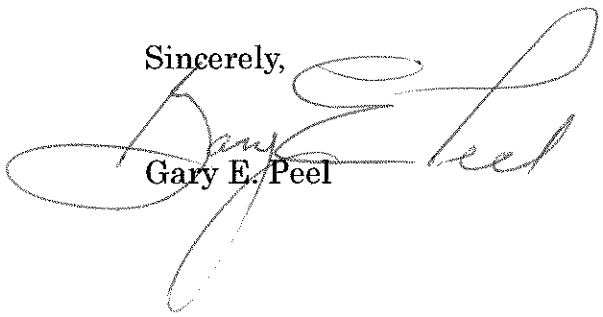
Again, I am NOT asking that you intervene in my habeas appeal. Instead, I am asking that your committee revisit the need for a change or amendment to the federal rules of criminal procedure to address the problem of non-action by the federal appellate courts on habeas corpus appeals.

When those courts refuse to act on pending habeas matters, and when the Supreme Court refuses to mandate appellate court action after a reasonable period of time, the habeas petitioner is left with NO option, despite having to endure the "in custody" restrictions imposed his/her freedoms.

Should you have any questions of me, I can be reached at Garyepeel@Hotmail.com or via cell phone at 618-514-7203

Thank you again for your time.

Sincerely,



Gary E. Peel

GEP:gep
Encl. (1)

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208

April 17, 2019

Ms. Rebecca A. Womeldorf
Rules Committee Chief Counsel
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment Federal Rules of Criminal Procedure
Former Agenda Item 18-CR-D

Dear Ms. Womeldorf;

I had previously suggested an amendment to the Federal Rules of Criminal Procedure to mandate a time frame for ruling on habeas motions. At the time, my concern was directed to the U.S. District Courts. You graciously informed me, by letter of 10-12-18 that my proposal had been declined but was being forwarded to the Advisory Committee for further consideration by the Judicial Conference Committee on Case Administration and Case Management.

The purpose of this letter is to seek reconsideration in light of similar delays that occur at the *appellate* level. Again, I am NOT seeking any intervention in my current appeal to the Seventh Circuit Court of Appeals (Case No. 18-2732), but I wanted to advise your office that the inexplicable delays at both the District and Appellate levels are particularly prejudicial to habeas petitioners who lose standing if they are no longer "in custody."

My appeal was opened by the Seventh Circuit on 8-9-18. Eight months has now passed, and the matter has not even been assigned a briefing schedule. However, on 4-15-19, oral argument was heard on six (6) cases and five of those [non-habeas] cases were filed *at a later date* than my habeas appeal.

Do you think that my case now serves as an example of how habeas cases are placed on the back burner and should perhaps warrant a reconsideration of a rules change?

Thank you for your consideration.

Very truly yours,

Gary E. Peel

From: Gary Peel
To: RulesCommittee Secretary
Subject: RE: Suggestion on Criminal Rules
Date: Friday, May 14, 2021 4:42:59 PM

Thank you for your response.

I have two suggestions for the committee.

1. Amend the civil and criminal rules to provide that all potentially *dispositive* motions be addressed (decided) within a certain number of days (e.g. 30, 60, 90, ?) after the final Response, Reply or Sur-Reply Brief is due, and
2. Add a new civil and criminal rule that obligates all appellate courts to render merit-based decisions on a chronological basis, i.e. the oldest pending appeal should be addressed and decided first (or as near to chronological as reasonable).

Exceptions can be permitted to the above rules, for example,

a. in the case of an emergency filing, the appellate court could announce that it is taking up the case immediately, or earlier than normal, because of the emergency nature of the appeal, or
b. a case pending in the Supreme Court could be potentially dispositive of the pending appellate case and for that reason alone, the appellate decision on the merits could be postponed.

From: RulesCommittee Secretary
Sent: Friday, May 14, 2021 2:51 PM
To: Gary Peel
Subject: RE: Suggestion on Criminal Rules

Mr. Peel – Your letter was also docketed as a suggestion on appellate rules (Docket No. 21-AP-F) and forwarded to the Chair and Reporter of the Advisory Committee on Appellate Rules. Thank you.

From: RulesCommittee Secretary
Sent: Friday, May 14, 2021 1:26 PM
To: Gary Peel
Subject: Suggestion on Criminal Rules

Good afternoon. The office of Rules Committee Staff received your April 28 letter concerning a new rule mandating a time frame for motion resolution. The suggestion has been forwarded to the Chair and Reporters of the Advisory Committee on Criminal Rules, and the Chair of the Standing Committee. We are posting the suggestion to the Rules & Policies page of the uscourts.gov website. Your suggestion will be located under the Rules Suggestions section as Docket No. 21-CR-G.

The minutes from the meetings of the Advisory Committees will reflect any action taken on your suggestion. The Judiciary's Rulemaking website houses the minutes and agenda materials for each Advisory Committee meeting at Records of the Rules Committees.

We very much welcome suggestions and appreciate your interest in the rulemaking process. Please do not hesitate to contact us with questions.

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