# COMMITTEE ON
# RULES OF PRACTICE AND PROCEDURE

## June 4, 2024

## TABLE OF CONTENTS

## TABLE OF CONTENTS

## TABLE OF CONTENTS

**JUDICIAL CONFERENCE OF THE UNITED STATES**
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
**June 4, 2024 | Washington, DC**

# AGENDA

## 1. Opening Business

A. Welcome and Opening Remarks – Judge John D. Bates, Chair

B. **ACTION:** The Committee will be asked to approve the minutes of the January 2024 Committee meeting.

C. Status of Rules Amendments

- Report on rules adopted by the Supreme Court and transmitted to Congress on April 2, 2024 (potential effective date of December 1, 2024).

D. Federal Judicial Center Research Projects

## 2. Joint Committee Business

A. Information Items

- Report on electronic filing by self-represented litigants.
- Report on redaction of social-security numbers.
- Report of joint subcommittee on attorney admission.

## 3. Report of the Advisory Committee on Evidence Rules – Judge Patrick J. Schiltz, Chair

A. **ACTION:** The Committee will be asked to approve the following for publication for public comment:

- Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay).

B. Information Items

- Report on panel discussion regarding artificial intelligence, machine-generated information, and possible amendments to the Evidence Rules.
- Report regarding possible amendments to Rule 609 (Impeachment by Evidence of a Criminal Conviction).
- Report on suggestion for a new rule to address evidence of prior false accusations made by alleged victims in criminal cases.

**4. Report of the Advisory Committee on Appellate Rules** – Judge Jay S. Bybee, Chair

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

- Rule 39 (Costs on Appeal); and
- Rule 6 (Appeal in a Bankruptcy Case).

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

- Rule 29 (Brief of an Amicus Curiae);
- Rule 32 (Form of Briefs, Appendices, and Other Papers);
- Appendix of Length Limits; and
- Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).

C. Information Items

- Report on consideration of suggestions regarding intervention on appeal.
- Report on consideration of suggestion regarding PACER access.
- Report on consideration of possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention).
- Report on revisiting the issue of improving appendices.

**5. Report of the Advisory Committee on Bankruptcy Rules** – Judge Rebecca B. Connelly, Chair

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

- Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case);
- Six Official Forms related to the proposed Rule 3002.1 amendments: Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R;
- Rule 8006 (Certifying a Direct Appeal to a Court of Appeals); and
- Official Form 410 (Proof of Claim).

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

- Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan);

- Rules 9014 (Contested Matters), 9017 (Evidence), and New Rule 7043 (Taking Testimony);
- Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions).

C. Information Items

- Report on consideration of suggestions regarding social-security number redaction in bankruptcy filings.
- Report on consideration of suggestion to allow masters in bankruptcy cases and proceedings.
- Report on technical amendments conforming certain forms and their instructions to the Restyled Bankruptcy Rules.
- Reconsideration of proposed amendments to Official Forms 309A and 309B.

**6. Report of the Advisory Committee on Civil Rules** – Judge Robin L. Rosenberg, Chair

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

- Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery); and
- Proposed New Rule 16.1 (Multidistrict Litigation).

B. Information Items

- Reports from subcommittees on discovery, Rule 41, Rule 7.1, and cross-border discovery.
- Report on consideration of suggestion regarding jury demand after removal.
- Report on consideration of suggestion regarding random case assignment.
- Report on consideration of suggestion regarding remote testimony.
- Report on consideration of suggestion regarding the use of "master."

**7. Report of the Advisory Committee on Criminal Rules** – Judge James C. Dever III, Chair

A. Information Items

- Report on Rule 17 (Subpoena) regarding pretrial subpoena authority.

- Report on Rule 53 (Courtroom Photographing and Broadcasting Prohibited) regarding broadcasting of criminal proceedings.
- Report on consideration of new suggestion regarding referring to minors by pseudonyms.
- Report on consideration of new suggestion regarding Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District).

**8. Other Committee Business**

A. Legislative Update.

B. **ACTION:** Strategic Planning. This agenda item asks committees to provide input on the proposed process for the 2025 review and update of the *Strategic Plan for the Federal Judiciary*.

C. **ACTION:** 2024 Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (2024 Privacy Report). The Committee will be asked to recommend that the Judicial Conference of the United States approve the 2024 Privacy Report and ask the AO Director to transmit it to Congress in accordance with the law.

D. Next Meeting – January 7, 2025.

# RULES COMMITTEES — CHAIRS AND REPORTERS

## Committee on Rules of Practice and Procedure
## (Standing Committee)

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

### Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Washington, DC

## Advisory Committee on Appellate Rules

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

## Advisory Committee on Bankruptcy Rules

| Chair | Reporter |
|---|---|
| Honorable Rebecca B. Connelly<br>United States Bankruptcy Court<br>Harrisonburg, VA | Professor S. Elizabeth Gibson<br>University of North Carolina at Chapel Hill<br>Chapel Hill, NC |

### Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

## Advisory Committee on Civil Rules

| Chair | Reporter |
|---|---|
| Honorable Robin L. Rosenberg<br>United States District Court<br>West Palm Beach, FL | Professor Richard L. Marcus<br>University of California<br>Hastings College of the Law<br>San Francisco, CA |
| | **Associate Reporter** |
| | Professor Andrew Bradt<br>University of California, Berkeley<br>Berkeley, CA |

## Advisory Committee on Criminal Rules

| Chair | Reporter |
|---|---|
| Honorable James C. Dever III<br>United States District Court<br>Raleigh, NC | Professor Sara Sun Beale<br>Duke University School of Law<br>Durham, NC |
| | **Associate Reporter** |
| | Professor Nancy J. King<br>Vanderbilt University Law School<br>Nashville, TN |

## Advisory Committee on Evidence Rules

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

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
## (Standing Committee)

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

### Members

| | |
|---|---|
| Honorable Paul J. Barbadoro<br>United States District Court<br>Concord, NH | Elizabeth J. Cabraser, Esq.<br>Lieff Cabraser Heimann & Bernstein, LLP<br>San Francisco, CA |
| Louis A. Chaiten, Esq.<br>Jones Day<br>Cleveland, OH | Honorable William J. Kayatta, Jr.<br>United States Court of Appeals<br>Portland, ME |
| Honorable Edward M. Mansfield<br>Iowa Supreme Court<br>Des Moines, IA | Dean Troy A. McKenzie<br>New York University School of Law<br>New York, NY |
| Honorable Patricia A. Millett<br>United States Court of Appeals<br>Washington, DC | Honorable Lisa O. Monaco<br>Deputy Attorney General (ex officio)<br>United States Department of Justice<br>Washington, DC |
| Andrew J. Pincus, Esq.<br>Mayer Brown LLP<br>Washington, DC | Honorable Gene E.K. Pratter<br>United States District Court<br>Philadelphia, PA |
| Honorable D. Brooks Smith<br>United States Court of Appeals<br>Duncansville, PA | Kosta Stojilkovic, Esq.<br>Wilkinson Stekloff LLP<br>Washington, DC |
| Honorable Jennifer G. Zipps<br>United States District Court<br>Tucson, AZ | |

### Consultants

| | |
|---|---|
| Professor Daniel R. Coquillette<br>Boston College Law School<br>Newton Centre, MA | Professor Bryan A. Garner<br>LawProse, Inc.<br>Dallas, TX |

**Consultants (continued)**

Professor Joseph Kimble
Thomas M. Cooley Law School
Lansing, MI

Joseph F. Spaniol, Jr., Esq.
Bethesda, MD

**Secretary to the Standing Committee**

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Washington, DC

## Committee on Rules of Practice and Procedure

| Members | Position | District/Circuit | Start Date | End Date |
|---|---|---|---|---|
| John D. Bates<br>Chair | D | District of Columbia | Member: 2020<br>Chair: 2020 | ----<br>2024 |
| Paul Barbadoro | D | New Hampshire | 2023 | 2025 |
| Elizabeth J. Cabraser | ESQ | California | 2021 | 2024 |
| Louis A. Chaiten | ESQ | Ohio | 2023 | 2026 |
| William J. Kayatta, Jr. | C | First Circuit | 2018 | 2024 |
| Edward M. Mansfield | JUST | Iowa | 2023 | 2026 |
| Troy A. McKenzie | ACAD | New York | 2021 | 2024 |
| Patricia Ann Millett | C | DC Circuit | 2020 | 2025 |
| Lisa O. Monaco* | DOJ | Washington, DC | ---- | Open |
| Andrew J. Pincus | ESQ | Washington, DC | 2022 | 2025 |
| Gene E.K. Pratter | D | Pennsylvania (Eastern) | 2019 | 2025 |
| D. Brooks Smith | C | Third Circuit | 2022 | 2025 |
| Kosta Stojilkovic | ESQ | Washington, DC | 2019 | 2025 |
| Jennifer G. Zipps | D | Arizona | 2019 | 2025 |
| Catherine T. Struve<br>Reporter | ACAD | Pennsylvania | 2019 | 2026 |

Secretary and Principal Staff: H. Thomas Byron III, 202-502-1820

* Ex-officio - Deputy Attorney General

## RULES COMMITTEE LIAISON MEMBERS

| | |
|---|---|
| Liaisons for the Advisory Committee on Appellate Rules | Hon. Daniel A. Bress<br>*(Bankruptcy)*<br><br>Andrew J. Pincus, Esq.<br>*(Standing)* |
| Liaison for the Advisory Committee on Bankruptcy Rules | Hon. William J. Kayatta, Jr.<br>*(Standing)* |
| Liaisons for the Advisory Committee on Civil Rules | Hon. Catherine P. McEwen<br>*(Bankruptcy)*<br><br>Hon. D. Brooks Smith<br>(*Standing*) |
| Liaison for the Advisory Committee on Criminal Rules | Hon. Paul J. Barbadoro<br>(*Standing*) |
| Liaisons for the Advisory Committee on Evidence Rules | Hon. M. Hannah Lauck<br>(*Civil*)<br><br>Hon. Michael W. Mosman<br>(*Criminal*)<br><br>Hon. Edward M. Mansfield<br>*(Standing)* |

**Office of the General Counsel – Rules Committee Staff**
**Administrative Office of the U.S. Courts**
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Washington, DC 20544
Main: 202-502-1820

## Chief Counsel

H. Thomas Byron III, Esq.

## Counsel

Allison A. Bruff, Esq.
*(Civil, Criminal)*

Bridget M. Healy, Esq.
*(Appellate, Evidence)*

S. Scott Myers, Esq.
*(Bankruptcy)*

## Other Staff

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

**Federal Judicial Center**
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Washington, DC 20544

## Director

Hon. John S. Cooke

## Research Associates

Carly E. Giffin, Esq.
Research Associate
*(Bankruptcy)*

Laural L. Hooper, Esq.
Senior Research Associate
*(Criminal)*

Timothy T. Lau, Esq.
Research Associate
*(Evidence)*

Marie Leary, Esq.
Senior Research Associate
*(Appellate)*

Dr. Emery G. Lee
Senior Research Associate
*(Civil)*

Tim Reagan, Esq.
Senior Research Associate
*(Standing)*

# TAB 1

# TAB 1A

Item 1A will be an oral report.

# TAB 1B

**MINUTES**
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
January 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Austin, Texas, on January 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Judge D. Brooks Smith
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 Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

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

Others who provided support to the Standing Committee, in person or remotely, included Judge J. Paul Oetken, Chair of the Joint Subcommittee on Attorney Admission; Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, Professor Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing

* 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.

Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

## OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order. He welcomed attendees and members of the public, including those who were attending remotely. He also welcomed new Standing Committee members Justice Edward M. Mansfield and Louis A. Chaiten, Esq. Judge Bates recognized Professor Joseph Kimble for his selection by the Michigan State Bar to receive the Roberts P. Hudson Award for his service to the Bar and legal profession. He also noted that Professors Kimble and Garner deserve a lot of credit for their work on restyling the federal rules.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee approved the minutes of the June 6, 2023, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, noted that the latest set of proposed rule amendments had been submitted to the Supreme Court for review and, if all goes smoothly, will be transmitted to Congress in the spring to take effect on December 1, 2024.

Judge Bates remarked that it is good for the Standing Committee to be aware of the projects underway by the FJC and that a short memorandum regarding that work begins on page 94 of the agenda book. Dr. Reagan explained that the FJC assigns liaisons to various Judicial Conference committees and conducts empirical research for the committees. The FJC's role, he explained, is to contribute methodological expertise and objective research capacity without taking policy positions. Judge Bates thanked the FJC for the continuing support and superb research done on behalf of the Rules Committees.

## JOINT COMMITTEE BUSINESS

### *Joint Subcommittee on Attorney Admission*

Judge J. Paul Oetken, chair of the Joint Subcommittee on Attorney Admission and a member of the Bankruptcy Rules Committee, and Professors Struve and Bradt reported on this item. A written report starts on page 101 of the agenda book. The joint subcommittee is considering a proposal from Dean Alan Morrison and others to make admission to the bars of the federal district courts more uniform.

Professor Struve noted the joint subcommittee was in the early stages of its work and thanked its members, who represent the Bankruptcy, Civil, and Criminal Rules Committees. She explained that the Morrison proposal highlights the variation in the criteria for admission to the bars of district courts. It notes that many federal districts require membership in the bar of the state in which the district is located, and in four states this in effect requires that lawyers pass the local state bar exam in order to be admitted to the district court bar. The proponents point out that the admission requirements can be time consuming and expensive and that seeking admission pro hac vice can also be burdensome given varying local counsel requirements and fees. They argue there is no reason for a district court to require in-state bar admission. Their petitions for various restrictive districts to change their local provisions have been unsuccessful.

The proposal contains three options. Option One is to centralize attorney admission and discipline within the Administrative Office of the United States Courts (AO), allowing attorneys in good standing in any state bar to be admitted to practice in any federal district court. Option Two provides that admission in any district court would entitle an attorney to practice in all other districts but would not centralize the process within the AO. Option Three bars district courts from having a local rule that would require in-state bar admission as a condition of admission to practice in the district court.

Professor Struve explained that there have been periodic discussions about attorney admission criteria over the last 90 years. An attorney proposed a nationwide rule for the district courts in 2002, but it did not garner much rulemaking interest or discussion. In the early 2000s, Professor Coquillette examined the adjacent, but separate, topic of centralizing federal rules on attorney conduct, which received a lot of pushback. Professor Coquillette added that the DOJ was the moving party for the unified rules of attorney conduct, but every bar association was against it.

Professor Struve noted that Appellate Rule 46 is one model that already exists in the national rules. It provides for admission to the courts of appeals based on an attorney being of good moral and professional character and being admitted to practice in the United States Supreme Court, a state high court, or another federal court.

The joint subcommittee held its first meeting in October 2023. There was no interest in adopting Option One. There were questions of feasibility and concerns that a centralized office within the AO would lack the local knowledge and contacts required for effective attorney discipline proceedings.

There was some interest in Options Two and Three. In-state admission requirements are particularly burdensome, especially in states that require taking the bar exam for admission. But members were mindful of the local courts' interests in protecting the quality of law practice. Additionally, courts use admission fees for funding important work, and there could be revenue effects. The subcommittee was inclined to consider models with elements of Options Two and Three. There would likely still be separate applications to each district in which one wishes to practice and perhaps fees as well.

The subcommittee also recognized the need to be mindful of rulemaking authority and 28 U.S.C. § 1654, which refers to the rules of courts that permit attorney admission. However, the existence of Appellate Rule 46 suggests rulemaking on attorney admissions has not been foreclosed. Professor Coquillette recalled that some senators had offered to pass legislation giving the Rules Committees power to make rules involving attorney conduct. Going forward, the subcommittee plans to look further into these issues.

Professor Struve also reported that, in response to the agenda book materials, Dean Morrison and others explained that their primary goal is to eliminate barriers that prevent lawyers who are admitted to practice in one district from practicing in another. While not wedded to centralizing admission, they would suggest addressing district variation in how often attorneys must renew their licenses and how much the court charges. They have no interest in removing authority from individual districts to discipline attorneys.

Judge Bates explained that he populated the joint subcommittee with people from jurisdictions with different approaches so there will be a thorough examination through the subcommittee process. There are a lot of issues, and it is a pretty important matter for many courts across the country and for the Bar.

An academic member commented that Option Three has the most promise as there is no good reason today to require in-state bar admission. A practitioner member echoed that Option Three has the best chance of progressing. He acknowledged that there may be something to be served by requiring membership in the local bar but offered three points in support of something like Option Three. First, he noted that in-state bar admission is not a great proxy for experience. For example, he practiced in a particular district for years as an Assistant United States Attorney but was not able to be admitted as a private attorney because he was not barred in that state. Second, the concern around pro hac vice fees can be dwarfed by fees paid to local counsel. Third, reciprocity is not a full solution because defense attorneys must go wherever the case is.

A judge member made the point that spouses of military service members face extraordinary barriers when trying to maintain legal careers while moving around the country every few years. She emphasized the considerable difficulty and cost of admission to state bars and noted that many states already make exceptions to their bar requirements for military spouses. There is also a need to reduce the variable expenses, or possibly make an exception, for military spouses and others who cannot afford these expenses. Option Three should be the bare minimum and would show respect for military service members and their spouses.

Judge Bybee agreed that this project is well worth the effort to study. He noted, however, that diversity cases are an area in which attorneys need to know the state law. The state bar might object to an out-of-state attorney taking a matter from state court directly to federal court. That argument is less compelling for other forms of jurisdiction, but it is not clear how the rules could distinguish between diversity jurisdiction cases as opposed to other or mixed jurisdiction cases.

Professor Struve noted that the subcommittee had not yet considered the issue, but Dean Morrison's proposal attempted to rebut the diversity case argument in his submission.

Another judge member asked what it would cost to initiate Option One at the AO. She also asked about the range of fees across the country for admission pro hac vice, noting that such fees were a substantial source of court income in her district. She suggested that it might be desirable to encourage parity among those fees.

Professor Struve indicated the subcommittee had not conducted its own systematic study yet, but they had been informed that pro hac vice admission fees can reach $500 in some districts.

Another judge member questioned the aptness of the analogy between appellate and district practice given how circumscribed the responsibilities of counsel are on appeal as compared to litigation in the district court. Additionally, he would be cautious about making changes that would make cases less likely to feature repeat players; in his experience, the involvement of attorneys who are known to the court tends to increase the quality of practice.

Another judge member observed that there are many concerns wrapped up in this issue and many ways those concerns could be addressed. Option Three is the most promising. But it is

important to involve state bars in some respect because it is important for district courts and state bars to work together to monitor attorney practice and discipline. Option One is less preferable because it could lead to lower standards. She also noted that it has become more common for attorneys to practice remotely or in another close-proximity jurisdiction. Her district had an issue with attorneys who were living and practicing in the state but applying pro hac vice in every case, seemingly to get around the in-state bar requirement. If the rulemakers were to adopt an approach that mandates reciprocity, it may be that an attorney who lives in a particular jurisdiction for a certain amount of time should be required to be admitted to that bar, possibly with an exception for military spouses.

A practitioner member expressed sympathy for this proposal as someone who spends a great deal of time and money getting admitted pro hac vice in federal courts across the country. But he asked whether districts that require in-state bar admission justify that requirement based on better behavior from repeat, in-state attorneys. He also asked if the subcommittee had looked at whether it would be unauthorized practice of law for an attorney to litigate a lengthy diversity case in federal court without being admitted to that state's bar.

Professor Struve responded that the subcommittee had not yet looked into that issue but that it can.

A judge member noted that these issues are not limited to diversity cases. A federal case often has a federal claim with numerous state law claims under supplemental jurisdiction. There is a concern that, despite soliciting clients within a state, a national practitioner who can only represent clients in federal court might be less familiar with state law that can, at times, afford the plaintiff greater relief than federal law.

Judge Bates thanked the subcommittee for its work so far. He noted that the authority question is particularly important with respect to Option One but is not necessarily eliminated with respect to the other approaches. More examination needs to be done.

Judge Oetken thanked the members of the Standing Committee for their helpful comments.

*Service and Electronic Filing by Self-Represented Litigants*

Judge Bates introduced this agenda item, which appears on page 182 of the agenda book, and invited Professor Struve to provide an update.

Professor Struve reported that the pro se electronic filing and service working group is studying two topics: (1) whether to take steps to increase electronic access to the court for self-represented litigants by CM/ECF or otherwise and (2) whether self-represented litigants need to traditionally serve their papers on litigants who will receive a notice of electronic filings anyway. The report in the agenda book summarizes spring 2023 interviews that Professor Struve and Dr. Reagan conducted with officials in district courts. She expressed gratitude to Dr. Reagan and his colleagues for their work.

The working group hopes to develop concrete proposals on both issues for the advisory committees in their spring meetings. One potential proposal discussed in concept at the fall meetings, without eliciting immediate expressions of concern, was a rule that would set a baseline

requirement that districts that disallow CM/ECF access for self-represented litigants would need to make reasonable exceptions to that policy.

*Electronic-Filing Deadlines Joint Subcommittee*

Professor Struve reported on this topic. In 2019, Judge Michael Chagares proposed a study on whether the national rules on computing time should be amended to set the presumptive deadline for electronic filing earlier than midnight. In 2023, the Third Circuit adopted a local rule moving the filing deadline back in that court of appeals from midnight to 5:00 p.m. The E-Filing Deadlines Joint Subcommittee met in August 2023 and voted unanimously to recommend that no action be taken and that the subcommittee be disbanded. The Advisory Committees endorsed this recommendation at their fall meetings and removed the topic from their agendas.

Judge Bates asked if the Standing Committee had any objection to disbanding the joint subcommittee and putting this issue to rest for the moment. Hearing no objection, Judge Bates disbanded the joint subcommittee and removed the matter from the agenda. The Committee will monitor how things play out in the Third Circuit.

*Redaction of Social Security Numbers*

Mr. Byron reported that the advisory committee reporters have begun to discuss Senator Ron Wyden's proposal to require complete redaction of Social Security numbers in court filings, instead of the current requirement in the privacy rules of redacting all but the last four digits of those numbers. The reporters' discussions are still in the early stages.

Professor Marcus noted the likelihood that this project, and thus the Standing Committee, will need to confront the question of whether the various sets of rules should continue to take a uniform approach to this topic.

Mr. Byron elaborated that a desire for uniformity was one historical motivation for the current rules. The Bankruptcy Rules Committee had identified the last four digits of a Social Security number as being extremely valuable in bankruptcy cases for creditors and other participants. The other committees essentially deferred to the Bankruptcy Rules Committee on this issue and also required redaction of all but the last four digits. The working group is currently reconsidering whether uniformity is still a predominant concern that should overrule other concerns such as privacy or identity theft. There are also already some variations among the rule sets. One issue is whether the Criminal, Civil, and Appellate Rules Committees want to consider requiring full redaction.

*Privacy Report*

Judge Bates asked Mr. Byron to report on the status of the 2024 report to Congress.

Mr. Byron explained that the Judiciary has an ongoing statutory obligation to study and report to Congress every two years on the adequacy of the privacy rules. Rules Committee Staff has been working with staff from the Committee on Court Administration and Case Management (CACM) on the privacy report. CACM has requested some FJC research projects that are relevant

to this question, but those projects likely will not be completed in time to fully report their results to Congress this year.

Ideally, a draft report will be ready in time for the Standing Committee to consider and approve at the June meeting.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 19, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 219.

Judge Bybee updated the Standing Committee on two proposals out for public comment. The Advisory Committee has received one comment on the proposed amendment to Rule 39. It has received no comments on the proposed amendment to Rule 6, which involves some very complicated changes dealing with direct appeals in bankruptcy cases. Judge Bybee thanked the Bankruptcy Rules Committee and others who commented on those changes prior to publication. The Advisory Committee will not hold hearings on Rules 6 and 36 due to a lack of requests to testify and expects to seek final approval from the Standing Committee in June 2024.

*Information Items*

***Amicus Disclosures.*** Judge Bybee and Professor Hartnett reported on this item. The Advisory Committee hopes to have a proposal before the Standing Committee in June 2024.

Professor Hartnett provided background on the proposal. The Advisory Committee reviewed proposed legislation, the AMICUS Act, which would have treated repeat amicus curiae filers like lobbyists, requiring them to register and to disclose contributors who had provided 3% or more of their revenue. That approach was rejected by the Advisory Committee because there is a difference between lobbying and submitting a public amicus brief to which there is an opportunity to respond. On the other hand, sometimes judges care not only about the contents of an amicus's arguments but also who the amicus is.

The Advisory Committee has tried to balance disclosure with free speech and free association rights. The current draft recognizes the distinctions (a) between contributions by a party and by a nonparty and (b) between contributions earmarked for the preparation of a brief and contributions to the organization generally. For example, the 25% threshold for disclosure is meant to avoid discouraging speech and association while recognizing that this level of contribution could give the contributor real influence on the speech. Striking this balance also informed how to set a de minimis threshold amount for disclosure of earmarked contributions by a nonparty.

The Advisory Committee has narrowed down the questions at issue, and Judge Bybee reported on three recent developments.

First, as to the appropriate lookback period for determining contributions by a party, the Advisory Committee had considered whether the proposed rule should use a fiscal year or the 12-

month period preceding the brief's filing. Neither was perfect, but the Advisory Committee has arrived at an elegant solution and would welcome feedback. To determine the threshold contribution amount that would require disclosure, this approach would multiply the amicus's prior fiscal year revenue by 25% and see whether a party had contributed more than that dollar amount within the last 12 months. This effectively combines the two periods into a single, easily calculable figure and closes a potential loophole.

Second, the proposed amendment had incorporated language from the AMICUS Act that would have excluded from disclosure certain amounts received in the "ordinary course of business." But no one was sure what that language meant, and it did not seem essential. To simplify matters, the Advisory Committee has deleted that phrase from the proposed amendment.

Third, the current rule broadly requires disclosure of any contribution earmarked for a particular brief, but it exempts contributions by members of the amicus. That was seen by some as a loophole because it allowed someone to join an amicus at the last minute and avoid disclosure. The Advisory Committee proposed setting a de minimis contribution amount of $1,000 that would not be reportable even when earmarked for the preparation of a brief. This avoids problems arising with a GoFundMe-style amicus brief. For any contribution over $1,000, it must be disclosed unless it comes from someone who has been a member for at least 12 months. Anyone who has been a member for less than 12 months is treated like a nonmember.

Judge Bybee welcomed any input from the Standing Committee.

Judge Bates thanked Judge Bybee, Professor Hartnett, and the Advisory Committee for their work. This important project began with communications from members of Congress to the Supreme Court. The matter was referred to the Standing Committee and then to the Advisory Committee. It has a lot of ramifications and has drawn public and congressional interest.

A judge member agreed that these are elegant solutions and commended the Advisory Committee for its work. Regarding the last sentence of subdivision (d), she recalled the concern expressed about individuals joining an amicus for the purpose of contributing toward a brief. She inquired whether that is a problem, and, if so, whether such individuals would now get around having to disclose that they are funding a brief by creating a new amicus, rather than joining an existing one.

Judge Bybee explained the Advisory Committee's sense that there are people who are willing to form an amicus organization with a name that completely obscures who is behind it. To address this issue, under subdivision (d), while the amicus need not disclose the contributing members if the amicus has existed for fewer than 12 months, it must disclose the date of creation. There is also a new provision in Rule 29(a)(4)(D), requiring a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will be helpful to the court.

A practitioner member commented that, unsurprisingly, there are people that see a case and would like to influence it without filing briefs in their own names, so they form organizations to do so. The disclosure of the date of creation is a check on this. It will flag to the reader that this is

an organization that does not have a long-standing interest or was formed for the purpose of filing an amicus brief if, for example, it was formed after the case was filed.

Another practitioner member added that nothing is perfect, but this solution does address the issue and provides relevant disclosure.

Another judge member also thought that the solution in subdivision (b) was elegant. However, the concern addressed in that subdivision (the relationship between the amicus and a party) was probably not the concern motivating the legislators who submitted the suggestion. It is more of a judicial-looking concern about the adversarial process. He expressed ambivalence on that issue because he was not sure how he would make better, or different, use of amicus briefs if he knew more about who was behind them beyond what they say and who the lawyers are.

Instead, subdivision (d) is directly responsive to the legislators' concerns, and some additions may be needed to guard against engineering to circumvent subdivision (d). For example, if someone funded an organization up front and it does the amicus briefing, would the amicus need to say anyone contributed funds for the brief? The Advisory Committee may want to consider something like submitting or drafting "briefs"—rather than "the brief," that is a particular brief—to capture an organization that is funded generally to file amicus briefs in a certain type of litigation.

A practitioner member wondered whether the $1,000 threshold is too high. It would not require that many like-minded payers each contributing $999 to fund a brief. If the focus is on GoFundMe campaigns, an amount in the $100 range might be more appropriate and make it much more difficult for a group of wealthy people to fund a brief through $999 contributions.

Judge Bates observed that a perfect product is not achievable here. He asked Judge Bybee to address another issue regarding whether to follow the Supreme Court in its recent change to permit amicus briefs without requiring leave of court or consent of the parties.

Judge Bybee explained that the current proposal follows the Supreme Court Rules in not requiring leave of court or consent of the parties. However, the Supreme Court recently issued its own ethics guidelines noting that it has different concerns from lower appellate courts due to the dynamics of disqualification. There is a rule of necessity at the Supreme Court under which the Justices will not regularly recuse due to amici, but that has not been the practice in courts of appeals. Large courts with sophisticated systems for identifying possible conflicts can fairly easily work around an amicus brief if it requires a judge's recusal at the panel stage. But it can be more complicated when the appeal progresses to en banc proceedings where an amicus could strategically file a brief to ensure the disqualification of a judge. The Advisory Committee is still thinking about these issues and would welcome thoughts on whether the rule should revert to the motion requirement to forestall the problem of a strategic en banc amicus filing.

Judge Bates remarked that he hoped that this discussion had been beneficial to the Advisory Committee's continuing efforts and that the Standing Committee would look forward to the next step.

***In forma pauperis.*** Judge Bybee reported that the Advisory Committee has been working diligently and conducting surveys on in forma pauperis status and expected to have a proposal before the Standing Committee in June 2024.

***Intervention on appeal.*** Judge Bybee reported that there is a subcommittee considering intervention on appeal. Although there is not yet a working draft, the subcommittee would appreciate getting a sense of where the Standing Committee stands on this issue. It is a controversial issue that has been studied by the Advisory Committee before, and it came up recently in the Supreme Court.

An academic member thought it would be a worthwhile undertaking to consider what a rule on intervention on appeal might look like. In teaching the relevant cases, he was surprised to learn about the system in the courts of appeals for handling intervention on appeal. They have tried to borrow Civil Rule 24, which itself has ambiguities and difficulties, to fit in the appellate structure. That might be fine because intervention on appeal should not be common. But he would encourage the Advisory Committee to think through this issue, which has come up so frequently in the last few years.

Judge Bybee thanked the Standing Committee for its comments, and Judge Bates thanked Judge Bybee and Professor Hartnett for their report.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 14, 2023, in Washington, D.C. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 249.

Judge Connelly reported that the Advisory Committee has been active, engaged, and productive. She thanked the reporters for the terrific job they have done.

*Action Items*

***Proposed amendment to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed).*** Judge Connelly reported on this item. The text of the proposed amendment appears on page 256 of the agenda book.

Generally, everything a debtor owns becomes part of the bankruptcy estate. Rule 1007 sets a timeline for the debtor to file schedules of the estate's property. It also provides a deadline and mechanism for filing a supplemental schedule for certain types of property interests listed in Bankruptcy Code Section 541(a)(5) that the debtor acquires within 180 days after filing the petition.

However, bankruptcy cases under Chapters 11, 12, and 13 of the Code can take three to five years or longer to resolve, and property the debtor acquires during this period is also property of the estate. The proposal would amend Rule 1007 to account for supplemental schedules to list

those other postpetition property interests that the debtor acquires and that become property of the estate under Bankruptcy Code Section 1115, 1207, or 1306.

Courts have been managing this issue through local rules and administrative orders, and this rule would dispel any concern about whether local courts have the authority to do so. Local management is important because courts have different interpretations about whether a debtor has an ongoing obligation to report postpetition acquisitions other than what is currently required under Rule 1007(h). The Advisory Committee did not want to adopt a particular position on those questions. The proposal also serves to put the debtor and counsel on notice that the court might require the filing of a supplemental schedule.

An academic member commented that this seems like an opportunity to fill a gap in the rules. He recalled researching cases where, for example, a debtor has a valuable cause of action, seeks to pursue it post-bankruptcy, and could be estopped from asserting it later for failure to disclose it. However, given that case law has developed, he questioned whether there is a need for rulemaking. He does not object to publication but is nervous about unintended consequences.

Professor Bartell noted that this proposal does not address judicial estoppel for a cause of action that a debtor had at the time of filing the petition and failed to disclose. It only addresses postpetition assets. It is a weaker version of the original proposal, which would have created a mandatory rule for disclosure. That created problems with how to craft a test for what to disclose. Instead, this proposal empowers local courts to impose a disclosure requirement if they wish to do so.

Professor Gibson added that courts disagree about whether, in the absence of a request by a party, a U.S. trustee, or the court, a debtor in this situation has a continuing duty to reveal postpetition property. It would be helpful for courts that believe there is such a continuing duty to make that fact clear, because failure to satisfy that duty could lead to judicial estoppel.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 1007(h) for public comment.**

***Proposed amendment to Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan).*** Judge Connelly reported on this item. The proposed amendment starts on page 258 of the agenda book.

Rule 3018 governs creditor acceptance or rejection of a Chapter 9 or Chapter 11 plan for reorganization. Although Chapter 9 municipal reorganizations are pretty rare, Chapter 11 reorganizations are very common. (Chapter 11 reorganizations ordinarily involve a business debtor but could involve an individual debtor.) Plan confirmation criteria will be different depending on whether creditors have accepted the plan.

Under Rule 3018, creditors have an opportunity to vote on a plan by indicating acceptance or rejection through a written ballot. The proposal would amend subdivisions (a) and (c) to permit courts to also consider an acceptance—or the change or withdrawal of a rejection—that is made

by a creditor's attorney or authorized agent and is part of the record. That can be done orally at the confirmation hearing or by stipulation.

This proposal addresses two common practices. First, parties are often heavily involved in negotiations leading up to the plan confirmation hearing. This proposal would facilitate effective negotiations by allowing the court to consider acceptances at the confirmation hearing reflecting those negotiations. Second, creditors are not required to vote, and some do not vote at all for a variety of reasons. Most, but not all jurisdictions, do not treat a nonvote as an acceptance. This proposal would reduce the practical difficulties of submitting a written ballot in a four-to-five-week period. While that turn-around time has not proven a challenge for the private sector, it may be a barrier for the government, which is the least likely creditor to vote. Among other reasons not to vote, getting authorization from the Secretary of the Treasury in that timeframe may present an issue for the IRS. This rule would create a potential opportunity for the IRS to participate by authorizing the DOJ to accept a plan.

This proposal is particularly important for small businesses. Subchapter V of Chapter 11 was enacted in 2020 to allow a special fast track for small businesses that cannot typically afford regular Chapter 11 practice. If a subchapter V plan is confirmed as consensual with sufficient acceptances, discharge occurs, the debtor may exit Chapter 11, and the subchapter V trustee's service ends. That means the small business is not burdened with continuing administrative expenses. In contrast, if there are not sufficient acceptances, the debtor does not get an immediate discharge and must remain under the court's purview throughout the plan period. The subchapter V trustee is also the disbursing agent throughout this process. So, there are administrative expenses, and remaining in Chapter 11 for multiple years may have an impact on the business.

Judge Connelly acknowledged that the government expressed concern about this proposal during the Advisory Committee's discussions. The Advisory Committee felt publishing the proposal would provide useful feedback and give the government more time to review it.

Ms. Shapiro explained that the government opposed the proposal in the Advisory Committee because it was concerned that the rule change would pressure the government to accept plans that it lacks the resources to fully review. There was also concern that the change from requiring written acceptances to permitting oral acceptances might result in judges pressuring Assistant United States Attorneys to accept a plan that was not able to go through the process for government review and approval. That said, the government will vote in favor of publication, and it intends to submit a letter to the Advisory Committee setting out its concerns.

A judge member expressed that, while he had no issue with the rule, he wondered whether its structure worked. Current Rule 3018(a)(3) seems to require cause for any change or withdrawal of acceptance or rejection. The proposed additional text in Rule 3018(a)(3)—"The court may also do so as provided in (c)(1)(B)"—appears to permit the court to permit the change or withdrawal of a rejection without cause. It seems the tail has grown much larger than the dog here.

Professor Gibson acknowledged the judge member's point. She noted that courts are already accepting settlements and changes from rejections to acceptances at the confirmation hearing even without the rule explicitly allowing it.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018(a) and (c) for public comment.**

***Proposed amendment to Official Form 410S1 (Notice of Mortgage Payment Change).*** Judge Connelly reported on this item. The proposed revised form starts on page 260 of the agenda book.

Proposed amendments to Rule 3002.1, which require mortgage creditors in a Chapter 13 case to disclose payment changes and other details that occur over the course of the case were published for public comment in 2023. The proposal addresses home equity lines of credit (HELOCs), among other issues. There can be a lot of variation in HELOC payments, and the proposed rule would allow the notice of change to be made either at the time of the change or annually with a reconciliation amount.

One of the public comments to Rule 3002.1 noted a need to update the official form to implement this change. The forms subcommittee determined that Official Form 410S1 should be revised to provide space for an annual HELOC notice at Part 3. If the proposed amendment is published in 2024, the form will be on the same timeline to take effect as proposed Rule 3002.1.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 410S1 for public comment.**

*Information Items*

Judge Connelly stated that none of the information items mentioned in the Advisory Committee's report required approval or specific feedback at this time. She elaborated on two items.

***Reconsideration of proposed Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case).*** At the June 2023 Standing Committee meeting, Judge Connelly requested permission to publish extensive changes to Rule 3002.1, including amendments to the subdivision addressing noncompliance that would authorize the court to enforce the rule by awarding noncompensatory sanctions. There was a robust discussion at the meeting, and, at Judge Connelly's request, Rule 3002.1 was published for comment without the provision on noncompensatory sanctions so that the Advisory Committee could discuss the points raised by the Standing Committee.

The Advisory Committee will defer further discussion of that subdivision for now, pending consideration of the public comments on Rule 3002.1 and further development in the case law.

***Remote testimony in contested matters.*** The Advisory Committee is considering a proposal to address the procedure for a bankruptcy judge to permit remote testimony in contested matters in bankruptcy cases. The proposed amendments were discussed in September, but the Advisory Committee deferred any recommendation so that certain Judicial Conference

committees, particularly CACM, could be informed and have an opportunity to provide input. The Advisory Committee plans to consider the proposal further at its meeting in April, and there will probably be an agenda item on this topic for the Standing Committee's meeting in June.

Professor Marcus observed that Civil Rule 43(a)'s strong presumption in favor of non-remote open-court testimony might in future be altered based in part on experience under the Bankruptcy Rules.

Judge Bates thanked Judge Connelly and the Advisory Committee.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 17, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 288.

Judge Rosenberg updated the Standing Committee on proposals out for public comment. In August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Public comments can be viewed on the regulations.gov website, and a summary of the comments will be provided in the Advisory Committee's spring agenda book. The Advisory Committee is holding three public hearings on these changes. Twenty-four witnesses testified at the first hearing, which was held in person in Washington, D.C., on October 16, 2023. The next two hearings are scheduled for January 16 and February 6, 2024, and will be conducted remotely. So far, there have been 16 written submissions for the January 16 hearing and 32 witnesses scheduled to testify. Another 24 witnesses are currently scheduled for the February hearing.

*Information Items*

***Rule 41 Subcommittee.*** Judge Rosenberg and Professor Bradt reported on this item.

Judge Cathy Bissoon chairs the subcommittee considering Rule 41(a). There is a circuit split about the meaning of the word "action" in Rule 41(a)(1)(A), which allows the plaintiff to dismiss an action by filing a notice or stipulation of dismissal. Some courts only allow an entire action to be dismissed, not a claim or an action against a particular party. Those courts require an amendment under Rule 15 for dropping anything less than the entire action.

The subcommittee has engaged in outreach to several attorney groups since the last report to the Standing Committee, including Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The subcommittee also sent a letter to federal judges through the Federal Judges Association. There were only eight responses, which were somewhat ambivalent and reflected different interpretations of the rule.

Judge Rosenberg reported that, to date, there have been sketches of possible rule amendments but no concrete proposals. There will be a subcommittee meeting before the April Advisory Committee meeting, and it is possible that the subcommittee may agree upon a proposal

to present to the full committee. An amended rule could clarify how much leeway a plaintiff has to dismiss something less than the entire action and whether that should extend to individual claims. Tangential considerations include the deadline by which a plaintiff can voluntarily dismiss without a stipulation or court order, who must sign a stipulation of dismissal, and which dismissals should be with or without prejudice.

Professor Bradt added that in the subcommittee's extensive outreach, the first question was whether there is a real-world problem for litigants. The answer seems to be yes, particularly in jurisdictions that interpret the rule to allow voluntary dismissal only of the entire action. That often leads to makeshift solutions, serial amendments to complaints, and follow-on motion practice and pleadings. The rough consensus of the members of the subcommittee seems to be that the rule ought to be more flexible than limiting dismissal to the entire action, but the degree of flexibility will be debated at upcoming meetings.

***Discovery Subcommittee.*** Judge Rosenberg and Professor Marcus reported on this item. Chief Judge David Godbey chairs the Discovery Subcommittee. Judge Rosenberg noted that a number of issues were being considered by the subcommittee.

*Serving subpoenas.* The first issue is service of subpoenas under Rule 45(b)(1), and discussion begins on page 294 of the agenda book. There is some ambiguity on whether service is satisfied by something other than in-hand service. The prior Rules Law Clerk prepared an extensive memorandum on the requirements in state courts. There was no consistent thread to provide guidance, but the subcommittee has concluded that the rule's ambiguity has produced sufficient wasteful litigation activity to warrant an effort to clarify the rule.

The subcommittee's consensus was that requiring in-person service in every instance was not desirable. The proposed sketch at page 295 in the agenda book materials would permit subpoena service by any means of service authorized under Rule 4(d), (e), (f), (h), or (i), or authorized by court order or by local rule if reasonably calculated to give notice.

Professor Marcus noted that this is a work in progress. At the Advisory Committee meeting, the DOJ raised concerns about the inclusion of Rule 4(i), and the Advisory Committee expects to hear more.

*Filing under seal.* Judge Rosenberg reported that the next issue relates to filing under seal. The Advisory Committee has received a number of submissions urging that the rules explicitly recognize that a protective order under Rule 26(c) invokes a good cause standard, rather than the more demanding standards in the common law and First Amendment context for sealing court files. The subcommittee discussed making an explicit distinction between filing under seal and the issuance of a protective order for materials exchanged through discovery. It has developed a proposed sketch for Rule 26(c)(4) and Rule 5(d)(5), appearing on page 297 of the agenda book, and feedback would be welcome.

The Advisory Committee discussed that making it more difficult to file under seal could prove troublesome in litigation with highly confidential, technical, and competitive information. The attorney members stressed the variation across districts. There were also suggestions to consult with clerks' offices since they are essential to the day-to-day handling of these issues.

Professor Marcus observed that the aspect of the draft proposal that emphasizes that existing Rule 26(c) does itself not authorize filing under seal had been discussed in previous years. He suggested that the Standing Committee's input would be particularly useful on the further sketches presented in the agenda book at pages 300-03 concerning procedures for handling motions to seal. Such procedural questions include (1) whether the motion to seal must be filed openly, (2) whether materials can be filed under a tentative or preliminary seal to meet deadlines, (3) whether the party seeking to file under seal needs to give notice to anyone with a confidentiality interest, (4) what happens if the motion to seal is not granted, (5) when the seal will be removed, (6) whether a member of the public can intervene to seek to unseal sealed materials, and (7) whether a party can retrieve its sealed materials from the court's file after termination of the action (and how such a retrieval would affect the record in the event of an appeal).

A practitioner member commented that this is a complicated topic. While a lot of cases have confidential information, there is a lot of over-designation, and if parties are persistent about sealing, it can come down to how much the other party or the court wants to push back. Certain kinds of cases may also present various First Amendment issues, which should not be defined by rule. The member wondered whether the rule should set a floor while the Committee Note could recognize that First Amendment or other concerns could lead the court to be more aggressive in policing sealing.

A judge member emphasized the great inconsistency in case law as to the difference between protective orders and sealing orders. She also noted that district courts will likely apply a different standard in criminal cases (for example, as to plea and sentencing issues) than they do in civil cases. There is a need for guidance concerning what a court ought to consider when thinking about a sealing order and whether it should be different in civil and criminal cases. She added that it can be a significant technical challenge for the clerk's office when a party requests for only part of a large filing to be sealed.

Alluding to the work (more than a decade previously) of the Standing Committee's Privacy Subcommittee, Professor Marcus recalled that there had been considerable concern over access to information in presentence reports; but this, he observed, is not the Civil Rules Committee's focus. The sketch also was not intended to alter the scope of First Amendment and common law rights to access court documents.

Another judge member commented that the motion should tell the court why the records need to be sealed. It would not be possible to set a hard-and-fast rule governing whether the motion to seal can itself be filed under seal. There should be no taking back of documents once filed on CM/ECF. If a motion is denied, the party can refile it in a manner consistent with what the court ordered. Otherwise, the material should remain inaccessible and effectively under seal but not able to be used in the case. That preserves the record for appeal. Professor Marcus asked if the bracketed language in the sketch that says "unless the court orders otherwise" (page 300, line 409 in the agenda book) would work. The judge member agreed that would make sense and the party can request that it be filed under seal and give a reason why.

Judge Bates observed that this is a very complex, large project for the Advisory Committee and its subcommittee. It is also a fairly difficult area because any rule would have tremendous

effects on the various districts and their local rules. Because of the inconsistency, it would require revision of local rules, as well.

*Cross-border discovery.* Judge Rosenberg and Professor Marcus reported that consideration of cross-border discovery is in the very early stages. The proposal comes from Judge Michael Baylson, who presented at the Advisory Committee's October meeting. He and Professor Gensler have prepared an article published in *Judicature* entitled "Should the Federal Rules Be Amended to Address Cross-Border Discovery?" They propose that the Advisory Committee should consider how the Civil Rules could better guide judges and attorneys in cases involving foreign discovery. The Sedona Conference submitted a letter in support.

The Advisory Committee recognized that this will be a major undertaking but felt it is worth pursuing. This topic may not be limited to discovery and evidence gathering and could implicate Rule 44.1, regarding proof of foreign law, and service of process. A new subcommittee chaired by Judge Manish Shah has been appointed to undertake this project. The first subcommittee meeting will be in January.

When, in the 1980s, the rulemakers sent to the Supreme Court a proposed amendment dealing with discovery for use in U.S. cases, the United Kingdom objected, the Court returned the proposal to the rulemakers, and no further action was taken. Professor Marcus observed that in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court refused to require first resort to the Hague Convention procedures for foreign discovery and allowed the federal courts to use the Federal Rules as to the parties before the American court. The proposed rule was criticized as following the view of the dissent in *Aerospatiale* rather than the view of the majority. However, things have changed significantly since the 1980s due to the increase in discovery of digital materials. Professor Marcus noted that, more recently, Judge David Campbell successfully used the Hague Convention procedures in a case before him.

Professor Marcus also observed that a separate statute, 28 U.S.C. § 1782, governs U.S. discovery for use in proceedings abroad. The subcommittee will also consider whether to address that topic.

Professor Marcus asked for suggestions about what to do and who might be an expert on this subject.

A judge member recalled listening to Judge Baylson and Judge Lee Rosenthal discussing this topic. Judge Baylson is very knowledgeable and has dedicated a great deal of considerable thought to it.

Ms. Shapiro noted that the DOJ has a great deal of experience with cross-border discovery and mutual legal assistance requests. It was noted that Joshua Gardner will represent the DOJ on the subcommittee.

***Rule 7.1 Subcommittee.*** Judge Rosenberg reported that the subcommittee is considering suggestions from Judge Ralph Erickson and Magistrate Judge Patricia Barksdale, prompted by the concern that the recusal statute potentially covers significantly more situations than the disclosure requirement in Rule 7.1(a). The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, was

created in March 2023 to consider whether a rule amendment is needed to better inform judges of the circumstances that might trigger the statutory duty to recuse.

Currently, Rule 7.1(a) provides for disclosure of any parent corporation of a party and any publicly held corporation owning 10% or more of a party's stock. In contrast, the recusal statute, 28 U.S.C. § 455(b)(4), provides that a judge shall recuse when he knows that he, individually or as a fiduciary, or his spouse or his minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding. The statute defines "financial interest" as ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.

To address this potential gap, Judge Erickson suggested requiring disclosure of grandparent corporations. Magistrate Judge Barksdale proposed requiring that parties check all the judge's publicly available financial disclosures and file a notice of any conflict.

The Advisory Committee has also considered the local rules from the 50 district courts that have rules on this subject, which are catalogued in a memorandum from a former Rules Law Clerk. There are a few options being considered.

The Judicial Conference's Codes of Conduct Committee has indicated that the Advisory Committee's consideration of a potential rule amendment would not conflict with its work. There is also relevant pending legislation, the Judicial Ethics and Anti-Corruption Act of 2023, which would bar a justice or judge from owning any interest in any security, trust, commercial real estate, or privately held company, with exceptions for mutual funds and government (or government-managed) securities.

The subcommittee plans to meet before the full Advisory Committee meeting in April with the goal of presenting a proposed amendment, if any is deemed necessary, at the April meeting.

Professor Bradt explained that the drafting challenge—and where Standing Committee feedback would be helpful—is in figuring out language to sufficiently capture the full range of circumstances in which a judge might be required to recuse without making the disclosure requirement unduly burdensome. One problem with only requiring disclosure of a parent corporation is that there might still be a grandparent company or other related entity giving the judge a financial interest.

There have also been concerns that it would be difficult for a rule to capture the everchanging landscape of financial instruments and business associations. Local rules have taken a wide variety of approaches. Some local rules expand the general categories of entities to be disclosed beyond those in Rule 7.1(a), using words like "affiliation" or "entity." Others require disclosure of defined financial relationships, like an insurer or third-party litigation funder. Another option is to require disclosure of entities owning a percentage of stock smaller than 10%. The 10% ownership threshold in the current rule is thought to serve as a proxy for control. A lower percentage might better capture the financial interest requirement of the recusal statute.

Judge Bates observed that, while there was no feedback from the Standing Committee right now, there is more work to do, and that may engender some feedback in the future.

***Random Case Assignment.*** Judge Rosenberg and Professor Bradt reported on this item. The Advisory Committee decided at the October meeting to accept the random assignment of cases as a project to explore. Attention on this issue has increased due to concerns that in high-profile cases, especially cases seeking nationwide injunctions against executive action, plaintiffs are engaged in a form of forum shopping, particularly in single-judge divisions of district courts.

The Brennan Center for Justice submitted a proposal urging the adoption of a rule to require the randomization of judicial assignment within districts for certain civil cases. Others have also expressed interest in this topic. In July 2023, nineteen United States senators sent a letter to Judge Rosenberg. The following month, the American Bar Association (ABA) adopted a resolution urging federal courts to implement district-wide random case assignment. The House and Senate Judiciary Committees have also held hearings on issues related to nationwide injunctions and forum shopping.

Judge Rosenberg noted that there are questions about whether a national rule can require reallocation of business among divisions of a district court or whether, under 28 U.S.C. § 137, such questions are beyond the scope of rulemaking. Since the October meeting, Professor Bradt has been researching the threshold consideration of whether this is an area for potential rulemaking.

Professor Bradt set out a sequence of relevant questions to consider. First, would a rule on this topic be a general rule of practice and procedure such that it falls within the Rules Enabling Act (REA)'s grant of rulemaking authority? Second, if so, should the supersession clause of the REA be invoked to override the provision in Section 137 giving districts local control over the division of their business? There are also statutory provisions governing the structure of district courts, including divisions, and, for prudential reasons, the Advisory Committee has avoided rulemaking in this area. There are further prudential questions of whether the Advisory Committee ought to act and, if so, what a rule might look like.

In tailoring any potential rule, it would be necessary to define the problem they would be seeking to solve. That is, in which kinds of cases should a rule impose a random case assignment requirement? The Brennan Center submission suggested that a rule should encompass any case in which a party seeks injunctive relief that may have an effect outside the district. The ABA suggested any case in which the United States is a party. Various local rules identify particular subject matters of cases.

Professor Bradt requested feedback from the Standing Committee about whether this is an appropriate subject for rulemaking.

Judge Bates commented that this is obviously an issue of great importance to the Judiciary. These initial issues of authority and prudential considerations of whether this is something that should be addressed through the rules process are very important and need to be thought about at the outset.

A judge member noted that there might be some benefit to working on this issue, even if it turns out not to be within the scope of authority of the Rules Committees. There might be a future legislative proposal on this topic at some point, and it would be nice to have had a committee like

this advance its thinking so that the Judiciary might be able to make suggestions to Congress. A practitioner member agreed. There is a need for objective analysis of what might be done. Although a little out of order, coming up with some ideas of what a solution might be, even if we ultimately do not act, could contribute to informing other actors who might be more able to do something directly. Judge Bates agreed that it can be illuminating to other possible actors that the Rules Committees are looking seriously at an issue and that they have some ideas as to how it can be approached.

Ms. Shapiro noted that the DOJ sent the Advisory Committee a letter in December formally taking the position that rulemaking on this subject is within the grant of authority in the REA. Judge Rosenberg commented that the DOJ's extensive and helpful letter came in after the agenda book materials were put together. Judge Bates agreed the letter was comprehensive and thoroughly addressed the authority question although it did not address the important prudential issues as much.

Professor Hartnett flagged a terminology issue. Although commentators often use the term "nationwide injunction," the problem is not an injunction's geographic scope. An injunction in a patent case barring one party from infringing the other's patent standardly does apply outside the district of the court that entered the injunction. The concern is that the injunction reaches beyond the parties. Using the terminology of "nonparty" injunction is more accurate and reduces the risk of a rule that does not address the real problem.

Another practitioner member echoed Professor Hartnett's observation that it is important to think carefully about the problem the Advisory Committee might target. But "nonparty" does not solve the issue of forum shopping to enjoin the United States.

Professor Hartnett clarified that the problem with injunctions against the United States arises when the injunction is read not only to enjoin the United States with regard to a particular plaintiff, but also with respect to nonparties.

Professor Coquillette commented that the prudential consideration is central. When Congress gets involved by making a rule directly, style and consistency can suffer, so it is a fundamental principle that the Rules Committees should be cautious about issues that Congress is considering.

***Demands for Jury Trials in Removed Actions.*** Judge Rosenberg and Professor Marcus reported on this item. A 2015 suggestion focused on the 2007 restyling project's change in the tense of a verb in Rule 81(c). When this submission was initially presented to the Standing Committee in 2016, two members of the Standing Committee proposed a change to Rule 38 to change the default rule so that parties need not demand a jury trial. Such a change would have obviated the need to consider the underlying Rule 81(c) suggestion. After considerable research by the FJC, the Advisory Committee decided not to propose a change in Rule 38's default rule on jury demands, and that proposal was removed from the Advisory Committee's agenda. The Advisory Committee will consider the Rule 81(c) suggestion again at its April meeting, but the Standing Committee need not spend time on it right now.

***Other topics.*** Judge Rosenberg and Professor Marcus reported on a few issues that the Advisory Committee lacked the capacity and resources to consider presently but that remained on its agenda.

The Advisory Committee has paused consideration on a Civil Rule 62(b) suggestion related to notice of premiums for supersedeas bonds. The proposal comes from the Appellate Rules Committee after it published a proposed change to Appellate Rule 39 in response to a Supreme Court decision. This issue is discussed in the agenda book starting on page 316. Judge Bates observed that the Appellate Rules Committee believes there is a possible need for a change to Civil Rule 62 but that the Civil Rules Committee was not as sure. He invited the advisory committees to continue discussing the subject outside the context of this meeting.

Another information item concerned a proposal about attorney's fee awards for Social Security appeals. Professor Marcus noted that the Supplemental Rules for Social Security cases only went into effect about a year ago. Moreover, one district is considering a local rule on this topic. Further experience could inform any later rulemaking efforts; in the meantime, the Advisory Committee does not recommend action on this proposal.

Professor Marcus directed the Committee's attention to the discussion in the agenda book (starting at page 328) of items to be removed from the Advisory Committee's agenda.

Judge Bates thanked Judge Rosenberg and the reporters for the thoroughness of their report on many important subjects.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on October 26, 2023, in Minneapolis, Minnesota. The Advisory Committee presented three information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 367.

*Information Items*

***Rule 17 and pretrial subpoena authority.*** Judge Dever reported that Judge Nguyen chairs the subcommittee examining potential changes to Rule 17 concerning subpoenas. There was a conference in October 2022 where the subcommittee gathered information about whether there is a problem with Rule 17, whether there are differences from court to court in the application of Rule 17, and how the *Nixon* standard of relevance, admissibility, and specificity is being applied. It has continued to gather information about this issue from experts and attorneys in industries associated with potentially relevant issues, such as the Stored Communications Act.

The subcommittee is now in the drafting process and has a meeting scheduled in February to discuss specific language. There are some basic principles outlined on page 369 of the agenda book. For example, there needs to be judicial supervision of any subpoena issued because it carries the authority of the court. The rule also needs to distinguish between personal or confidential information and other information. There should also be an option for an ex parte process.

***Rule 23 and government consent to bench trials.*** Judge Dever reported on this item. To have a bench trial, Rule 23(a) currently requires a written request from the defendant, the consent of the United States, and the approval of the court. The Federal Criminal Procedure Committee of the American College of Trial Lawyers proposes removing the government from that process when the defendant can provide reasons sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee had questions about the proposal at its April 2023 meeting and gathered information from the DOJ and the defense community. The Advisory Committee discussed the findings at its meeting in October. The proposal initially suggested there might be a backlog of cases due to the pandemic, but that turned out not to be the case. Only eight of the 94 districts said there was something of a backlog. But any rule change would not happen soon enough to address it. The Advisory Committee also learned that there is not a uniform DOJ policy on whether the government consents to a bench trial, and it varies by United States Attorney. In some districts the United States Attorney's Office always prefers a jury trial.

The Advisory Committee also discussed the leading Supreme court case addressing Rule 23, *Singer v. United States*, 380 U.S. 24 (1965), which recognized that the court could order a bench trial over the government's objection where there were compelling reasons associated with a defendant's need to get a fair trial. There were also a couple of cases that arose during the pandemic in which a court invoked the *Singer* language. The Advisory Committee could not find sufficient space between the *Singer* standard and other reasons that would be sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee voted overwhelmingly, but not unanimously, to remove this item from its agenda.

Judge Dever explained that the Advisory Committee also discussed the defense bar's concern that defendants were not receiving an acceptance of responsibility credit when they only went to trial to preserve a suppression issue for appeal. It viewed this as a Sentencing Guidelines issue, rather than an issue with the Federal Rules of Criminal Procedure.

Professor Beale recalled that the Advisory Committee discussed notifying the United States Sentencing Commission about this issue, but there was a question about whether such communication should come from the Criminal Rules Committee or the Standing Committee.

Judge Bates remarked that the mechanism of a communication to the Sentencing Commission could be worked out if the Advisory Committee thought it was a good idea and the Standing Committee agreed. The question was whether the Standing Committee agreed that the Sentencing Commission should be informed that the Advisory Committee thought an issue exists with respect to the acceptance of responsibility credit.

Professor Beale noted that some judges already give an acceptance of responsibility credit in this circumstance, but defense counsel reported that they frequently cannot get the credit. The Advisory Committee does not believe there is a uniform practice. But the Advisory Committee did not conduct an in-depth study on the issue and preferred to ask the Sentencing Commission to examine it.

Judge Dever added that U.S.S.G. § 3E1.1 currently gives the judge discretion. It does not say that a defendant who goes to trial cannot get the credit. But in the Commentary to § 3E1.1, the Application Notes do not include an example for giving the defendant credit after going to trial to preserve an issue for appeal. The Advisory Committee was unsure if the Sentencing Commission could amend the Application Notes to add an explicit example of this.

Judge Bates commented that the Advisory Committee's observation was that it would be a good idea to communicate to the Sentencing Commission that this seems to be an issue that might merit some examination, but not to make any specific recommendation.

A judge member asked for clarification on what would be communicated as a good idea. Is it that, if anyone is going to look at this issue, it should be the Sentencing Commission as opposed to the Rules Committees? She noted that judges have a lot of discretion at sentencing, and it is important to present this as an issue for the Sentencing Commission without taking a position.

Another judge member asked if the proposition was to formally communicate a concern.

Judge Bates asked the Advisory Committee to word the proposition.

Professor Beale stated that concerns were raised at the Advisory Committee's meeting about this issue. The Advisory Committee felt it was not a Criminal Rules issue but wanted to communicate those concerns to the Sentencing Commission. The Advisory Committee would take no position on whether the Sentencing Commission should do something. Rather, it would transmit those concerns, saying that the issue is not properly addressed to the Rules Committees.

Judge Dever commented that the Advisory Committee would be happy to send a letter to the Sentencing Commission but that it did not want to get ahead of the Standing Committee.

Judge Bates thought it was important for the Standing Committee to know whether the concern came from the Advisory Committee or only some of its members.

Professor King responded that the concern was raised by several members of the Advisory Committee. At the end of the discussion, Judge Dever asked the Advisory Committee about sending something to the Sentencing Commission. There was committee-wide agreement that the appropriate place to resolve this concern was at the Sentencing Commission and that it was important enough that the Advisory Committee wanted it to be conveyed. At the end of the meeting, Judge Bates and Judge Dever had a conversation about who should do it.

Judge Bates clarified that the communication, which might come from the Standing Committee or the Advisory Committee, would be a factual recitation—namely, that these concerns were raised but the Advisory Committee felt that they were more appropriately addressed to the Sentencing Commission.

A judge member stated that he does not see the role of the Standing Committee as being a clearinghouse of concerns and suggestions. Usually, the Rules Committees do not refer things along. They tell the suggester when they have come to the wrong place. Consequently, when one of the Rules Committees formally refers something to another governmental body, that referral conveys that the committee has a serious concern that should require more attention than it might

have received otherwise. There might be occasions on which the Rules Committees would make such a referral, but they should only do so after employing the same sort of vetting process that they use when making recommendations on rules. There may be other sides to the issue. For example, he suspected some United States Attorneys might have a different perspective than the defense counsel who had voiced concerns.

In light of the last-mentioned comment, Judge Bates asked Ms. Shapiro whether she had any comments to contribute on behalf of the DOJ. She did not. Professor Struve commented that a DOJ representative at the Advisory Committee meeting had observed that this issue might belong with the Sentencing Commission.

Judge Bates commented that they may be making more out of this issue than was needed. In fairness to the Advisory Committee, it was doing the right thing by checking with the Standing Committee. Judge Bates asked if there were any other concerns with the Advisory Committee sending something to the Sentencing Commission indicating the issue had come up and that the view was that it should be referred to the Sentencing Commission for any further exploration.

The judge member with the prior concern cautioned against creating a precedent of the Advisory Committee referring matters even if it includes a referral statement that the committee was not taking any position. But he acknowledged that the disclaimers would ameliorate the concern that a referral would come with a recommendation.

Judge Bates observed that this was a little different from what typically happens when a Rules Committee, possibly through the Rules Committee Staff, coordinates with another Judicial Conference Committee, often CACM. Communications with the Sentencing Commission regarding potential changes to the Guidelines or commentary are more sensitive and require care. But it is not beyond the capacity of the Advisory Committee to take that into account when drafting a letter to the Sentencing Commission.

Judge Bates asked if there were any other concerns about the Advisory Committee taking that sort of modest communication. Aside from the judge member who spoke earlier, there were no objections.

***Rule 53 and broadcasting court proceedings in the cases of United States v. Donald J. Trump.*** Judge Dever reported on this item. Thirty-eight members of Congress asked the Judicial Conference to authorize the broadcasting of court proceedings in the cases of *United States of America v. Donald J. Trump*. The Advisory Committee discussed the lack of Rules Enabling Act authority to promulgate a rule applying to a single defendant and noted that any rule would become effective, at the absolute earliest, in December 2026, which would likely be after a trial in the relevant cases. A coalition of media organizations later submitted a suggestion on this topic more generally, apart from the specific cases against Donald Trump.

In light of this, the Advisory Committee has formed a subcommittee to study whether to propose amendments to Rule 53. The subcommittee anticipates meeting in March, and the Advisory Committee plans to discuss this issue at its April meeting.

Judge Dever added that, for anyone who wanted to get a history of the issues, the AO has a terrific paper on its website titled *History of Cameras, Broadcasting, and Remote Public Access*

*in Courts*. Thirty years ago, the Advisory Committee, in a divided vote, recommended that Rule 53 be amended to permit broadcasting consistent with Judicial Conference policy. At the Standing Committee, the chair cast a tie-breaking vote, and the proposal went to the Judicial Conference where it was voted down. Rule 53 has not been substantively amended since it took effect in 1946.

Judge Dever also noted that some cross-committee projects are described in the Criminal Rules Committee's written report in the agenda book. Judge Bates observed that the Criminal Rules Committee was considering some important issues. The Rule 17 issue is a big one, and there is a lot of work yet to be done. There has been a lot going on recently regarding remote proceedings and broadcasting, and it may be the right time to look seriously at Rule 53.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz presented the report of the Advisory Committee on Evidence Rules, which last met on October 27, 2023, in Minneapolis, Minnesota. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 399.

*Information Items*

Judge Schiltz reported that at the last meeting, the Advisory Committee heard from two panels. The first panel, made up of five law professors, was invited to speak on any changes they would make to the Federal Rules of Evidence. A second panel featured two experts in artificial intelligence who educated the Advisory Committee about AI and its implications for litigation and the Evidence Rules. The focus was on deep fakes and the ability of AI to produce convincing, but fake, evidence that is hard to detect and will present a real problem for federal trials.

Following the presentations, the Advisory Committee discussed the suggestions, and decided to pursue three matters.

The first proposal being considered is a potential amendment to Rule 609, which addresses when prior convictions can be brought up to impeach a witness on the stand. The proposal is that only convictions for crimes indicating actual dishonesty or false statement would be admissible to impeach, and other types of convictions would not be admissible. The argument is that other types of convictions are not especially probative of credibility. There is also a high price to a defendant who wants to testify but is worried about the admission of prior convictions for crimes such as attempted murder or child pornography.

The second proposal is for a new Rule 416 governing the admissibility of evidence that a victim of alleged misconduct—most often sexual misconduct—had previously made false accusations of similar misconduct. This proposal came from one of the professors on the first panel, who noted that there is a great deal of confusion in the case law about how to treat evidence that a victim of an alleged crime had made false accusations of similar alleged crimes.

The third proposal is a possible amendment to the hearsay rule. The committee is considering two options with respect to out-of-court statements made by a witness on the stand who is under oath and subject to cross examination. A broad option could say that no such prior statements made by a testifying witness can be excluded as hearsay—although it could still be

excluded under Rule 403. A narrower version could say that no prior *inconsistent* statement of a testifying witness can be excluded under the hearsay rule. Today, a prior inconsistent statement can be introduced for its truth only if made under oath at a prior proceeding, which is rare.

The Advisory Committee also plans to hold a conference to further its study of AI and machine-based evidence. The issues, including authentication, hearsay, and expert testimony, are incredibly complicated, and AI technology is changing quickly. The committee's initial focus will likely be on issues of authenticity.

Judge Bates observed that the Chief Justice has focused on AI as an important issue for the Judiciary. These are very difficult issues that the Advisory Committee is considering. In some regards, the difficulty lies in understanding the issues. As to Rule 609, any change in that Rule will be controversial. He thanked Judge Schiltz for the report and the committee's continuing efforts on all those matters.

## OTHER COMMITTEE BUSINESS

The Rules Law Clerk provided a legislative update. The legislation tracking chart begins on page 416 of the agenda book. Since the agenda book was published in December, the National Guard and Reservists Debt Relief Extension Act of 2023 became law, meaning that Interim Bankruptcy Rule 1007-I will continue to apply for at least another four years.

*Action Item*

***Judiciary Strategic Planning.*** This was the last item on the meeting's agenda. Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

## CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 4, 2024, in Washington, D.C.

# TAB 1C

# TAB 1C1

**Effective (no earlier than) December 1, 2024**

Current Step in REA Process:

- Transmitted to Congress (Apr 2024)

REA History:

- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 32 | Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40. | AP 35, 40 |
| AP 35 | The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule. | AP 40 |
| AP 40 | The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination. | AP 35 |
| Appendix: Length Limits | Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court. | AP 35, 40 |
| BK 1007(b)(7) and related amendments | The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2). | |
| BK 7001 | The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)." | |
| BK 8023.1 (new) | This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap. | AP 43 |
| BK Restyled Rules | The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are 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 second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024. | |
| CV 12 | The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a). | |
| EV 107 | The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107. | EV 1006 |

**Effective (no earlier than) December 1, 2024**

Current Step in REA Process:

- Transmitted to Congress (Apr 2024)

REA History:

- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| EV 613 | The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement. | |
| EV 801 | The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party. | |
| EV 804 | The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement. | |
| EV 1006 | The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107. | EV 107 |

**Effective (no earlier than) December 1, 2025**

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 6 | The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals. | BK 8006 |
| AP 39 | The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs. | |
| BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R | Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule. | |
| BK 8006 | The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal. | AP 6 |
| Official Form 410 | The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024. | |

**Effective (no earlier than) December 1, 2025**

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| CV 16 | The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. | CV 26 |
| CV 16.1 (new) | The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, ~~designation of coordinating counsel,~~[1] submission of an initial MDL conference report, and entry of an initial MDL management order. | |
| CV 26 | The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. | CV 16 |

[1] After the public comment period, the Advisory Committee on Civil Rules voted to approve a revised version of proposed new Rule 16.1 that does not include a provision regarding coordinating counsel. That version is now before the Standing Committee.

# TAB 1C2

**Agenda E-19 (Summary)**
**Rules**
**March 2024**

# SUMMARY OF THE

# REPORT OF THE JUDICIAL CONFERENCE

# COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes the following items 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 January 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, chair, 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; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, 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 received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. (The Advisory Committees had removed the latter suggestion from their agendas, and the Committee approved the disbanding of the joint subcommittee that had been formed to consider it.) Additionally, the Committee received a report from a joint subcommittee (composed of representatives from the Bankruptcy, Civil, and Criminal Rules Committees) concerning a suggestion to adopt nationwide rules governing admission to practice before the U.S. district courts. The Standing Committee also heard a report concerning coordinated efforts by several advisory committees concerning a suggestion to require complete redaction of social security numbers and an update from its Secretary on the 2024 report to Congress on the adequacy of the privacy rules.

## FEDERAL RULES OF APPELLATE PROCEDURE

### *Information Items*

The Advisory Committee met on October 19, 2023. The Advisory Committee discussed several issues, including possible amendments to Rule 29 (Brief of An Amicus Curiae) and Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In addition, the Advisory Committee considered suggestions regarding intervention

on appeal and the redaction of social security numbers in court filings. The Advisory Committee removed from its agenda suggestions regarding the record in agency cases and regarding filing deadlines.

## FEDERAL RULES OF BANKRUPTCY PROCEDURE

### *Rules and Form Approved for Publication and Comment*

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan), and Official Form 410S1 (Notice of Mortgage Payment Change) with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed)

The proposed amendment to Subdivision (h) would clarify that a court may require an individual chapter 11 debtor or a chapter 12 or chapter 13 debtor to file a supplemental schedule to report property or income that comes into the estate post-petition under § 1115, 1207, or 1306.

Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed)

Subdivision (c) would be amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance, or a change or withdrawal of a rejection, of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance by written ballot, the amended rule would also authorize a court to permit a creditor or equity security holder to accept a plan (or change or withdraw its rejection of the plan) by means of its attorney's or authorized agent's statement on the record, including by stipulation or by oral representation at the confirmation hearing. A conforming change would be made to subdivision (a)(3) ("Changing or Withdrawing an Acceptance or Rejection").

Official Form 410S1 (Notice of Mortgage Payment Change)

The amended form would provide space for an annual Home Equity Line of Credit notice.

***Information Items***

The Advisory Committee met on September 14, 2023. In addition to the recommendation discussed above, the Advisory Committee continued its consideration of a suggestion to require redaction of the entire social security number from filings in bankruptcy and gave preliminary consideration to a suggestion for a new rule addressing a court's decision to allow remote testimony in contested matters in bankruptcy cases.

## FEDERAL RULES OF CIVIL PROCEDURE

***Information Items***

The Advisory Committee on Civil Rules met on October 17, 2023, and considered several information items. The Advisory Committee continued to discuss Rule 41 (Dismissal of Actions), and in particular whether to amend the rule to address caselaw limiting Rule 41(a) dismissals to dismissals of an entire action. It also discussed the work of the discovery subcommittee, which is considering proposals to amend Rule 45 (Subpoena) and to address filing under seal. The Advisory Committee formed a new subcommittee to study cross-border discovery. The Advisory Committee also heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee commenced consideration of suggestions concerning civil case assignment in the district courts.

Other topics discussed by the Advisory Committee include the Bankruptcy Rules Committee's consideration of a suggestion to permit remote testimony in contested matters, a suggestion to amend Rule 62(b) (Stay of Proceedings to Enforce a Judgment), a suggestion to amend Rule 54(d)(2)(B) (Judgment; Costs) with respect to attorney-fee awards in Social Security

cases, and a suggestion to amend Rule 81(c) (Applicability of the Rules in General; Removed Actions) with respect to jury demands in removed cases.

The Advisory Committee also discussed and removed from its agenda suggestions regarding Rule 10 (Form of Pleadings), Rule 11 (Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions), Rule 26(a)(1) (Initial Disclosure), Rule 30(b)(6) (Depositions by Oral Examination), Rule 53 (Masters), and Rule 60(b)(1) (Relief from a Judgment or Order), and a proposed new rule on contempt.

At upcoming hearings, the Civil Rules Committee will hear testimony from many witnesses on the proposed amendments that have been published for public comment—namely, proposed amendments to Rule 16(b)(3) (Pretrial Conferences; Scheduling; Management) and Rule 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation).

## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Information Items*

The Advisory Committee on Criminal Rules met on October 26, 2023, and considered several information items. The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee will develop a draft of a proposed amendment to clarify the rule and to expand the scope of parties' authority to subpoena material from third parties before trial.

The Committee also considered a recent request from 38 members of Congress to authorize broadcasting of proceedings in the cases of *United States v. Donald J. Trump*. The Committee concluded that it does not have the authority under the Rules Enabling Act to exempt specific cases from Rule 53 (Courtroom Photographing and Broadcasting Prohibited), which

generally prohibits the broadcasting of judicial proceedings from the courtroom in criminal cases. Further, any amendment to Rule 53 to allow exceptions for particular cases—for example, the cases of *United States v. Donald J. Trump*—would not take effect earlier than December 1, 2026, due to the requirements of the rulemaking process set forth by the Rules Enabling Act and Judicial Conference Procedures. The Committee received a later suggestion from a media coalition to amend Rule 53 to permit broadcasting of criminal proceedings. Given the timing of its receipt, the proposal was not discussed by the Committee at its October 2023 meeting, but the chair appointed a subcommittee to consider the proposal going forward.

The Advisory Committee decided to remove from its agenda a proposal submitted by the Federal Criminal Procedure Committee of the American College of Trial Lawyers to amend Rule 23 (Jury or Nonjury Trial) to eliminate the requirement that the government consent to a defendant's waiver of a jury trial. In order for a bench trial to occur, current Rule 23 requires a written waiver by the defendant of the right to trial by jury, the government's consent, and the court's approval. Among a variety of concerns discussed by the Advisory Committee, one relates to a defendant's ability to obtain credit for acceptance of responsibility under U.S.S.G. § 3E1.1(b) after a jury trial held solely to preserve an antecedent issue for appeal when the government has declined to either accept a conditional plea or consent to a bench trial. Though some members of the Advisory Committee voiced support for clarifying that judges may award acceptance of responsibility in these circumstances, members saw this as a Guidelines issue, not a rules issue. The Advisory Committee expressed support for making the United States Sentencing Commission aware of the concerns expressed by some members of the Committee. After discussion, the Standing Committee (over one member's objection) determined that the Advisory Committee chair could convey the members' concerns to the Sentencing Commission.

## FEDERAL RULES OF EVIDENCE

### *Information Items*

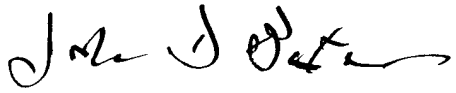
The Advisory Committee on Evidence Rules met on October 27, 2023. In connection with the meeting, the Advisory Committee held a panel discussion with several Evidence scholars on suggestions for changes to the Evidence Rules, followed by a presentation by experts on artificial intelligence and "deep fakes." Following the panel discussion and presentation, the Advisory Committee discussed the potential rule amendments raised by the presenters. In particular, the Advisory Committee decided to consider a possible amendment to delete Rule 609(a)(1), which allows admission of felony convictions not involving dishonesty or false statement, and another possible amendment that would add a new Rule 416 to the Evidence Rules to govern the admissibility of evidence of false accusations. In addition, the Advisory Committee will consider a possible amendment to Rule 801(d)(1) (Definitions That Apply to This Article; Exclusions from Hearsay) to provide for broader admissibility of prior statements of testifying witnesses. The Advisory Committee considered but decided not to pursue a possible amendment to Rule 803(4) (Exceptions to the Rule Against Hearsay) that would have narrowed the hearsay exception for statements made for purposes of medical treatment or diagnosis by excluding from that exception statements made to a doctor for purposes of litigation.

## JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations for discussion topics at the next long-range planning meeting scheduled for March 11, 2024 and future long-range planning meetings of Judicial Conference committee chairs. Recommendations on behalf of the

Committee were communicated to Judge Scott Coogler, the judiciary planning coordinator, by letter dated January 11, 2024.

Respectfully submitted,



John D. Bates, Chair

| | |
|---|---|
| Paul Barbadoro | Lisa O. Monaco |
| Elizabeth J. Cabraser | Andrew J. Pincus |
| Louis A. Chaiten | Gene E.K. Pratter |
| William J. Kayatta, Jr. | D. Brooks Smith |
| Edward M. Mansfield | Kosta Stojilkovic |
| Troy A. McKenzie | Jennifer G. Zipps |
| Patricia Ann Millett | |

# TAB 1D

Federal Judicial Center

Date: May 3, 2024

To: Standing Committee on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

## RESEARCH

### Current Research for Rules Committees

*Complex Criminal Litigation Website*

As suggested by the Criminal Rules Committee, the Center is developing as one of its special-topics websites (curated content) a collection of resources on complex criminal litigation.

*Intervention on Appeal*

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

*The Need for Redacted Social Security Numbers in Bankruptcy Cases*

In light of proposals to fully redact Social Security numbers in public filings rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers in public filings.

*Bankruptcy Judges' Use of "Special Masters"*

At the request of the Bankruptcy Rules Committee, the Center is surveying bankruptcy judges on how and whether they would use "special masters" if they had the authority to do that. It is acknowledged that there are

concurrent proposals to discontinue use of the word "master" because of the word's historical association with involuntary servitude.

**Completed Research for Rules Committees**

*Local-Counsel Requirements for Practice in Federal District Courts*

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes when and where federal district courts require local counsel to participate in litigation and attorney admissions (www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts).

*Fees for Admission to Federal Court Bars*

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes fees charged for admission to federal court bars, including admission fees, pro hac vice fees, and fees charged by state and territory bars for certificates of good standing (www.fjc.gov/content/385023/fees-admission-federal-court-bars).

*Default and Default-Judgment Practices in the District Courts*

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

**Current Research for Other Judicial Conference Committees**

*The Privacy Study: Unredacted Sensitive Personal Information in Court Filings*

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

*Remote Public Access to Court Proceedings*

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

*Case Weights for Bankruptcy Courts*

The Center is collecting data for updated research on bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

### Other Completed Research

*Special-Topic Website: Science Resources*

The Center maintains a website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Topics include fingerprint identification, neuroscience, the opioid crisis, DNA technologies, and water and the law.

## JUDICIAL GUIDES

### In Preparation

*Manual for Complex Litigation*

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

*Reference Manual on Scientific Evidence*

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

*Manual on Recurring Issues in Criminal Trials*

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

*Benchbook for U.S. District Court Judges*

The Center is preparing a seventh edition of its *Benchbook for U.S. District Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

## HISTORY

*Spotlight on Judicial History*

Since 2020, the Center has posted twenty-two short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recent posts include "*Chy Lung v. Freeman*: Anti-Chinese Sentiment and the Supremacy of Federal Immigration Law" (www.fjc.gov/history/spotlight-

judicial-history/chinese-immigration-restriction), "Eighth Amendment Prison Litigation" (www.fjc.gov/history/spotlight-judicial-history/eighth-amendment-prison-litigation), "The Certificate of Division" (www.fjc.gov/history/spotlight-judicial-history/certificate-division), and "NFL Television Broadcasting" (www.fjc.gov/history/spotlight-judicial-history/nfl-television-broadcasting).

*A User Guide to the History of the Federal Judiciary Website*

The Center recently added to its History website a user guide that provides brief descriptions of resources of interest to specific audiences, including the general public, judges and court staff, educators, students, and researchers (www.fjc.gov/history/user-guide).

*Snapshots of Federal Judicial History, 1790–1990*

The Center recently added to its History website extensive exhibits presenting data about the federal judiciary at various points in its evolution (www.fjc.gov/history/exhibits/snapshots-federal-judicial-history-1790-1990).

## EDUCATION

### Specialized Workshops

*Judicial Seminar on Emerging Issues in Neuroscience*

A two-day, in-person judicial seminar explored developments in neuroscience and the role that neuroscience can play in legal determinations, such as decisions about criminal culpability and the admissibility of evidence. The seminar was cosponsored by the American Association for the Advancement of Science and funded by a grant from the Dana Foundation.

*Electronic Discovery Seminar*

A two-day, in-person judicial workshop explored technologies, rules, and legal requirements related to the retrieval of electronically stored information. It was cosponsored by the Electronic Discovery Institute.

*Employment Law Workshop*

A two-day, in-person judicial workshop explored issues arising in employment-law litigation, including the use of experts, electronic discovery, case management, retaliation, implicit bias, big data, and the role of the whistleblower. The New York University School of Law's Institute of Judicial Administration and Center for Labor and Employment Law cosponsored the program.

*Ronald M. Whyte Intellectual Property Seminar*

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues

in intellectual property law. It was cosponsored by the Berkeley Center for Law and Technology.

*Antitrust Judicial Law and Economics Institute for Federal Judges*

A three-day, in-person judicial workshop focused on antitrust law and economics fundamentals in the context of various procedural issues, including pleading an antitrust case after the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*; antitrust injury; class certification; and the use of experts at class certification, during damages analysis, and throughout trial. The program was a collaboration of the Center, the American Bar Association's Antitrust Section, the University of Chicago, and the University of California at Berkeley.

**Distance Education**

*Court Web*

A monthly webcast included as recent episodes "Hot Topics in Federal Sentencing" (featuring Northern District of Ohio Judge Benita Pearson and Alan Dorhoffer, director of the U.S. Sentencing Commission's Office of Education and Sentencing Practice), "Finding the Ripcords: Top Ten 'Safe Landing' Federal Practice Cases" (featuring attorney Jim Wagstaffe and discussing recent appellate cases addressing jurisdictional issues), "Best Practices for Serving Unrepresented Litigants in the Federal Courts" (featuring Northern District of California Judge Jacqueline Scott Corley and Western District of Missouri Judge Willie Epps), and "Below the Radar: Vital Civil Procedure Developments You Might Not Know" (featuring attorney Jim Wagstaffe and highlighting the most recent developments in federal jurisdiction and civil procedure).

*Term Talk*

The Center presents periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes include "*Turkiye Halk Bankasi v. United States*; *Pugin v. Garland*" (discussing subject-matter jurisdiction over criminal prosecutions against foreign sovereigns) and "*Biden v. Nebraska*; *United States v. Texas*" (discussing state standing to sue for losses suffered by a third party and standing to seek vacation of immigration guidelines).

*Consumer Case-Law Update for Bankruptcy Judges*

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

*Business Case-Law Update for Bankruptcy Judges*

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

*Interactive Orientation for Federal Judicial Law Clerks*

The Center provides term law clerks with online interactive training resources.

*Customer Service in the Courts*

Launched in 2023, this e-learning course discusses working with self-represented litigants, among other topics. The course objectives are to provide information and address concerns without crossing into legal advice.

**General Workshops**

*National Leadership Conference for Chief Judges of United States District and Bankruptcy Courts*

This is an annual conference. In addition to updates from various Judicial Conference Committees, the 2024 workshop included a session on the evaluation of the interim recommendations of the Cardone Report.

*National Workshop for U.S. District Court Judges*

These three-day workshops are held in even-numbered years.

*National Workshop for U.S. Magistrate Judges*

These three-day workshops are held annually. Among the topics examined at the 2024 workshop was the impact of ChatGPT on court filings, including those by self-represented litigants, and the impact of "deepfakes" on evidence and procedure.

*National Workshop for U.S. Bankruptcy Judges*

These three-day workshops are held annually.

*Circuit Workshops for U.S. Appellate and District Judges*

In 2023, the Center put on two- or three-day workshops for Article III judges in the Second, Ninth, and Eleventh Circuits.

*National Conference for Appellate Staff Attorneys*

The Center puts on biennial three-day educational conferences for appellate staff attorneys, now in odd-numbered years.

*Wm. Matthew Byrne, Jr., Judicial Clerkship Institute for Career Law Clerks*

Held in collaboration with Pepperdine University Caruso School of Law, this annual two-day program offers sessions on managing pro se litigation, bankruptcy appeals, and jurisdictional issues.

*Federal Defender Capital Habeas Unit National Conference*

This annual three-day conference is designed for attorneys, paralegals, investigators, and mitigation specialists.

*National Seminar for Federal Defenders*

This annual three-day seminar is designed for assistant federal defenders who have been practicing criminal law for a minimum of three years.

**Orientation Programs**

*Orientation Programs for Judges*

The Center invites newly appointed judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions in civil and criminal trial practice, case management, judicial ethics, opinion writing, and—for district judges—the criminal sentencing process. The second phase includes sessions on civil-rights litigation, employment discrimination, case management, relations with the media, and ethics. Recent orientation programs for district judges have included updates on the Cardone Committee's recommendations and evaluation. Orientation programs for circuit judges include a program at New York University School of Law for both state and federal appellate judges.

*Orientation Seminar for Assistant Federal Defenders*

This week-long seminar is held every year.

# TAB 2

# TAB 2A

Item 2A will consist of oral reports.

**MEMORANDUM**

**To:** Advisory Committee Chairs

**From:** Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

**Re:** Update on Review of Privacy Rules

**Date:** March 19, 2024

---

## I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

## II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (4~~3~~) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

## III. Other Privacy Rule Issues

**A.** The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

**B.** The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

**C.** Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

* * * *

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

# FEES FOR ADMISSION TO FEDERAL COURT BARS

Tim Reagan
Federal Judicial Center 2024

This is a report on fees charged for admission to the attorney bars of federal courts of appeals and federal district courts. It was prepared for a subcommittee on attorney admissions created by the Judicial Conference's standing Committee on Rules of Practice and Procedure.[1]

Fees for admission to the bars of the courts of appeals range from $214 to $300. For the district courts, fees range from $199 to $350. State and territory bars charge from no fee to $50 for certificates of good standing.

The fee for original admission to a federal bar is $199 plus any additional fee that the local court charges.[2] The national fee was increased from $188 to $199, and the fee for a certificate of good standing from a federal bar was increased from $20 to $21, on December 1, 2023.[3]

The federal government and federal agencies or programs that are funded from judiciary appropriations are exempt from the national fee.[4] Requirements for practice by federal government attorneys are also constrained by statute:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 517.

Some federal-court bars charge periodic renewal fees.

## Certificates of Good Standing from State and Territory Bars

Membership in a district court's bar requires proof of membership in another bar, as specified by the court's local rules. Certificates of good standing are proof of bar membership, and the fees charged for them in the states and territories range from no fee to $50.

---

1. This report and its appendix, "Compilation of Rules and Fees," are available at www.fjc.gov/content/385023/fees-admission-federal-court-bars.

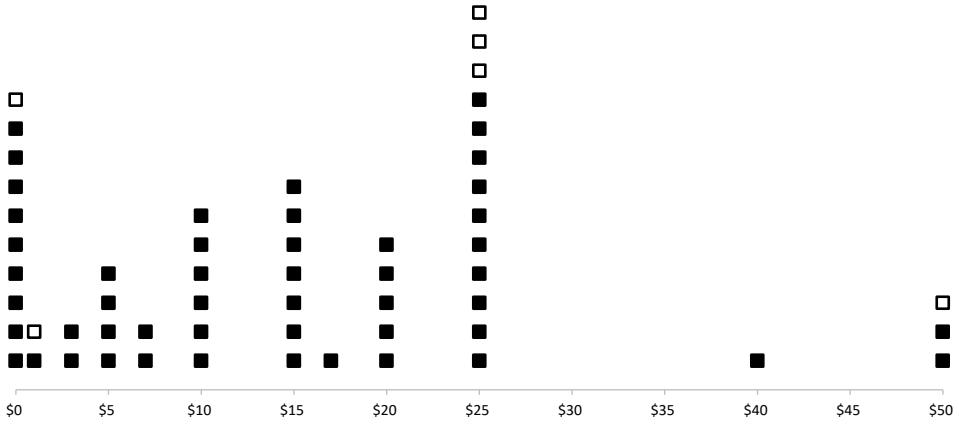
2. Court of Appeals Miscellaneous Fee Schedule, www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule (item 13); District Court Miscellaneous Fee Schedule, www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule (item 10); 28 U.S.C. §§ 1913–1914.

3. Report of the Proceedings of the Judicial Conference of the United States 10–14 (Mar. 14, 2023), www.uscourts.gov/sites/default/files/jcus_mar_2023_proceedings_final_7-5-23_0.pdf; *see also, e.g.*, Inflationary Increases to Miscellaneous Fee Schedules Effective December 1, 2023, www.ca6.uscourts.gov/sites/ca6/files/OCP-CSO-23-035%20Court%20of%20Appeals%20Miscellaneous%20Fee%20Schedule.pdf.

4. Court of Appeals Miscellaneous Fee Schedule, *supra* note 2; District Court Miscellaneous Fee Schedule, *supra* note 2.

Ten jurisdictions (including American Samoa) charge no fee (18%). Another ten jurisdictions (including Puerto Rico) charge a fee that is less than $10 (18%). Nineteen jurisdictions charge from $10 to $20 (34%), and thirteen jurisdictions (including the District of Columbia, Guam, and the Virgin Islands) charge the most common fee of $25 (23%). The remaining four jurisdictions (including the Northern Mariana Islands) charge $40 or $50 (7%).

**Fees for State and Territory Certificates of Good Standing**
(states designated with solid markers)




## The Federal Courts of Appeals

According to Federal Rule of Appellate Procedure 46(a)(1), attorneys licensed to practice law in the United States are generally eligible for admission to each circuit's appellate bar:

> An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

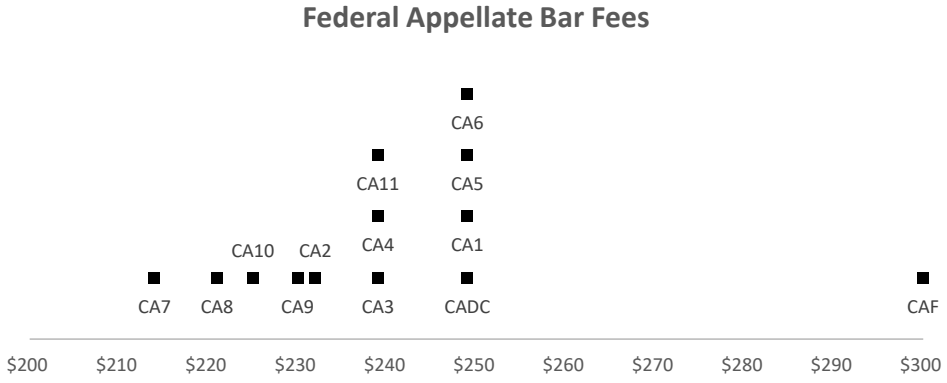
Admission requires (1) submission of an application, (2) motion by a current bar member, and (3) payment of a fee.[5]

The median bar admission fee is $239, and the range is from $214 to $300.

Bar admission in the Second, Fifth, and Eleventh Circuits is for a term of five years. Renewal fees are $25, $50, and $20, respectively.

Only the Eleventh Circuit's court of appeals posts a pro hac vice fee ($50). Only the rules for the District of Columbia, Second, and Fourth Circuits appear to mention pro hac vice appearance.

5. Fed. R. App. P. 46(a)(2)–(3).

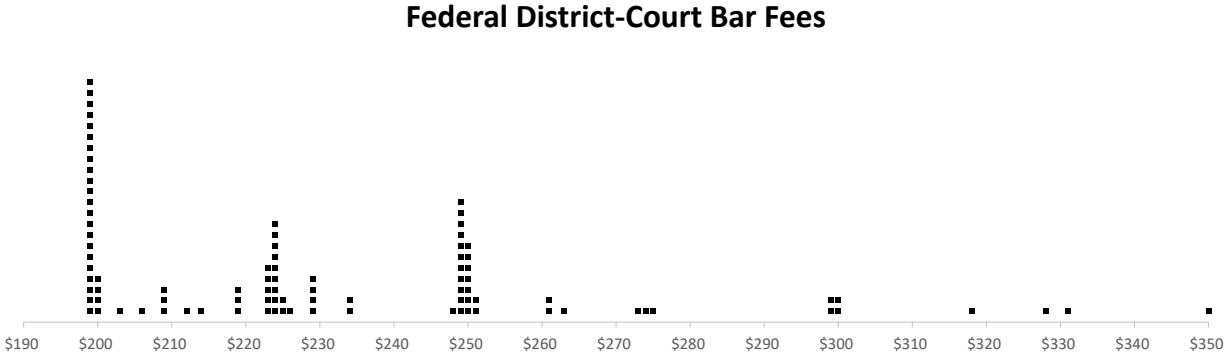



## The Federal District Courts

In the district courts, admission fees range from the national minimum of $199 to $350. Some districts charge renewal fees up to $75 per year. Pro hac vice fees range from no fee to $550.

*Admission Fees for New Membership*

Admission fees for membership in federal district-court bars range from the national minimum of $199 (twenty-two districts, or 23%) to $350 (the District of Guam). Nearly two-fifths of the districts add from $1 to $35 to the national fee (thirty-seven districts, or 39%). A little over one-fifth charge about $250 total (twenty-one districts, or 22%). Six districts charge from $261 to $275 (6%), and four charge about $300 (4%). The four districts with the highest fees charge from $318 to $350 (4%).



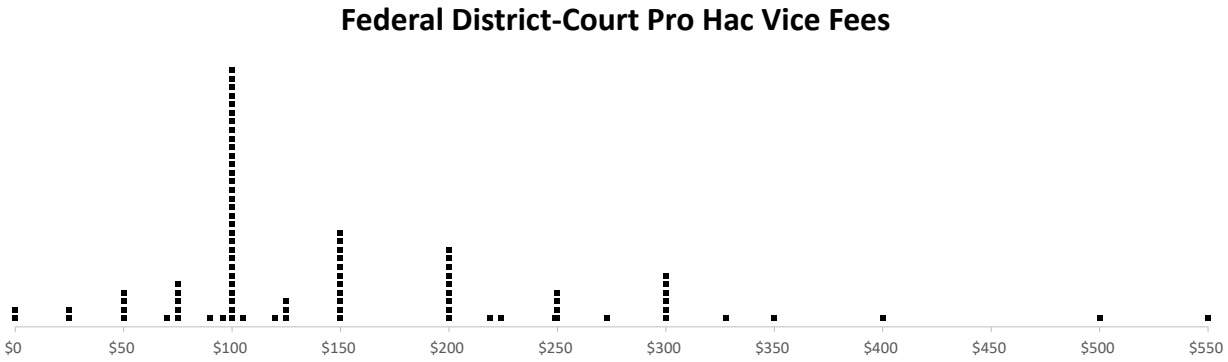

## Renewal Fees

Twenty-five districts (27%) charge dues, often referred to as renewal fees. Renewal periods range from one to six years, and annualized dues range from $3 to $75.[6]

6. Alabama Middle ($10), Alabama Northern ($10), Alabama Southern ($10), California Central ($25), Colorado ($30), Delaware ($25), District of Columbia ($8.33), Florida Middle ($3), Illinois Southern ($50), Iowa Northern ($25), Iowa Southern ($25), Louisiana Eastern ($15), Louisiana Middle ($5), Louisiana Western ($15), Maryland ($12.50), Missouri Eastern

*Appearance Pro Hac Vice*

Thirty districts (32%) charge the most common pro hac vice fee of $100. Sixteen districts (17%) charge less than that, including two districts with no fee (the Western District of Michigan and the Eastern District of North Carolina). Five districts charge more than $300.[7] Three districts charge pro hac vice renewal fees.[8] Four districts do not permit pro hac vice appearance; their bars are open to members of any state bar.[9]




*Local-Counsel Requirements*

Fifty districts (53%) at least sometimes require participation by local counsel for admission to the district court's bar, such as by acting as a sponsor.[10]

Fourteen districts (15%) at least sometimes require litigation participation by local counsel for some members of the district court's bar.[11]

---

($18.75), New Mexico ($12.50), New York Northern ($25), North Carolina Eastern ($9), Northern Mariana Islands ($15), Puerto Rico ($75), Texas Southern ($25), Texas Western ($8.33), Utah ($30), and Virgin Islands ($45).

7. California Central ($500), California Northern ($328), Guam ($400), South Carolina ($350), and West Virginia Northern ($550).

8. Guam ($100 annually), Kentucky Western ($150 annually), and Louisiana Eastern ($45 triennially).

9. Colorado (the bar is open to members of a state or territory bar), Illinois Central (the bar is open to members of a state or District of Columbia bar), Michigan Eastern (the bar is open to members of a federal, state, or territory bar), and Wisconsin Eastern (the bar is open to members of a federal, state, or District of Columbia bar).

In addition, the Western District of Michigan allows, but disfavors pro hac vice appearance.

10. Alabama Middle, Alabama Northern, Alabama Southern, Arizona, Delaware, District of Columbia, Georgia Southern, Guam, Indiana Southern, Kansas, Kentucky Eastern, Kentucky Western, Louisiana Eastern, Louisiana Middle, Louisiana Western, Maine, Maryland, Michigan Eastern, Minnesota, Mississippi Northern, Mississippi Southern, Missouri Western, Nevada, New York Eastern, New York Northern, New York Southern, New York Western, North Carolina Eastern, North Carolina Middle, North Carolina Western, Ohio Northern, Pennsylvania Eastern, Pennsylvania Middle, Pennsylvania Western, Puerto Rico, South Carolina, Tennessee Eastern, Tennessee Middle, Texas Eastern, Texas Northern, Texas Western, Vermont, Virgin Islands, Virginia Eastern, Virginia Western, Washington Eastern, Washington Western, West Virginia Northern, West Virginia Southern, and Wisconsin Eastern.

11. California Southern, Hawaii, Indiana Northern, Indiana Southern, Michigan Eastern,

A large majority of districts (seventy-two, or 77%) require members of the district court's bar to participate in applications for pro hac vice appearance, or to associate with the appearance itself, at least sometimes.[12] Eighteen districts (19%) do not require participation by local counsel in pro hac vice appearances.[13] Four districts (4%) do not permit pro hac vice appearances.[14]

*Government Attorneys*

It is common for local rules to specify waiver of fees and mitigated admission requirements for government attorneys. Sometimes this includes state or local government attorneys as well as federal government attorneys. Sometimes this includes federal defender attorneys and sometimes also other attorneys compensated under the Criminal Justice Act. A few courts also specify mitigated requirements for public-interest attorneys. Textual specifications that appear similar may be interpreted differently, and textual specifications that appear different may be interpreted similarly.

Mississippi Northern, Mississippi Southern, Nebraska, Nevada, Northern Mariana Islands, Oklahoma Eastern, Oklahoma Northern, Oklahoma Western, and Tennessee Middle.

12. Alabama Northern, Alabama Southern, Alaska, Arizona, Arkansas Eastern, Arkansas Western, California Central, California Eastern, California Northern, California Southern, Connecticut, Delaware, District of Columbia, Florida Southern, Georgia Middle, Georgia Northern, Georgia Southern, Guam, Hawaii, Idaho, Illinois Southern, Indiana Northern, Indiana Southern, Iowa Northern, Iowa Southern, Kansas, Louisiana Eastern, Louisiana Middle, Louisiana Western, Maine, Maryland, Massachusetts, Minnesota, Mississippi Northern, Mississippi Southern, Missouri Western, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York Northern, New York Western, North Carolina Eastern, North Carolina Middle, North Carolina Western, Northern Mariana Islands, Ohio Southern, Oklahoma Eastern, Oklahoma Northern, Oklahoma Western, Oregon, Pennsylvania Eastern, Pennsylvania Middle, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee Middle, Texas Northern, Texas Western, Utah, Vermont, Virgin Islands, Virginia Eastern, Virginia Western, Washington Eastern, Washington Western, West Virginia Northern, West Virginia Southern, and Wyoming.

13. Alabama Middle, Florida Middle, Florida Northern, Illinois Northern, Kentucky Eastern, Kentucky Western, Michigan Western, Missouri Eastern, New York Eastern, New York Southern, North Dakota, Ohio Northern, Pennsylvania Western, Tennessee Eastern, Tennessee Western, Texas Eastern, Texas Southern, and Wisconsin Western.

14. *See supra* note 9.

# LOCAL-COUNSEL REQUIREMENTS FOR PRACTICE IN FEDERAL DISTRICT COURTS

Tim Reagan[1]
Federal Judicial Center 2024

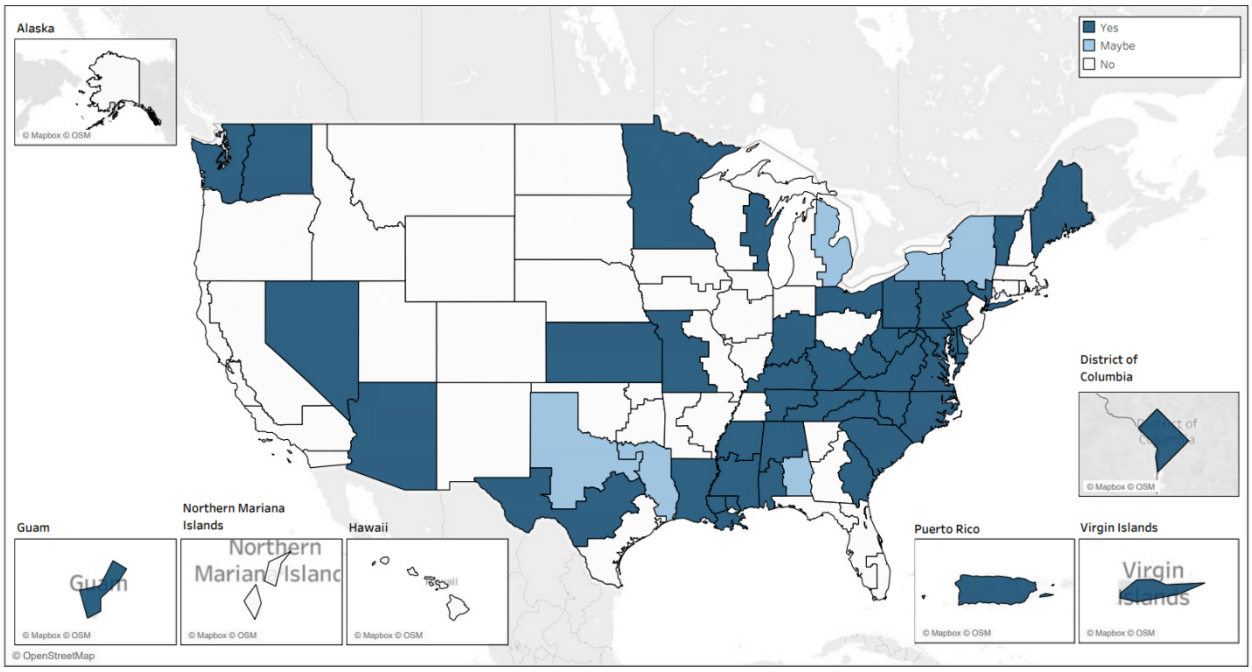
It is very common for district courts' rules to require local-counsel participation for bar admission or pro hac vice appearance in at least some cases. The rules for more than three-quarters of the districts do.

Although local-counsel participation in litigation is more often required for pro hac vice appearances than for appearances by bar members, several districts sometimes require the latter.

Some, but not all, district rules define local counsel. The epitome of local counsel is an attorney who is a member of the district court's bar, who is a member of the local state or territory bar, and who lives and works in the district. For ease of reference in this report, the District of Columbia is regarded as a territory.

This report was prepared for a subcommittee on attorney admissions created by the Judicial Conference's standing Committee on Rules of Practice and Procedure.[2]

**Local-Counsel Participation Required for Bar Admission**




1. The graphics in this report were created by Cheena Mae V. Pongase and Margaret S. Williams.

2. This report and its appendix, "Summaries of Rule Text," are available at www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts.

## Local-Counsel Requirements for Bar Admissions

Fifty districts (53%) require participation by local counsel in the bar-admission process. For seven of these districts, the local-counsel requirement depends on circumstances such as where the applicant lives or works.

The following analyses describe requirements of local-counsel participation in federal district-court bar admissions in the context of what other admissions are required.

*Local State-Bar Membership Required*

Sixty districts (64%) require membership in the bar of the state or territory that includes the district for membership in the district court's bar.[3]

Two of these districts require more than membership in the state bar. The Northern District of Alabama also requires the attorney to live and work in Alabama. For admission to the district court's bar, the district requires an admission motion by a current member. The Southern District of Alabama requires the attorney to be a member of the district-court bar where the attorney lives or works. Admission to the Southern District's bar requires a motion by a current member or by the court.

Twenty-seven other districts requiring local state-bar membership require one or more current members of the district court's bar to participate in the admission process. Parenthetical numbers in the following list represent how many current members of the district court's bar must participate:[4]

Arizona (1)
Delaware (1)
Georgia Southern (2)
Guam (1)
Kentucky Eastern (1)
Kentucky Western (1)
Louisiana Eastern (2)
Louisiana Middle (2)
Louisiana Western (1)
Maine (1)
Minnesota (2 to 3)
Mississippi Northern (1)
Mississippi Southern (1)
Nevada (1)
North Carolina Eastern (2 to 3)
North Carolina Middle (1)
North Carolina Western (1)
Pennsylvania Eastern (1)
Pennsylvania Middle (1)
South Carolina (2)
Virgin Islands (1)
Virginia Eastern (2)
Virginia Western (2)
Washington Eastern (2)
Washington Western (2)
West Virginia Northern (1)
West Virginia Southern (1)

3. Two of these districts expand eligibility for some attorneys. In the District of New Jersey, defense attorneys in a criminal cases may appear if they are members of a federal or state bar. In the District of the Virgin Islands, a patent attorney admitted to practice before the U.S. Patent Office may appear in a patent case if admitted to a federal, state, or territory bar.

4. The Eastern District of North Carolina requires an admission motion from one current bar member and—except for members of either the Middle District's bar or the Western District's bar—certifications from two current members of the district court's bar. The Middle and Western Districts of North Carolina require an admission motion from one current bar member, except for members of the bar of another district court in North Carolina.

Admission to the Middle District of Alabama requires a motion by a current member or by the court, or the attorney seeking admission must be a member of the district court's bar where the attorney lives or works.

Five districts (5%) expand bar eligibility with specific limited exceptions to the requirement of membership in the bar of the state that includes the district. For these districts, new bar admissions require participation by a current member of the district court's bar.

In the District of Kansas, members of the Western District of Missouri's bar also are eligible for admission. In the District of Vermont, members of a federal district court's bar in the First or Second Circuit also are eligible for admission. Admission to these two districts' bars requires participation by a current member of the district court's bar.

In the Eastern and Southern Districts of New York, attorneys who are members of the bar for either the District of Connecticut or the District of Vermont—the two districts in the circuit outside of New York—and the bar of the state that includes that district also are eligible for admission. Admission to the bar of each of these two New York districts requires participation by a current member of the district court's bar, except for attorneys who already are members of the other New York district's bar.

In the Western District of Missouri, members of the District of Kansas's bar also are eligible for admission. Admission to the Western District of Missouri's bar requires participation by two or three current members of the district court's bar.

*State-Bar Membership Not Required*

The rules for some districts state that members of another state's bar are eligible for admission to the district court's bar without mentioning the District of Columbia. Many, but not all, of these districts extend eligibility to members of the District of Columbia's bar as a matter of practice.

A State

The rules for three districts state that membership in any state's bar is required for membership in the district court's bar. In the Western District of Texas, the admission application must include two letters of recommendation from members of the district court's bar where the attorney lives.

A State or the United States Supreme Court

For admission to their bars, two districts require membership in a state bar or the bar of the United States Supreme Court. The Southern District of Indiana requires sponsorship by a current member of the district court's bar.

A State or the District of Columbia

The rules for six districts state that bar membership is open to a member of a state or District of Columbia bar. In the Northern District of Texas, a nonresident attorney may be admitted by taking an oath before a judge in another district court, but otherwise admission requires introduction by a current member of the district court's bar.

Membership in the District of Columbia's bar is open to a member of the District of Columbia's bar, to a member of a state bar where the attorney principally works, and to in-house counsel admitted to a state bar and authorized to provide legal advice where the attorney works. The admission petition must include an affidavit or declaration from a current member of the district court's bar.

A State or Territory

Three districts open bar membership to members of the bar of a state or territory, including the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa. One of these, the Eastern District of Tennessee, requires the endorsement of two current members of the district court's bar for bar admission.

The District of Puerto Rico's bar is open to members of state bars and members of listed territory bars; American Samoa is not on the list. (Admission also typically requires passing the district court's bar exam.) The petition for admission must include three personal references, including two from current members of the district court's bar.

A State or Federal District Court

Admission to two district courts' bars is based on membership in a state bar or another federal district court's bar.

The Northern District of New York's bar requires admission to New York's bar, a federal district court's bar, or a state bar in the state where the attorney lives. Unless the attorney is a member of the Eastern, Southern, or Western District's bar, admission must be sponsored by a current member of the district court's bar.

Admission to the Western District of New York's bar requires admission to New York's bar, admission to the Eastern, Northern, or Southern District's bar, or admission to the bar of another federal district court and the bar of the state that includes that district. If the attorney is not a member of a federal district court's bar, then admission is by motion from a current member of the Western District's bar.

A State or the District of Columbia and a Federal District Court

The District of Maryland's bar requires admission to Maryland's bar or, so long as the attorney does not maintain a law office in Maryland, admission to a state or District of Columbia bar and another federal district court's bar. Admission is by motion from a current member of the district court's bar.

A State, Territory, or Federal District Court

In two districts, an attorney is eligible for bar membership if the attorney is a member of any state or territory bar or a member of another federal district court's bar. The Northern District of Ohio requires an admission motion by a current member of the district court's bar or the endorsement of two current members, unless the attorney is a member of the Southern District's bar. The Eastern District of Michigan allows attorneys without an office in the district

to take the oath of admission remotely if sponsored by a current member of the district court's bar.

A State or Federal Court

Four districts open bar membership to members of any state or federal bar. The Eastern District of Texas requires an admission motion by a current member of the Texas bar or a federal district court's bar.

A State, District of Columbia, or Federal Court

In two districts, an attorney who is a member of a state, District of Columbia, or federal-court bar is eligible for admission. The Eastern District of Wisconsin requires admission participation by a current member of the district court's bar.

A State or Territory and Federal Court

Admission to the Middle District of Tennessee's bar requires admission to Tennessee's bar or to the bars of a federal court and a state or territory. Admission is by motion of a current member of the district court's bar bearing signatures from two current members.

Federal District Court or United States Supreme Court

Admission to the Western District of Pennsylvania's bar requires admission to Pennsylvania's bar or eligibility to become a member of Pennsylvania's bar or admission to the United States Supreme Court's bar or to a federal district court's bar. Admission is by oral motion by a current member of the district court's bar.

*Local Counsel Not Required for Bar Admissions*

Forty-four districts (47%) do not require participation by a current member of the district court's bar for new bar admissions.[5]

Members of a district court's bar in Arkansas are members of the other district court's bar in Arkansas. Other attorneys are eligible for membership if licensed where they principally work and either residents of Arkansas or previously admitted to another district court's bar.

The other forty-two districts are organized in the following list by admission requirements.[6]

| **Local State Bar** | California Southern | Georgia Northern |
|---|---|---|
| Alaska | Florida Middle | Hawaii |
| California Central | Florida Northern | Idaho |
| California Eastern | Florida Southern | Iowa Northern |
| California Northern | Georgia Middle | Iowa Southern |

5. In the Northern District of Illinois, the petition for admission must include affidavits from two members of state or District of Columbia bars.

The Western District of Texas requires two letters of recommendation from members of the district court's bar where the attorney lives.

6. In the Central District of Illinois, admission eligibility includes admission to the bar of the Northern or Southern District as well as admission to a state or District of Columbia bar.

Massachusetts
Montana
New Hampshire
New Jersey
Northern Mariana Islands
Ohio Southern
Oregon
Rhode Island
South Dakota
Utah
Wyoming

**A State**
Michigan Western
Nebraska

**A State or the U.S. Supreme Court**
Indiana Northern

**A State or the District of Columbia**
Illinois Central
Illinois Northern
Illinois Southern
Missouri Eastern
Wisconsin Western

**A State or Territory**
Colorado
New Mexico

**A State or Federal District Court**
Connecticut

**A State or Federal Court**
Oklahoma Eastern
Oklahoma Northern
Oklahoma Western

**A State, District of Columbia, or Federal Court**
North Dakota

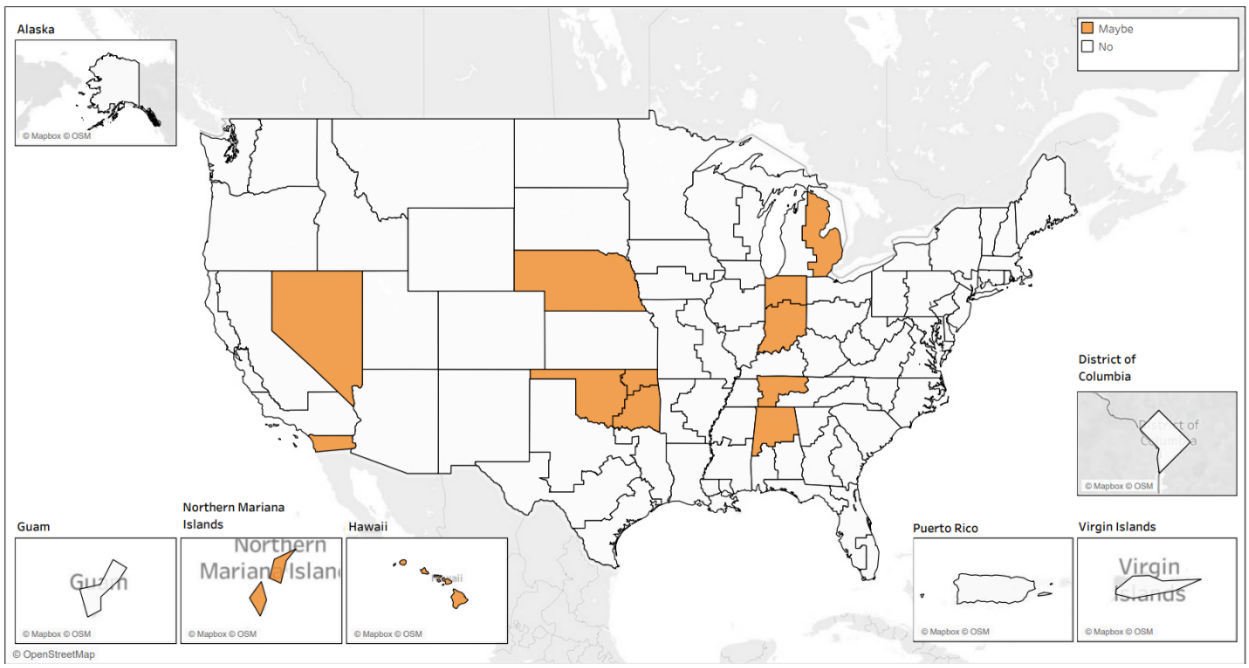
**A State or District of Columbia and Federal District Court**
Tennessee Western

**A State or Territory and Federal District Court**
Texas Southern

## Local-Counsel Requirements for Practice by Bar Members

Thirteen districts (14%) require association with local counsel even for some members of the district court's bar.

**Local Counsel Required for Practice by Some Bar Members**




For two districts, the local-counsel requirement depends on whether the attorney is a member of the bar for the state that includes the district. The Eastern District of Oklahoma—which opens its bar to members of state and federal bars—requires attorneys who are not members of Oklahoma's bar to

associate a member of the district court's bar who is. The Middle District of Tennessee—which opens its bar to members of other state and territory bars who are also members of federal bars—requires association with local counsel in civil cases for attorneys who are not members of Tennessee's bar.

For three districts, the local-counsel requirement depends on the location of the attorney's office. In the Southern District of California and the District of Hawaii, the court may require an attorney whose office is outside the district to associate a member of the district court's bar whose office is inside the district. In the District of Nevada, an attorney who does not have an office in Nevada must associate a Nevada attorney who does.

For four districts, the local-counsel requirement depends on where the attorney lives. In the Northern and Southern Districts of Indiana and the District of Nebraska, the court may require association with a member of the district court's bar who lives in the district for an attorney living outside the district. The Southern District of Alabama may also require local counsel for an attorney not living in the district.

For three districts, the local-counsel requirement depends on both where the attorney lives and where the attorney works. The Northern and Western Districts of Oklahoma require an attorney who does not live and work in Oklahoma to associate a member of the district court's bar who does. The District of the Northern Mariana Islands generally requires association with local counsel for attorneys who do not live and work in the district, but this requirement can be waived for good cause.

The Eastern District of Michigan—whose bar is open to members of state, territory, and federal district-court bars—requires attorneys who are not members of Michigan's bar to associate members of the district court's bar who have offices in the district.

## Local-Counsel Requirements for Pro Hac Vice Appearances

More than three-quarters of the districts at least sometimes require the participation of local counsel for pro hac vice appearances, either during the permission process or during the litigation.

*Pro Hac Vice Appearance Not Permitted*

Four districts (4%) do not permit pro hac vice appearance: the District of Colorado,[7] the Central District of Illinois,[8] the Eastern District of Michigan,[9] and the Eastern District of Wisconsin.[10] All of their bars are open at least to members of any state bar. In addition, the Western District of Michigan allows, but disfavors pro hac vice appearance.

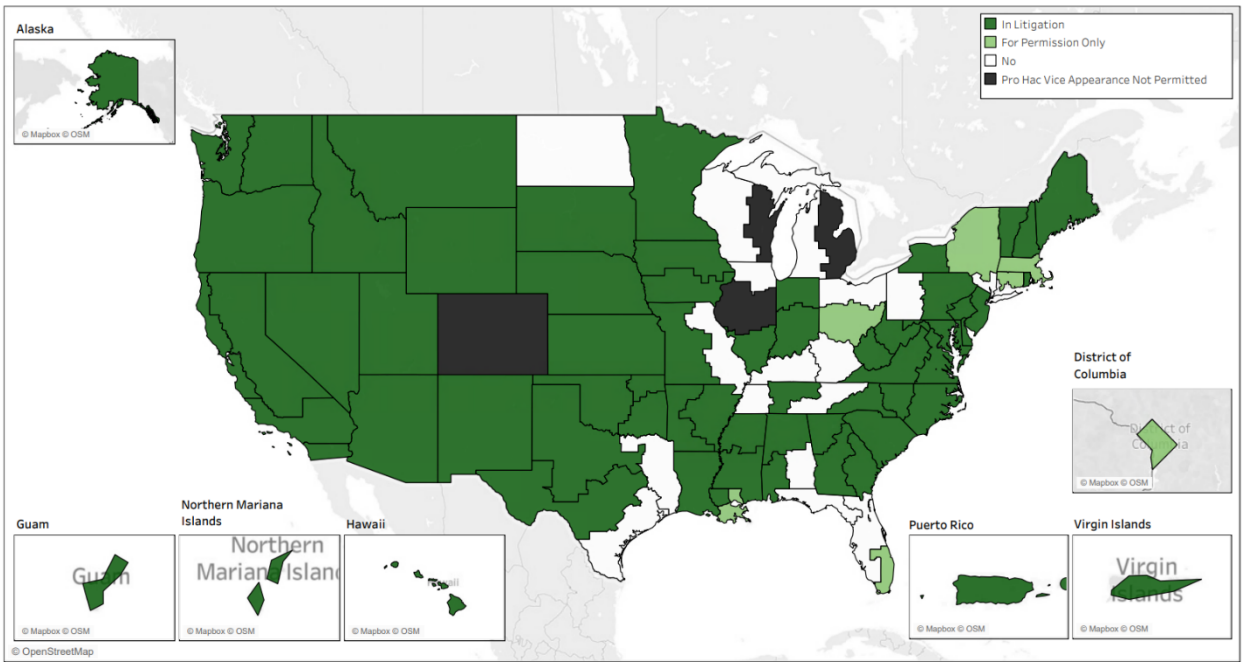
7. The district's bar is open to members of a state or territory bar.

8. The district's bar is open to members of a state or District of Columbia bar or a bar of the Northern or Southern District. Pro hac vice appearance may be permitted for an attorney awaiting admission to the district court's bar.

9. The district's bar is open to members of a state, territory, or federal district-court bar.

10. The district's bar is open to members of a federal, state, or District of Columbia bar.

**Local Counsel Required At Least Sometimes for Pro Hac Vice Appearance**




*Local Counsel Not Required*

The local rules for eighteen districts (19%) do not require local-counsel participation for pro hac vice appearance. As this is the more unusual situation, the particulars of these districts are described with some detail below. The analysis assumes that members of any federal bar are also members of a state or territory bar, because state and territory bars are the original licensing authorities.[11]

The rules for seven of these districts expand eligibility for pro hac vice appearance beyond eligibility for bar admission:

- Northern District of Florida: Bar admission requires admission to Florida's bar. An attorney who is a member of a bar where the attorney lives or works may seek pro hac vice appearance.
- Eastern and Western Districts of Kentucky: Bar admission requires admission to Kentucky's bar. A member of another federal or state bar may be permitted to appear pro hac vice.
- Eastern and Southern Districts of New York: Bar admission requires admission to New York's bar or to the bar of another state in the circuit and the district court's bar in that state (so long as the district in the other state provides a reciprocal privilege). An attorney who is a member of a state or federal district-court bar may be permitted to appear pro hac vice.

11. One of the district court's rules refers to attorneys licensed in other countries. The rules for the Northern District of West Virginia state that an attorney licensed in another country may be permitted to appear pro hac vice.

- Western District of Pennsylvania: Bar admission requires admission to Pennsylvania's bar or to a U.S. Supreme Court or district-court bar. A member of a state or federal district-court bar may be permitted to appear pro hac vice.
- Western District of Tennessee: Bar admission requires admission to Tennessee's bar or another district court's bar and the bar of another state or the District of Columbia. An attorney not licensed in Tennessee who is licensed in another state or the District of Columbia may be permitted to appear pro hac vice.

In three other districts, eligibility for pro hac vice appearance is narrower than eligibility for bar admission, in two cases because of specifications of where an attorney lives or works:

- Eastern District of Missouri: Bar admission requires admission to a state or District of Columbia bar. An attorney who meets these requirements but who does not live or work in the district—absent relief from the geographic requirement for good cause—may be permitted to appear pro hac vice.
- Northern District of Ohio: Bar admission requires admission to a state, territory, or federal district-court bar. The district court disfavors pro hac vice appearances, but a member of a federal or state bar may seek permission to appear pro hac vice.
- Eastern District of Tennessee: Bar admission requires admission to a state or territory bar. An attorney who does not live or work in the district and who is a member of another district court's bar and a member of a state or territory bar may be permitted to appear pro hac vice.

In two of the districts without a local-counsel requirement for pro hac vice appearance, eligibility for pro hac vice appearance is essentially the same as eligibility for bar admission:

- Western District of Michigan: Bar admission requires admission to a state bar. Pro hac vice appearance may be permitted pending admission to the district court's bar or in unusual circumstances.
- Western District of Wisconsin: Bar admission requires admission to a state or District of Columbia bar. A member of a state or District of Columbia bar may be permitted to appear pro hac vice.

In three districts without local-counsel requirements for pro hac vice appearance, eligibility for pro hac vice appearance is different from—but not necessarily wider or narrower than—eligibility for bar admission:

- Middle District of Alabama: Bar admission requires admission to a state bar. An attorney who is a member of a district court's bar where the attorney lives or works may be granted permission to appear pro hac vice.
- Middle District of Florida: Bar admission requires admission to Florida's bar. An attorney who is neither a Florida resident nor a member

of Florida's bar may seek pro hac vice appearance if the attorney is a member of another federal district court's bar.

- Northern District of Illinois: Bar admission requires admission to a state or District of Columbia bar. A member of a state or federal district-court bar may be permitted to appear pro hac vice.

Three districts allow any attorney to seek pro hac vice appearance:

- District of North Dakota: Bar admission requires admission to a federal, state, or District of Columbia bar.
- Eastern District of Texas: Bar admission requires admission to a federal or state bar. An attorney may be permitted to appear pro hac vice.
- Southern District of Texas: Bar admission requires admission to the Texas bar or the bar of another district court and the bar of another state or territory. An attorney may be permitted to appear pro hac vice.

*Local Counsel Required*

Fifty-six districts (60%) require local-counsel participation for pro hac vice appearances. In addition to being a member of the district court's bar, local counsel may be required to live or work in the district or be a member of the local state's bar.

For seven of the districts (7%), the local-counsel requirement is participation in the process of obtaining permission to appear pro hac vice and not participation in the litigation:[12]

| | | |
|---|---|---|
| Connecticut | Louisiana Eastern | Ohio Southern |
| District of Columbia | Massachusetts | |
| Florida Southern | New York Northern | |

For thirty-seven of the districts (39%), attorneys appearing pro hac vice must associate local counsel, but local counsel does not have to participate in the permission process:

| | | |
|---|---|---|
| Alabama Northern | Kansas | North Carolina Eastern |
| Arkansas Eastern | Louisiana Middle | North Carolina Middle |
| Arkansas Western | Louisiana Western | Northern Mariana Islands |
| California Central | Maine | Oklahoma Northern |
| California Eastern | Maryland | Oregon |
| California Northern | Mississippi Northern | Pennsylvania Eastern |
| Delaware | Mississippi Southern | Pennsylvania Middle |
| Georgia Northern | Missouri Western | Puerto Rico |
| Georgia Southern | Nevada | South Dakota |
| Guam | New Jersey | Virgin Islands |
| Hawaii | New Mexico | |
| Idaho | | |

12. In the Southern District of Ohio, an attorney appearing pro hac vice may not serve as a trial attorney without additional permission.

| | | |
|---|---|---|
| Washington Eastern | West Virginia Northern | West Virginia Southern |
| Washington Western | | |

For twelve of the districts (13%), local counsel must both participate in the pro hac vice permission process and associate with the pro hac vice attorney:

| | | |
|---|---|---|
| Minnesota | Oklahoma Eastern | Virginia Eastern |
| Montana | Rhode Island | Virginia Western |
| New Hampshire | South Carolina | Wyoming |
| North Carolina Western | Utah | |
| | Vermont | |

That means that just over half of the districts require pro hac vice attorneys to associate local counsel.

*Local Counsel Possibly Required*

The rules for sixteen districts (17%) state that association with local counsel may be required for some but not all attorneys appearing pro hac vice.

In four districts, association is or may be required in civil cases:

| | |
|---|---|
| Georgia Middle | Iowa Southern |
| Iowa Northern | Tennessee Middle |

In five districts, the requirement depends on where the attorney lives:

| | | |
|---|---|---|
| Alabama Southern | Indiana Northern | Nebraska |
| Illinois Southern | Indiana Southern | |

In two districts, the requirement depends on the location of the attorney's office:

| | |
|---|---|
| California Southern | New York Western |

In five other districts, it is a matter of judicial discretion:

| | | |
|---|---|---|
| Alaska | Oklahoma Western | Texas Western |
| Arizona | Texas Northern | |

# TAB 3

# TAB 3A

**MEMORANDUM**

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

**FROM:** Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

**RE:** Report of the Advisory Committee on Evidence Rules

**DATE:** May 15, 2024

---

# I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 19, 2024, at the Administrative Office in Washington, D.C. On the morning of the meeting, the Committee convened a panel of experts who discussed developments in Artificial Intelligence (AI) and machine learning and provided guidance on how the rules of evidence might need to be adjusted to handle evidence that is the product of AI. At its subsequent meeting, the Committee processed the comments of the panelists, and also considered three possible amendments to the rules. The Committee approved a proposed amendment to Rule 801(d) for public comment and agreed to continue to consider a possible amendment to Evidence Rule 609 and a possible amendment that

would add a rule governing evidence of prior false accusations of sexual misconduct made by alleged victims in criminal cases.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report.

## II. Action Item

### Proposed Amendment to Rule 801(d)(1)(A)

The Committee recommends that a proposed amendment to Rule 801(d)(1)(A) be released for public comment. Currently, Rule 801(d)(1)(A) provides for a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness: the prior statement is substantively admissible only when it is made under oath at a formal proceeding. While all prior inconsistent statements are admissible for impeachment purposes, only a very few are admissible as substantive evidence. So in the typical case, a court upon request will have to instruct the jury that a prior inconsistent statement may be used to impeach the witness's credibility, but may not be used as proof of a fact.

The amendment approved by the Committee for public comment would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject, of course, to Rule 403. The amendment would track the 2014 change to Rule 801(d)(1)(B), which provides that all prior consistent statements admissible to rehabilitate a witness are also admissible as substantive evidence (again, subject to Rule 403). This convergence of substantive and credibility use dispenses with the need for confusing limiting instructions with respect to all prior statements of a testifying witness.

The amendment adopts the position of the original Advisory Committee, which proposed that all prior inconsistent statements would be admissible over a hearsay objection. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). The amendment is consistent with the practice of a number of states, including California.

The current Rule 801(d)(1)(a) limitations are based on three premises. The first premise is that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the very person who made the prior statement is present at trial and, while under oath, is subject to cross examination about it. The problem with hearsay is that the declarant is not subject to cross-examination, but with prior statements of testifying witnesses, the declarant is by definition subject to cross-examination. Moreover, if an oath at the time of the statement is so critical, no explanation is given for why

prior identifications under Rule 801(d)(1)(C) are admissible without an oath requirement. It is anomalous that a prior identification that is inconsistent with a witness's in-court testimony is admissible substantively under Rule 801(d)(1)(C) but not under Rule 801(d)(1)(A), when the rationale for admissibility is the same under both rules.

The second premise for the current rule was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403 -- as the Committee recently recognized in the 2023 amendment to Rule 106, which allows admission of oral unrecorded statements for completion purposes.

The third premise was that if a witness denies making the prior statement, then cross-examination about the statement might be difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] 'affirmed the statement as his'").

A majority of the Committee concluded that the amendment would remove an unreasonable limitation on admissibility and end the need for trial judges to give (in virtually all trials) a limiting instruction that is difficult for lay jurors to understand and thus follow.

***The Committee approved the proposed amendment to Rule 801(d)(1)(A) for public comment. Two Committee members dissented, and the Department of Justice abstained.***

***The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.***

The proposed amendment to Rule 801(d)(1)(A), and the Committee Note, are attached to this Report.

# III. Information Items

## A. Panel Discussion on AI and Machine Learning

The Committee invited eight experts to present information regarding artificial intelligence and machine learning and asked the experts to assess the possible impact of AI on the Federal Rules of Evidence. The panel included computer scientists from NIST, three leaders in the field who are working to ensure that AI is properly regulated and vetted, and two law professors who provided suggestions on possible amendments to the Evidence Rules. After the very helpful presentations, the Committee discussion indicated several takeaway points:

1. Consideration should be given to a rule covering machine-learning output when it is not accompanied by an expert witness. One possibility is a new rule applying the Rule 702 reliability standards to such machine-learning data. The problems posed by machine-learning data are not ones of authenticity but rather of reliability. One challenge, however, is to draft a rule on machine-learning evidence that will not cover basic, well-established machine-based data such as thermometers, radar guns, etc.

2. The problem of deepfakes is really one of forgery --- a problem that courts have dealt with under the existing rules for many years. This cautions against a special rule on deepfakes --- with the proviso that traditional means of authentication such as familiarity with a voice, and personal knowledge, might need to be tweaked because the authenticating witness may not be able to detect a deepfake.

3. An opponent should not have the right to an inquiry into whether an item is a deepfake merely by claiming that it is a deepfake. Some initial showing of a reason to think the item is a deepfake should be required. The question is whether a rule is necessary to establish the requirement of an initial showing of fakery. Courts currently require some kind of showing before inquiring into whether digital and social media evidence have been subject to hacking; it is not enough for an opponent to contend that the item is inauthentic because, you never know, it might have been hacked. And courts have imposed that initial requirement on the opponent without relying on a specific rule. The question for the Committee is whether a procedural rule to impose a burden of going forward on the opponent is necessary when it comes to deepfakes. Such a rule might be added to Rule 901 as a new Rule 901(c). Former Judge Paul Grimm and Dr. Maura Grossman proposed a Rule 901(c) that the Committee considered at the meeting. The Committee agreed that the proposal could not be adopted in its present form, because it required the opponent to show that it was more likely than not a fake, which seems too high for an initial burden. The Committee remains open to considering a rule that would impose on the opponent a burden of going forward when an item is challenged as a deepfake.

4. It may be that the admissibility of machine-learning evidence could be dependent on validation studies, without the necessity of courts and litigants inquiring into source codes, algorithms, etc. Thought must be given, however, to how such validation studies can be conducted, and how they are to be reviewed by courts.

With the benefit of all that was learned from the panel discussion, the Committee will continue its inquiry into whether and what amendments are necessary to deal with AI and machine-learning evidence. The Committee remains aware of the challenge of drafting rules that take three years to enact, to cover a rapidly developing area in which three years is like a lifetime. The need to avoid obsolescence by the time of enactment requires rules to be general --- perhaps too general to be helpful.

## B. Rule 609(a)(1)

The Committee considered a proposal to eliminate Rule 609(a)(1). Rule 609(a)(1) allows impeachment of witnesses with felony convictions that do not involve dishonesty or false statement. Most importantly, criminal defendants can be impeached with their prior convictions not involving dishonesty or false statement if the court finds that their probative value outweighs their prejudicial effect.

The argument for eliminating Rule 609(a)(1) is that the convictions falling within the rule are not very probative of a witness's character for truthfulness and can be very prejudicial. The convictions that *are* probative --- those that involve dishonesty or false statement --- are and would remain automatically admissible under Rule 609(a)(2). The major expressed concern about Rule 609(a)(1) is that criminal defendants will be prejudiced by their prior convictions, to the point where they decide not to take the stand at all. The Committee was presented with accounts from public defenders nationwide attesting to the fact that broad use of impeachment under Rule 609(a)(1) has a substantial impact on whether the accused will testify at trial. The Committee was also presented with case studies indicating that courts in criminal cases have often allowed impeachment of defendants with inflammatory convictions, violence-based convictions, and most troublingly, convictions that are similar or identical to the crime with which the defendant is charged.

After discussion, a majority of the Committee was opposed to an elimination of Rule 609(a)(1). There was a consensus that a number of courts have erred in admitting convictions that should not have been allowed under the more-probative-than-prejudicial balancing test. But those mistakes did not, in the view of the majority, justify elimination of the rule. The Committee did, however, agree to consider an amendment to Rule 609(a)(1) that would tighten up the balancing test applicable to criminal defendants, by requiring that the probative value must *substantially* outweigh the prejudicial effect before a conviction not involving dishonesty or false statement can be admitted to impeach the accused. That tweak to the applicable balancing test may well encourage courts to more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence. The Committee will consider the proposed change to the balancing test at its next meeting.

## C. Prior False Accusations Made by Alleged Victims in Criminal Cases of Sexual Misconduct

The Committee considered a proposal for a freestanding rule covering prior false accusations by alleged victims in criminal cases of sexual misconduct. Currently, evidence of false accusations is governed by a scattered set of rules. Some courts apply Rule 404(b), other courts rely on Rule 412, and when the complainant who made a prior false complaint testifies at a sexual assault trial, Rule 608(b) comes into play. The Committee saw the value of having a single rule --

- set forth in the proposal as a new Rule 416 --- to cover the complex questions of admissibility of false accusations. But the Committee decided to defer consideration of any rule until research is conducted into how the states handle evidence of false accusations. False accusations in sexual assault cases obviously arise much more frequently in state courts. The Committee determined that research into state practices is advisable because the state experience might well show the costs and benefits of a single rule to cover evidence of false accusations.

## IV. Minutes of the Spring, 2024 Meeting

A draft of the minutes of the Committee's Spring, 2024 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Proposed amendment to Evidence Rule 801(d)(1)(A), with the recommendation that it be released for public comment.

Draft Minutes of the Spring, 2024 meeting of the Advisory Committee on Evidence Rules.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE**[1]

**Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

* * * * *

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

**(A)** is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~;

**(B)** is consistent with the declarant's testimony and is offered:

[1] Matter to be omitted is lined through.

**(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

**(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

**(C)** identifies a person as someone the declarant perceived earlier.

* * * * *

**Committee Note**

The amendment provides for substantive admissibility of inconsistent statements of a testifying witness. The Committee has determined, as have a number of states, that delayed cross-examination under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement

and the underlying subject matter, and the trier of fact "has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well-addressed by cross-examination and the factfinder's ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly

have produced, had [the declarant] 'affirmed the statement as his'").

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense. The rule is one of admissibility, not sufficiency.

The amendment does not change the Rule 613(b) timing requirement for introducing extrinsic evidence of a prior inconsistent statement.

# TAB 3B

**Advisory Committee on Evidence Rules**
Minutes of the Meeting of April 19, 2024
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 19, 2024 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

*The following members of the Committee were present:*
Hon. Patrick J. Schiltz, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Edmund A. Sargus, Jr.
Hon. Richard J. Sullivan
John S. Siffert, Esq.
James P. Cooney III, Esq.
Rene Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

*Also present were*:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Michael Mosman, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Marshall Miller, Esq., Department of Justice
Timothy L. Lau, Esq., Federal Judicial Center
Tom Byron, Esq., Chief Counsel, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Zachary Hawari, Esq., Rules Law Clerk
Melody Brannon, Esq., Federal Public Defender
Alden Dima, National Institute of Standards and Technology (NIST)
Timothy Blattner, NIST
Michael Majurski, NIST
Bruce Hedin, Hedin B. Consulting
Professor Peter Henderson, Princeton University
Claire Leibowicz, Partnership on A.I.

*Present Via Microsoft Teams*
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Andrea Roth, U.C. Berkeley
Professor Rebecca Wexler, U.C. Berkeley
Anna Roberts
Asees Bhasin

Cara Salvatore
Daniel Steen
James Comans
John Hawkinson
John McCarthy
Tim Reagan, Esq., Federal Judicial Center
Hon. Amy St. Eve
Professor Julia Simon-Kerr
Professor Maura Grossman
Meredith Mathis
Nate Raymond
Sai
Susan Steinman
Suzanne Monyak
Tejas Bhatt

## I. Welcome and Introductions

The Chair welcomed everyone to the meeting and specifically welcomed Judge Michael Mosman, the new Liaison from the Criminal Rules Committee, and Rakita Johnson, a new member of the A.O. staff, to the Committee. The Chair then recognized the U.S. Marshals Service to make a security announcement.

The Chair explained that the Committee would host a symposium on artificial intelligence (hereinafter "A.I.") and its application to the Evidence Rules in the morning followed by the regular Committee meeting to consider potential amendments to the Rules in the afternoon.

## II. Symposium on Artificial Intelligence

The Chair introduced the symposium on A.I. by informing participants that the Judicial Conference has been discussing the impact of A.I. on the federal courts and that Chief Justice Roberts has launched an initiative to help courts adapt to A.I. He explained that Evidence is on the cutting edge when it comes to the development and use of A.I. at trial.

The Reporter thanked Tim Lau for his invaluable help in assembling a panel of distinguished experts. He explained that the symposium would proceed in three parts: 1) Presentations from experts at the National Institute of Standards and Technology ("NIST") regarding the development of A.I. and the challenges it presents; 2) Presentations from experts on law and technology to build a bridge between the unique technical characteristics of A.I. and its practical impact on the legal system; 3) Presentations from legal academics with expertise in providing frameworks for the admissibility of A.I. evidence.

The first portion of the symposium featured presentations from Michael Majurski, Alden Dima, and Dr. Timothy Blattner of NIST. They discussed the development of A.I. and deep learning and the reliability and security risks it presents. They described the myriad technologies that are tracking, transcribing, altering, and generating information. They noted the obvious risks of A.I. hallucinations or deepfakes and the need for risk management assessment frameworks. These experts emphasized the importance of developing frameworks to ensure that A.I. systems are reliable and explainable and the ongoing work in that arena.

Professor Peter Henderson, Dr. Bruce Hedin, and Claire Leibowicz gave presentations regarding the legal issues generated by advancing A.I. technologies. They discussed the operation of A.I. in making existing content more accessible, in creating new content, and in analyzing data, emphasizing that A.I. may

produce inaccurate results because it is always working to fill in content and make predictions despite a lack of information. A.I. might translate foreign languages incorrectly, fill in non-existent details to enhance low resolution images, or generate hallucinated source material. The experts emphasized the importance of having access to all A.I. system inputs and outputs to assess reliability, and they described the obstacles to such access created by trade-secret protection. They further noted the difficulty in defining A.I. with any precision. The experts also emphasized the importance of ensuring accountability, transparency, competence, and effectiveness in evaluating the use of technology in the legal sphere and the need for lawyers to improve understanding regarding reliable use of technology in practice. These experts also described the use of deepfakes (or synthetic media) and the rapid increase in the sophistication, volume, and accessibility of deepfake generation. They explained that the risk of false allegations of deepfake evidence (with respect to authentic material) presented just as great a threat to the legal system as deepfakes themselves. They discussed the difficulty in detecting deepfake material with great accuracy given the constant improvement in deepfakes to respond to detection and described various methods for signaling the provenance of media proactively by placing an artifact in the media contemporaneously to demonstrate its authenticity. Widespread use of these artifacts will require collaboration between developers and creators to adopt authenticity infrastructure.

Professor Rebecca Wexler and Professor Andrea Roth from the U.C. Berkeley School of Law both made presentations regarding the problems of authentication of A.I. and other machine-generated output. Professor Wexler argued that there is no need to modify the Federal Rules of Evidence to account for the possibility of deepfakes. She traced the long history of forgery and the ability of the federal courts to account for forgery under existing standards of authentication, arguing that the possibility of deepfakes presents comparable concerns. She noted that Rule 901(b)(5) providing that an "opinion about a voice" is "sufficient" to authenticate media is one Rule that might need to be modified to address A.I. and the possibility of deepfakes.

Professor Roth focused her presentation on all machine-generated evidence and the need to amend the Federal Rules of Evidence to ensure the reliability of machine-generated output admitted into evidence, when not accompanied by an expert. Professor Roth explained that most machine-generated evidence is presented by a trial expert whose testimony is subject to Rule702. But she noted that *Daubert* is inadequate alone to validate the machine-generated output itself and that the use of a certification under Rule 902(13) allows the presentation of machine-generated evidence without a trial witness. Professor Roth emphasized the need for standards in the Federal Rules of Evidence to ensure the reliability of machine-generated output, to allow access to the programs to assess their reliability, and to permit the impeachment of machine output that is admitted at trial.

## III. Opening Business

The Chair opened the meeting of the Committee by thanking the panelists for their fantastic contributions on the daunting topic of A.I. He then asked for a motion to approve the minutes of the Committee's Fall 2023 meeting. A motion was made, seconded, and unanimously approved.

The Chair then offered a report on the January 2024 meeting of the Standing Committee. He explained that the Advisory Committee had no action items for approval at the Standing Committee meeting and that he had informed the Standing Committee of the Agenda for the Spring 2024 Advisory Committee meeting. The Chair reported that several Standing Committee members asked him about the proposal to adopt a new Rule 416 on prior false accusations and expressed interest in seeing a draft of the Rule.

The Reporter then noted that this meeting would be the last for Judge Schiltz as Chair of the Evidence Advisory Committee and that his service as Chair had been the latest accomplishment in his remarkable rulemaking career, that included service as Reporter to the Appellate Rules Committee and as a member of

the Standing Committee. The Reporter noted that the Evidence Advisory Committee had completed an unprecedented amount of work during Judge Schiltz's tenure as Chair, successfully drafting and proposing 7 amendments and new Rule 107. The Reporter remarked that it had been an honor to work alongside Judge Schiltz. The Reporter presented Judge Schiltz with a book containing the amendments passed during his time as Chair as a token of appreciation.

Judge Schiltz explained that his work in rulemaking has been a highlight in his career. He opined that the Federal Rules of Evidence are the best of all the rules to work on, due to the important policies and rights they protect and ensure. He noted that the Advisory Committee operates as all government should, with an emphasis on meticulous research and a good-faith effort to find solutions for difficult problems. Judge Schiltz said he would miss the work.

Professor Coquillette commented that Judge Schiltz had also been an example of how to be a great Reporter during his time with the Appellate Rules Committee. Judge Bates agreed that it has been a joy to work with Judge Schiltz in his time as Chair of the Evidence Advisory Committee, noting how amazingly productive the Committee has been during his tenure.

## IV. Potential Amendments to Evidence Rules to Address Artificial Intelligence and other Machine-Generated Output

The Reporter invited discussion on the morning symposium regarding A.I. and the Evidence Rules. He reminded the Committee that there were no action items for consideration but that the Committee would be monitoring the development of A.I. and considering whether to advance any proposals for the Fall 2024 meeting.

He called the Committee's attention to proposals to amend Rule 901(b)(9) and to adopt a new Rule 901(c) on page 18 of the Agenda materials that would allocate burdens when parties concede that A.I. evidence is being used and that would place the burden on a party objecting to evidence on the grounds that it is a deepfake. One Committee member noted that proposed Rule 901(b)(9)(B) would operate "if the proponent concedes" that an item was generated by A.I. The Committee member suggested that language should be replaced with "if the court finds" to be consistent with the operation of the Rules generally. Another Committee member commented that he got the sense from the experts during the symposium that the most helpful protection in the A.I. context would come from allowing the opponent of the evidence to test the A.I. The Chair noted that trade secrets often prevent this kind of testing and that an approach that required testing would end up excluding the evidence as a result. One Committee member suggested that exclusion might be appropriate if there could be no testing. The Chair responded that a testing requirement could eliminate commonly admitted and crucial evidence, such as DNA evidence.

Another Committee member noted that Rule 901 governs authenticity but that there really are two problems with any machine or A.I. generated output. There is an authenticity concern but also a separate reliability concern. He commented that the reliability concern would need to be addressed through a provision like new Rule 707 outlined on page 25 of the Agenda materials. The Chair agreed that a provision that addresses authenticity by requiring a showing of reliability is mixing apples and oranges. He further noted that proposed Rule 901(c) on page 18-19 of the Agenda materials would allow a judge to admit evidence whose probative value outweighs prejudicial effect *after* its opponent has shown by a preponderance that the evidence had been "fabricated or altered in whole or in part." He queried how a judge could ever admit evidence that had been shown to be "fabricated" under the proposed balancing test.

The Reporter noted that original Rule 901(b)(9) included an accuracy requirement that did not necessarily fit into an authentication rule and that likely belonged in a separate provision like Rule 707, but

that it would be hard to remove it now. The Reporter said that the existing Rule 901(b) proposals could be reworked.

Another Committee member noted the contrast between the position of Judge Grimm and Professor Grossman, who argue that the Federal Rules of Evidence need a provision to address A.I. because A.I. is so distinct from anything that has been encountered before, and the position of Professor Wexler, who argues that dispute resolution has been dealing successfully with allegations of fakery for hundreds of years and that deepfakes can be handled under existing Rules in the same way that allegations of forged handwriting are managed. This Committee member suggested that there are very few cases dealing with A.I. evidence at this point and that the Committee may need more data to determine how serious a crisis A.I. presents for courts before proceeding with any amendment proposals. The Reporter agreed that there are very few cases addressing the issue but suggested that the Committee might want to get ahead of an onslaught of anticipated cases. Peter Hedin noted that there is a distinction between analytical A.I. and generative A.I. He suggested that DNA analysis relies upon algorithms considered to be A.I. and is routinely admitted into evidence. It is the issue of generative A.I. and specifically deepfakes that is new to the courts.

The Committee member commented that he would like to wait to see how judges handle A.I. evidence before proposing amendments to the Federal Rules of Evidence. He argued that it remains to be seen whether A.I. will cause a crisis for the courts or whether federal judges already possess the tools they need to handle this information. The Reporter noted that similar concerns arose with the advent of social media and that the Committee took a wait-and-see approach that turned out to be justified. The federal courts have had little trouble navigating the admissibility of social media evidence using the existing authentication rules. Another Committee member noted that proposed Rule 707 on page 25 of the Agenda materials was more appealing to deal with the reliability of machine-generated output. Mr. Lau cautioned that the term A.I. may not be capable of definition and that it may be undesirable to import that terminology into the Federal Rules of Evidence. The Reporter agreed, suggesting that other, more flexible terminology might be employed such as "synthetic." Professor Roth also noted that the concern over an opponent's lack of access to the software behind machine-generated output would be reduced if independent bodies such as NIST were given access to perform validating audits.

The Reporter reviewed the various proposals contained on pages 18-26 of the Agenda materials. He opined that Rule 902(13) represents a simple certification provision that need not contain all the authentication requirements if it is tied to other amendments to the authentication provisions. He suggested that there would be no need for the amendment to Rule 902(13) on page 28. Professor Roth suggested that judges likely subject machine-generated evidence to *Daubert*-like standards but that there is no authority for a trial judge to do that in the Rules absent a testifying expert. She explained that proposed Rule 707 would authorize judges to subject machine-generated output to the Rule 702 reliability requirements even in the absence of an expert.

A Committee member opined that trial judges already possess the tools necessary to regulate this type of evidence. She recounted a case in which a city medical examiner refused to provide source code supporting DNA evidence to a defendant in which the judge ordered the source code produced under a protective order. The Committee member suggested that trial judges already have the tools necessary to ensure that machine-generated results are valid and reliable. Another Committee member asked how that approach would work with a third-party private vendor. The Committee member responded that private companies would provide the code if it meant that their results would not be admissible in evidence otherwise. The Reporter suggested that most trial judges do not require the production of source code and that perhaps, an amendment could prompt more trial judges to do so.

Judge Bates asked whether a rule like proposed Rule 707 would apply to basic scientific instruments that are well accepted in federal court. The Chair replied that Rule 707 would apply to even basic

instruments because their results are "machine-generated." He explained that the foundation requirement of Rule 707 would apply to everything, even blood-alcohol analysis. The Chair expressed concern that the proponent of even basic and well accepted machine output would have to proceed through a full *Daubert* analysis every time an opponent objects to that output. He suggested that a rule defined as broadly as the Rule 707 proposal would overwhelm trials and pose a big problem for judges and litigants. The Chair noted that trial judges were able to navigate the admissibility of social media evidence by requiring some basis for an objection to authenticity before proceeding with an assessment of falsification in the absence of any Rules amendments prescribing a procedure. Another Committee member inquired whether an amendment could draw a distinction between systems in everyday use – such as a clock – and forensic systems – such as facial recognition software. Professor Roth suggested that basic machine-generated output like radar guns had been subjected to reliability review for decades and had long since been accepted. Similarly, basic machine-generated receipts would easily pass muster.

The Reporter stated that he would work on a version of Rule 707 for review at the Fall meeting that would address concerns of overbreadth and its application to basic instruments. He stated that he would look at Rule 901(b)(5) that accepts an opinion about a voice as sufficient to authenticate a recording in light of deepfake possibilities as well. The Reporter explained that his current instinct was not to amend Rule 901(b)(9) to include the reliability requirement there. The Chair agreed, noting that it would not work to import reliability into the authentication rules. Judge Bates opined that it may not be possible to leave Rule 901(b)(9) alone in amending the Rules to deal with machine-generated output when Rule 901(b)(9) currently includes an "accuracy" requirement. The Reporter said he would focus on a Rule 707 proposal but would not drop a potential amendment to Rule 901(b)(9). He promised to communicate with Judge Grimm and Maura Grossman about a Rule 901(b)(9) revision.

## V. Potential Amendments to Federal Rule of Evidence 609

The Reporter introduced the discussion of Rule 609 by reminding the Committee that Professor Jeff Bellin made a presentation to the Committee at its Fall 2023 meeting in which he proposed the repeal of Federal Rule of Evidence 609 – the Rule that authorizes the impeachment of witnesses with their prior convictions. The Reporter explained that the Committee had not expressed an interest in repealing Rule 609 altogether but had expressed an interest in exploring modifications to Rule 609(a)(1) – the provision that allows impeachment of testifying witnesses with prior felony convictions subject to balancing. He reminded the Committee that Rule 609(a)(1) contains a balancing test more protective than Rule 403 when applied to admissibility of convictions of an accused. That test --- that the probative value must outweigh the prejudicial effect --- was designed to protect the rights of criminal defendants who are subject to unique prejudice when their prior felony convictions are revealed to the jury.

The Reporter explained that the problem with the Rule 609(a)(1) balancing test applicable to testifying criminal defendants is that federal courts are not applying it properly. He referred the Committee to the case law digest behind Tab 5 of the Agenda materials showing that federal courts are properly excluding prior similar convictions of testifying defendants in only approximately 20% of cases. Because the federal courts have not excluded the prior convictions of testifying criminal defendants that bear close similarity to the charged offense, the Reporter proposed the complete abrogation of Rule 609(a)(1) that permits felony conviction impeachment (with a corresponding amendment to Rule 608(b) to prevent use of that provision to impeach with convictions excluded under Rule 609). The Reporter explained that such an amendment would eliminate felony conviction impeachment of all witnesses, not only criminal defendants; and it would leave intact Rule 609(a)(2), providing for automatic impeachment of all witnesses with dishonesty convictions. He noted the legislative history behind Rule 609, explaining that Congress was only one vote away from eliminating felony conviction impeachment for crimes that do not involve dishonesty or false statement when Rule 609 was originally enacted.

The Reporter then described the many reasons for eliminating felony conviction impeachment. First, he noted that the felonies not already covered by the dishonesty provision in Rule 609(a)(2) lack probative value with respect to a witness's truth-telling. Violent crimes or drug offenses tell a jury little about a witness's capacity for lying. Further, the Reporter emphasized that several states have limited prior conviction impeachment due to concerns about its limited probative value and potential for severe prejudice. Most significantly, the Reporter highlighted data showing that felony conviction impeachment prevents criminal defendants from exercising their constitutional right to testify. Given the threat to criminal defendants' constitutional rights, the Reporter proposed that Rule 609(a)(1) should be abrogated. He explained that it would be unfair to allow the defendant to impeach prosecution witnesses with prior felonies if the prosecution is barred from using the defendant's felony convictions. He suggested that there is no reason to retain felony conviction impeachment in civil cases if it is eliminated in criminal prosecutions. The Reporter informed the Committee that the American Association for Justice had advocated the abrogation of Rule 609(a)(1), arguing that plaintiffs are denied recovery on viable civil claims by juries because of the plaintiffs' past criminal convictions.

If Rule 609(a)(1) were abrogated, the Reporter noted that corresponding amendments to Rules 609(b) and 608(b) would be needed to prevent the admission of felony convictions and underlying acts through those provisions. The Reporter directed the Committee to drafting options to accomplish these objectives on page 257 of the Agenda materials. He noted that it would be a good idea to limit Rules 609(b) and 608(b) even without complete abrogation of Rule 609(a)(1). The Reporter pointed the Committee to pages 261-263 of the Agenda materials for differing versions of amendments to Rule 609 to abrogate felony conviction impeachment. One version would retain the existing structure of Rule 609(a) and another version would restructure the Rule completely to avoid leaving an open subsection where Rule 609(a)(1) felony impeachment once was.

The Reporter then invited Melody Brannon, the Federal Public Defender from the District of Kansas, to share her experience with Rule 609(a)(1) impeachment. Ms. Brannon described her substantial experience over more than three decades as a federal defender. She explained that the possibility of felony conviction impeachment has an outsized impact on a criminal defendant's constitutional rights, not merely the right to testify at trial, but also the right to plead not guilty and go to trial at all when a defense is dependent on the testimony of the criminal defendant. Ms. Brannon also argued that the introduction of a criminal defendant's prior felony convictions lowers the government's burden of proof. She emphasized that the impact of a felony conviction is felt long before a trial in a holding cell in considering a plea offer when a defense lawyer informs a defendant that their priors will be admissible if they testify. Ms. Brannon explained that she advises clients that their prior felony convictions are highly likely to be admitted if they testify given the liberal application of Rule 609(a)(1) and that they should expect to be impeached. Defendants are not concerned about the credibility costs, but rather the propensity use of their priors. Ms. Brannon explained that defendants have difficulty understanding why their prior convictions will still be used against them after they have served their debt to society for those crimes. She explained that the prejudice from Rule 609(a)(1) impeachment is enhanced for her clients of color due to their disproportionately higher rates of prior conviction. Ms. Brannon highlighted the widespread criticism of felony impeachment and the empirical data revealing its improper propensity effect on jurors. She noted that, in contrast to the voluminous data showing the dangers of felony impeachment, there is no empirical data suggesting that felony conviction impeachment increases the reliability of verdicts. Ms. Brannon opined that the existing Rule 609(a)(1) balancing test is not protecting criminal defendants and that similar prior convictions are frequently admitted even in close cases where they are used for propensity and have an impact on the outcome. She suggested that there is no effective way to limit the use of prior felony convictions to impeachment and to prevent propensity use once they are admitted because human jurors are incapable of ignoring their propensity relevance. Ms. Brannon closed by explaining that the availability of Rule 609(a)(1) impeachment is preventing criminal defendants from testifying, thus preventing them

from going to trial, resulting in guilty pleas even in cases where there is a viable defense. She urged the Committee to publish a proposed amendment abolishing Rule 609(a)(1) impeachment for public comment.

One Committee member asked Ms. Brannon whether she favored abrogating felony conviction impeachment of government cooperating witnesses, as well as for defendants, and whether the loss of that impeachment evidence for government witnesses would undermine an effective defense. Ms. Brannon responded that she favors the complete abrogation of felony-conviction impeachment, including for government witnesses. She explained that losing felony-conviction impeachment of government witnesses would be well worth it to eliminate similar impeachment of criminal defendants. She explained that there are many ways to attack the credibility of cooperating government witnesses. Many have favorable plea deals which suggest their bias. Many have also made prior inconsistent statements that can be used. Ms. Brannon opined that these methods of impeachment are far more effective than showing that a government witness has a prior manslaughter conviction, which tells the jury little about that witness's truthfulness. She stated that preserving a criminal defendant's right to testify was well worth the loss of this impeachment evidence with nonexistent probative value. A Committee member commented that if you ask any criminal defense attorney whether she would rather retain felony-conviction impeachment of government witnesses or abrogate Rule 609(a)(1) impeachment and eliminate such impeachment of defendants, every defense attorney would choose complete abrogation.

Another Committee member asked whether prosecutors would simply increase their efforts to admit a defendant's past crimes under Rule 404(b) if Rule 609(a)(1) impeachment were eliminated. The Reporter responded that would not be a collateral consequence of abrogation because Rule 404(b)(1) would continue to limit efforts to admit prior convictions and because prosecutors *already* routinely attempt to admit a defendant's prior convictions through both Rule 404(b) and Rule 609 if they can. He opined that there would be no effect on Rule 404(b) if Rule 609(a)(1) were abrogated.

Another Committee member suggested that some attacks on a witness for bias include some reference to the witness's criminal history as in the example of a government cooperator who is biased because he was charged in connection with the case and has accepted a plea deal to testify for the prosecution. The Committee member suggested that any rule change ought to ensure that such attacks on bias remain available. The Reporter responded that attacks on bias are always allowable, and that the abrogation of Rule 609(a)(1) would not alter such bias impeachment. Ms. Brannon agreed that the elimination of Rule 609(a)(1) would not inhibit bias impeachment. She suggested that a witness might be impeached with a violation of probation, for example. The Chair inquired whether it would be okay to have a criminal defendant impeached with a violation of the conditions of supervised release. Ms. Brannon responded that a defendant's violation of the terms of supervised release could be probative of dishonesty where that defendant promised to abide by the conditions of supervised release and then broke those promises. If Rule 609(a)(1) were abrogated, the Chair asked whether the government could impeach a testifying criminal defendant for bias on cross-examination by asking: "You've been in prison before, you'd do anything to avoid going back wouldn't you?" Ms. Brannon replied that a defense lawyer would definitely move in limine to prevent such cross questioning referencing criminal history but that such impeachment would be more probative of honesty than simply the fact of some prior felony.

Another Committee member suggested that the Committee would throw the baby out with the bathwater if it were to eliminate felony conviction impeachment altogether. That member argued that Rule 609(a)(1) is well-written and that the only problem with it is that some judges are not applying it well. The member explained that prior violent felonies should simply not be admitted through the existing balancing test because the probative value to show dishonesty is so low. This Committee member explained that Rule 609(a)(1) does help defendants undermine the government's cooperating witnesses and that it should not be eliminated. This member was not persuaded that felony-conviction impeachment affects a meaningful number of defendants and suggested that there were no trials in many violent crime cases even in the

absence of any prior convictions. This Committee member opined that Rule 609 is well-written and well-conceived and should not be changed at all.

The Chair queried whether there was any concern about abolishing Rule 609(a)(1) and allowing jurors to assume that testifying witnesses *lack* any criminal history. Jurors might assume that, if a witness had prior criminal convictions, he or she would have been asked about them. The Chair wondered whether it would make sense to instruct juries that they are not to make any assumptions about criminal history and that witnesses may or may not have prior convictions.

Ms. Shapiro expressed confusion about concerns regarding prior conviction impeachment for violent crimes such as rape. She opined that such convictions would be excluded by the existing balancing test in Rule 609(a)(1), both because they lack probative value as to dishonesty and due to the high likelihood of prejudice. Ms. Shapiro explained that the current rule would only admit other types of convictions that would have relevance to the defendant's credibility as a witness. Ms. Brannon explained that there is a very narrow subset of convictions that courts will not admit under Rule 609(a)(1). The Reporter agreed, noting that convictions for rape and other violent crimes usually do not get admitted under the existing balancing test, but that even those convictions have been occasionally admitted, as seen in the case digest. Ms. Shapiro responded that this would result from improper application of the existing rule rather than a problem with the language of Rule 609. Mr. Miller agreed, arguing that Rule 609(a)(1) as currently drafted empowers the right people to determine the probative value of a prior felony conviction – federal district court judges. He argued that the protective balancing test that requires the probative value of the prior conviction to outweigh prejudice to the defendant strikes the right balance. If trial judges are applying that test improperly, Mr. Miller suggested that there could be opportunities for judicial education but that a rule amendment was not the correct response.

The Chair agreed that if the existing Rule 609(a)(1) balancing test worked as it was intended to, the Rule would likely operate well. He suggested that an amendment to Rule 609(a)(1) that modified the balancing test would improve application of the Rule. For example, instead of requiring the probative value of a criminal defendant's prior felony conviction to simply "outweigh" any unfair prejudice, the balancing test might be rewritten to require that the probative value "substantially outweigh" any prejudice to the defendant. The Chair suggested that such a modification to the balancing test --- combined with instructive language in the committee note --- could get judges to narrow the range of prior convictions they admit against defendants. Mr. Miller responded that he did not have any sense of whether problems applying the existing Rule 609(a)(1) balancing test are widespread. He remarked that he has seen trial judges diligently apply the Rule 609 test.

The Reporter explained that he had contemplated the idea of a modified balancing test and circulated a draft of a revision to Rule 609(a)(1) that would alter the balancing test required to admit a prior felony conviction against a criminal defendant such that it would be admitted only if its probative value substantially outweighs the prejudice to the defendant. The Chair noted that the Committee would not be taking any votes on the newly circulated proposal.

Judge Bates expressed appreciation for the information about prior conviction impeachment provided by the Federal Public Defender and queried whether a survey from the Federal Judicial Center could provide additional empirical data to help inform the Committee's deliberations concerning Rule 609. The Reporter asked what information could be collected by the FJC and noted that it would be difficult to devise a test of the existing operation of Rule 609. A Committee member agreed with Judge Bates, suggesting that he is skeptical of the anecdotal evidence regarding how frequently Rule 609, in particular, prevents a criminal defendant from testifying. He noted that defendants plead guilty for other reasons, particularly in cases in which there is strong evidence of guilt, and they want to get a three-point reduction at sentencing.

The Reporter suggested that there is sufficient information to support an amendment even without a survey. He analogized the Rule 609 balancing proposal to the recent amendment to Rule 702. Rule 702 was drafted correctly and well, but the cases revealed that some federal courts were applying the wrong standard to admit expert opinion testimony. Rule 702 was amended to emphasize the proper standard and to remedy the problems in the case law. The Reporter explained that the case digest on Rule 609(a)(1) shows improper application of the Rule 609 balancing test, and that this improper application justifies a modest modification to Rule 609(a)(1) to require the probative value of a felony conviction to "substantially outweigh" any prejudice to a criminal defendant at the very least. A Committee member asked whether a new Committee note would accompany the balancing amendment. The Reporter explained that there could be no modification to the Committee notes in the absence of an amendment to rule text, but that the Committee could and would include a new note if it proposed an amendment to the balancing test in the Rule.

Mr. Lau said he would explore the possibility of an FJC study on prior conviction impeachment of criminal defendants. He stated that he was not sure that a survey would be helpful and that it would be better to have information regarding the number of Rule 609 objections made by defendants and the rulings. The Reporter asked whether the FJC would be able to include data from unpublished opinions. Mr. Lau noted that that could be explored and that databases like Westlaw are not necessarily complete. The Chair noted that many Rule 609 rulings are not written down in an opinion because they are made on motions in limine. He inquired whether the FJC could coordinate with the Sentencing Commission to ascertain plea rates among defendants with and without prior convictions. The Chair asked Mr. Lau to check with the FJC regarding the design of a Rule 609 study that might be helpful to the Committee.

Mr. Valladares opined that there is a clear problem with Rule 609 as it is applied to criminal defendants and that it needs to be addressed even if the problem is one of application. He noted that lead academics identify Rule 609 as a significant problem and that the Advisory Committee needs to act to remedy the clear injustice being done by the existing Rule. The Chair asked whether a more protective balancing test with a strong Committee note cautioning against admissibility of certain convictions would be a helpful remedy. Mr. Valladares remarked that Professor Bellin had proposed abrogating Rule 609 in its entirety in his Fall 2023 presentation to the Committee and that the proposal to retain Rule 609(a)(2) dishonesty convictions and abrogate only Rule 609(a)(1) was already a compromise position that cut back on Professor Bellin's proposal. Mr. Valladares urged the Committee to consider abrogation of Rule 609(a)(1) as the appropriate fix, though he agreed that a modification of the balancing test would be better than nothing. He argued that the Committee had to do something to address the harmful impact of the Rule on criminal defendants. Another Committee member agreed, noting that the American College of Trial Lawyers strongly supports a Rule 609 change of some kind.

A Committee member opined that defense lawyers will never let a criminal defendant testify even in the absence of Rule 609(a)(1) impeachment. Another Committee member responded that the problem is that Rule 609(a)(1) creates a true inability to testify for a criminal defendant. The Reporter reminded the Committee that the caselaw clearly shows that criminal defendants do testify and do get impeached with their prior convictions even when those convictions should not pass the Rule 609(a)(1) balancing test, thus justifying a rule change.

Ms. Shapiro suggested that all the evidence regarding defendant impeachment with prior convictions is anecdotal and that prosecutors report that it is indeed very difficult to admit violent felonies to impeach a criminal defendant. She explained that the caselaw digest presents an incomplete picture of the true practice under Rule 609 because it omits the trial court rulings that exclude such felonies that are then never used to impeach the defendant and never challenged on appeal. She noted that it would be helpful to study the states in which prior conviction impeachment is not allowed to ascertain whether criminal defendants testify at a higher rate in those jurisdictions. The Chair noted that the Eighth Circuit opinions appear to

permit prior conviction impeachment quite liberally but that he excludes them in his courtroom and those exclusion decisions are missing from any record of the frequency of Rule 609 impeachment. Mr. Lau promised to explore the kind of data he might be able to obtain to get a sense of practice under Rule 609 and its effect on criminal defendants in different jurisdictions.

Another Committee member asked whether different trial judges might disagree about which felony convictions are probative of dishonesty even if the Rule 609(a)(1) balancing test were strengthened. The Chair responded that there is disagreement in that regard, with some judges viewing *any* conviction as probative of a willingness to testify untruthfully. The Committee member noted that some of the data regarding rates of testimony among criminal defendants was quite old (dating back to the 1950's) and that it would be helpful to have more recent data.

Committee members were then polled about potential amendments to Rule 609. One noted that he was largely persuaded by the arguments of the Department of Justice and that in his experience, prosecutors have a difficult time admitting Rule 609 convictions against criminal defendants. He remarked that he was not certain he would oppose a balancing amendment, but expressed concern that Congress may not favor a change to Rule 609. Another Committee member agreed that a criminal defendant's convictions were not routinely admitted in his experience but opined that it would be problematic if courts were approaching this kind of impeachment differently. He reported that he was open to further consideration of an amendment but not yet persuaded. Another Committee member thought that adding the word "substantially" to the Rule 609(a)(1) balancing test would be a helpful amendment that would send a message but that he would like to see more data. Another Committee member remarked that the member would be opposed to abrogation of Rule 609(a)(1) but could consider a modified balancing standard. Another suggested that admission of prior felony convictions differs from judge to judge and that a modified balancing standard could be a simple way to alert judges who are admitting them too freely to adjust their approach to this evidence. Another Committee member opined that criminal defendants are unlikely to take the stand even if they cannot be impeached with prior felony convictions, but expressed willingness to consider a modification to the balancing test in Rule 609(a)(1). Another Committee member argued that convictions that do not fall within the dishonesty category of Rule 609(a)(2) have no probative value in showing lying and so abrogation of Rule 609(a)(1) is a superior option. That said, the Committee member stated that a more stringent balancing test could be helpful for judges who find some probative value in prior convictions that are not dishonesty convictions. The Reporter explained that he would favor abrogation because the probative value of a non-dishonesty conviction will always be substantially outweighed by prejudice to a criminal defendant. That said, the Reporter explained that a subtle change to the balancing test would be an improvement.

Judge Bates agreed that the proposal to modify Rule 609 deserves serious consideration but that he thought additional data from the FJC would be important in determining an appropriate standard. He noted that we are in a place where only 7 states deviate from the Federal Rule, meaning that 43 states still adhere to felony conviction impeachment of even criminal defendants. Judge Bates noted that the Supreme Court would likely consider Rule 609 to be the substantial majority position. The Reporter reminded the Committee that only one state had a rule on illustrative aids, but that the Committee proposed new Rule 107 to regulate them, nonetheless. Judge Bates replied that it would still be helpful to see the data that the FJC could uncover. A Committee member suggested that seeing criminal trial and defendant testimony rates in states without felony conviction impeachment could be useful information.

The Reporter asked the DOJ representatives for their thoughts on the modification to the Rule 609 balancing test. Mr. Miller responded that the Department would have its subject matter experts review the balancing proposal. The Chair suggested that if violent felony convictions are already not being admitted under the current version of Rule 609, as the Department suggested, making the test more rigorous should not affect outcomes.

The Chair explained that the Reporter would bring back a proposal to modify the Rule 609(a)(1) balancing test, along with any FJC data, at the Fall 2024 meeting. He noted that there would need to be overwhelming approval to proceed with a proposal to abrogate Rule 609(a)(1) altogether and that absent such a groundswell of support for abrogation, the Committee would proceed with consideration of a balancing proposal.

## VI. Proposal to Amend Rule 801(d)(1)(A)

The Chair next introduced a proposal to eliminate the "oath" and "prior proceeding" requirements from Rule 801(d)(1)(A), so that all prior inconsistent statements made by testifying witnesses would be admissible for their truth, as well as to impeach. This would treat prior consistent and inconsistent statements of witnesses similarly. When admitted, they are admitted for any purpose for which they are relevant.

The Chair explained that prior inconsistencies are routinely admitted at trial to impeach a witness's testimony, but that very few of them are admissible for their truth because of the oath and prior proceeding requirements. Only when the prosecution has called a witness before a grand jury in a criminal case, for example, would that witness's prior inconsistent statement be admissible to prove the truth of what it asserts. This means that the trial judge must give a limiting instruction for the vast majority of prior inconsistent statements that are admitted, cautioning the jury to use a statement for its impeachment value but not to rely upon it substantively. The Chair opined that juries have difficulty understanding these instructions and often do not follow them. Therefore, many of these prior inconsistencies are in fact being used substantively, but we pretend that they are not. He explained that an amendment that frees a jury to rely upon prior inconsistent statements for their truth aligns the hearsay rule with the reality that jurors often do rely upon these statements, ensuring that the Federal Rules of Evidence honestly match the reality in the courtroom. The Chair reminded the Committee that it had proposed an amendment to Rule 613(b) regarding extrinsic evidence of prior inconsistent statements to match the Rule's requirements with the practice at trial.

The Chair emphasized that there is no hearsay danger in allowing these statements to be relied upon for their truth where the declarant must be on the stand and subject to cross-examination regarding the prior statement. The jury will hear the witness's explanation for their inconsistency and choose the version it finds credible. The Chair closed by noting that 15 states have a similar rule that allows all prior inconsistent statements to be admitted for their truth. He stated that the question for the Committee is whether to publish the proposed amendment appearing on page 224 of the Agenda materials that would allow full use of all prior inconsistent statements. The Reporter noted that the amendment would be quite straightforward, simply eliminating the "oath" and "prior proceeding" requirements from existing Rule 801(d)(1)(A). He also reminded the Committee that these are statements that are already admitted, and that the amendment would simply permit the jury to make fuller use of information it already possesses.

One Committee member expressed support for the proposal but questioned whether the change would allow litigants to defeat summary judgment on the civil side with prior inconsistent statements that would count as substantive evidence. The Chair opined that this would not allow parties to foreclose summary judgement by creating inconsistent statements. He explained that when an opponent of summary judgment seeks to file a new affidavit contradicting prior deposition testimony given in the case (that would otherwise justify summary judgment), courts routinely strike the affidavit as a sham affidavit. Another Committee member expressed concern that substantive admissibility of prior inconsistencies could undermine summary-judgment practice, suggesting a scenario in which a plaintiff's deposition says one thing that would justify summary judgment against the plaintiff but that a third-party witness might file an affidavit stating that the plaintiff told the third party something different/inconsistent that would defeat summary

judgment. If that prior inconsistency is now substantive evidence rather than simply impeachment, it could alter summary judgment practice and outcomes. The Chair suggested that it is already inappropriate to grant summary judgment in the face of evidence that a deponent's version of events is contradicted. He further questioned whether making it easier for defendants to win summary judgment should be a goal of rulemaking for the Federal Rules of Evidence.

Another Committee member noted that the rule change would also have significant consequences in criminal cases. He posed a hypothetical victim who reports to police following a domestic disturbance that her spouse hit her but then testifies at trial that there was no assault and that she fell. Under the current Rule 801(d)(1)(A), the victim's prior inconsistent statement to police is not admissible for its truth and may be used only to impeach the victim at trial. Under the proposed amendment, the victim's prior statement could be used by the prosecution for its truth to convict the defendant which is a significant change. The Chair expressed skepticism that any prosecution would rest *solely* on a prior inconsistent statement. In the domestic-violence context, for example, there is almost always evidence of loud arguments or broken furniture or bruises on the alleged victim. The Chair also reminded the Committee that the victim's statement in this scenario is given to the jury under the existing Rules along with a limiting instruction cautioning them not to rely upon it. He opined that juries do rely upon such statements for their truth, but we operate under the fiction that they do not. The amendment would in no way alter access to prior statements that jurors already enjoy. The Committee member remarked that prosecutors do not currently bring the case with the recanting victim to trial because of the lack of admissible evidence and that the substantive admissibility of prior inconsistencies could affect charging and could result in more of these cases being brought. The Reporter noted that the prosecution would get a benefit in being able to use all prior inconsistent statements for their truth, but that it would be a benefit all parties would enjoy across the board – any party could introduce the prior inconsistent statement of any testifying witness for its truth. The Reporter also stated that in the hypothetical given --- a case of domestic violence --- it is good policy to find substantive admissibility in the statement that is closer to the event, and that the current rule would mean that the domestic violence prosecution could not be brought.

Another Committee member noted that trial judges rigorously enforce limits on impeaching one's own witness with a prior inconsistency not admissible for its truth as an abuse of Rule 607. The Reporter commented that another advantage of the proposed amendment is that it would do away with concerns about a party abusing its right to impeach with prior inconsistencies by calling witnesses it knows will not provide helpful information only to impeach with a prior inconsistency that is not admissible for its truth. If all prior inconsistent statements are admissible for their truth, there can be no abuse of the right to impeach one's own witness and trial judges will no longer need to plumb a prosecutor's motives in calling a witness to the stand in assessing the admissibility of prior inconsistent statements.

One Committee member suggested that the change could be helpful if jurors cannot appreciate the distinction between impeachment and substantive use of prior inconsistent statements. He noted that there could be a benefit to criminal defendants who can argue that the prior inconsistent statements of an informant, for example, are admissible for their truth. Another Committee member explained that a criminal defendant has no burden of proof at trial and, thus, does not benefit from substantive use of prior statements. The Reporter suggested that it may still be helpful for a defendant to be able to argue that the facts given in a prior statement are accurate. Another Committee member agreed that the Rules are disingenuous about the current limit on prior inconsistent statements with many being used for their truth by juries. He commented that the proposed amendment would do away with mini-trials concerning the motivations for calling a forgetful or recanting witness who has made prior helpful statements. One additional Committee member opined that it would be beneficial to simplify Rule 801(d)(1)(A) given that prior inconsistent statements are already admitted and given to juries.

Ms. Shapiro addressed the alternate version of the amendment on page 225 of the Agenda materials that includes a corroboration requirement for prior inconsistent statements, arguing that this requirement should not be adopted because it is unnecessary and detracts from the simplicity of the proposal. The Chair agreed, explaining that the corroboration alternative had been included to address any concerns about a prior inconsistency serving as the sole basis for a conviction. The Reporter noted the consensus among Committee members that a corroboration requirement is not necessary or advisable, stating that the corroboration alternative was not on the table.

Ms. Shapiro informed the Committee that she had collected feedback from DOJ lawyers regarding a potential change to Rule 801(d)(1)(A). She reported that the civil litigators favored the change and expressed no concerns about summary-judgment practice as a result of an amendment. She explained that prosecutors expressed concerns about the amendment, however. Prosecutors noted that prior inconsistent statements that are not given under oath and at a prior proceeding may be unreliable and that jurors should not be permitted to choose such questionable hearsay over the trial testimony given by the witness. Ms. Shapiro explained that cross-examination of the witness regarding the prior inconsistency may be ineffective and inadequate, particularly when the witness denies making the prior statement or claims a lack of memory. The Reporter responded that jurors are frequently permitted to elevate hearsay over trial testimony concerning an event, such as when a witness's excited utterance differs from her trial testimony. Ms. Shapiro noted that hearsay statements admitted through other exceptions, like the excited utterance exception, enjoy special guarantees of reliability that justify their use and that a witness's prior inconsistent statement (not given under oath and at a prior proceeding) enjoys no special reliability. She further emphasized that we expect juries to comprehend and follow instructions throughout the trial process, such that concerns about limiting instructions in this one context cannot justify an amendment to Rule 801(d)(1)(A).

The Chair then inquired whether Committee members would favor publication of the proposed amendment to Rule 801(d)(1)(A). Mr. Valladares expressed a willingness to publish the proposal for the purpose of gathering feedback from the public comment process. Ms. Shapiro abstained from voting on behalf of the Justice Department. One Committee member expressed opposition to publication, explaining that jurors can and do follow instructions and that it is inappropriate to treat prior statements that are inconsistent with trial testimony like other reliable hearsay statements. Another Committee member concurred and opposed publication.

Another Committee member favored publication, explaining that he had practiced in a jurisdiction that allowed substantive use of all prior inconsistent statements and that it had posed no problems and had largely benefited prosecutors. Additional Committee members agreed that the Committee should publish the proposal for notice and comment. The Reporter reminded the Committee that the original Advisory Committee preferred and proposed substantive admissibility of all prior inconsistent statements. After all members had provided input, the vote was 6 Committee members in favor of publication, 2 members opposed to publication, and an abstention on behalf of the Justice Department.

The Chair noted that unanimity among Committee members was not necessary to publish a proposal and a decision was reached to publish the proposed amendment to Rule 801(d)(1)(A) appearing on page 224 of the Agenda materials. Ms. Shapiro recommended deleting the last sentence of the first paragraph of the proposed committee note providing that: "A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements." The Chair emphasized that eliminating limiting instructions was one of the major reasons for the amendment and that the note should retain the sentence. All agreed to retain the sentence but to delete the word "confusing" from it. Ms. Shapiro then highlighted a sentence in the second paragraph of the proposed Committee note stating: "Thus any concerns about reliability are well-addressed by cross-examination, the oath at trial, and the fact-finder's ability to view the demeanor of the

person who made the statement." She suggested that the reference to the "oath at trial" ought to be eliminated as unnecessary. The Reporter agreed to remove the reference to "the oath at trial" from the Note. The Chair noted that the proposal to publish the amendment would proceed to the Standing Committee in June.

## VII. Potential New Federal Rule of Evidence 416 Governing Prior False Accusations

The Chair next recognized the Academic Consultant, Professor Richter, to give a report on a proposal to adopt new Federal Rule of Evidence 416. Professor Richter directed the Committee to Tab 6 of the Agenda materials and reminded the Committee that Professor Erin Murphy had attended the Fall 2023 meeting and had proposed a new Rule 416 that would allow evidence of a person's prior false accusations to be admitted to suggest the falsity of a current accusation. The Committee had expressed interest in considering the proposal further. Professor Richter reported that the proposal presents some potential benefits but carries some serious risks that should be carefully considered by the Committee. She recommended that the Committee perform additional research if it was inclined to continue consideration of a false-accusations rule.

Professor Richter noted that prior false accusations come up primarily in sex-offense cases and consist of evidence that a victim allegedly falsely accused a different person of a sexual assault on a different occasion. She pointed out that the vast majority of sex-offense cases in which such evidence is at issue are prosecuted at the state level under state evidence rules. She also emphasized the existing empirical data suggesting that a very small fraction of sexual-assault accusations is false. So the problem does not arise frequently.

Professor Richter explained that admitting prior false accusation evidence under the existing Federal Rules of Evidence is complicated to say the least. Evidence that a victim has made a prior false accusation falls under Rule 404(b) as a person's "other crime, wrong, or act." Other acts are typically subject to the *Huddleston* standard of proof such that the proponent needs to present sufficient evidence from which a reasonable jury could find that the person made a prior accusation and that it was false. While there may be unique circumstances in which a victim's prior false accusations are admissible for a permitted purpose through Rule 404(b)(2), they are principally offered to show a victim's propensity to falsely accuse – meaning that evidence of prior false accusations should ordinarily be excluded under Rule 404(b)(1). If a victim testifies at trial, that opens her up to impeachment with prior dishonest acts under Rule 608(b), however. Subject to Rule 403, a defendant may ask a testifying victim about prior false accusations so long as the defendant has a good faith factual basis for the question. If a testifying victim denies the prior false accusation, the defendant may not admit evidence to prove it due to the ban on extrinsic evidence in Rule 608(b).

Whether a defendant seeks to admit evidence of a prior false accusation through Rule 404(b)(2) or to inquire on cross of a victim about such prior accusations, Rule 412 must be considered in sexual-offense cases. That provision protects alleged victims of sexual misconduct by excluding evidence of the victim's other sexual acts or sexual predisposition. The Advisory Committee notes to Rule 412 state that evidence of false accusations is not excluded by the Rule, and most courts agree that prior false accusations show a victim's prior lying behavior rather than prior sexual conduct. The standard of proving the falsity of a prior accusation to remove it from Rule 412's ambit is not clear in the caselaw. Finally, Professor Richter explained that a criminal defendant might have a constitutional right to present evidence of a false accusation or to impeach a testifying victim with such a false accusation in some circumstances.

Professor Richter called the Committee's attention to Rule 416 proposed by Professor Murphy on page 345 of the Agenda materials that would simplify and expand the admissibility of false-accusations evidence. The proposed new rule would allow "extrinsic evidence" of a person's prior false accusation in any case

(civil or criminal and not only in sexual-offense cases) when the falsity of the prior accusation and the person's awareness of its falsity have been established by a preponderance of the evidence. Thus, it would require a finding by the trial judge under Rule 104(a) of a knowing false accusation. The proposed rule would allow trial judges to consider the facts that a complaint was not pursued in the prior case and that the accused denied wrongdoing but provides that those facts are insufficient to establish falsity by a preponderance. Proposed Rule 416 would also require that the prior false accusation was "similar in nature" or "of equal or greater magnitude" to the current accusation. The rule would require written pre-trial notice and compliance with Rule 412(c) where the prior false accusation involves sexual conduct of a victim. Lastly, the rule would specify that a defendant could admit prior false-accusations evidence even if the victim does not testify and could admit extrinsic evidence to prove the prior false accusation if the victim testifies and denies the prior false accusation on cross. Professor Richter noted the many drafting issues and options for crafting a false accusations rule explored in the Agenda materials on pages 345-351 should the Committee decide to pursue one. She noted that the Committee should carefully consider the costs and benefits of a new rule, however, before deciding whether to proceed.

Professor Richter explained that a new Rule 416 would streamline and simplify admissibility of false-accusations evidence and would eliminate the tortured path the evidence must currently take through at least five evidence rules. She noted that admissibility under the existing Federal Rules of Evidence could be considered both under and overinclusive. Because of the limitations on other-acts evidence in Rule 404(b) and on extrinsic evidence under Rule 608(b), it is nearly impossible to admit extrinsic evidence of a prior false accusation. This can be made more difficult in sexual-offense cases in which Rule 412 excludes evidence of a victim's prior acts. This framework may make it too difficult to admit prior false accusations in appropriate circumstances, especially when a criminal defendant could have a constitutional right to do so in certain cases. On the other hand, the current Rules may be too forgiving toward a victim's prior false accusations by requiring only proof sufficient for a jury to find falsity or a good-faith basis for believing an accusation to be false. Such low standards of proof may subject victims to prior-accusations evidence without sufficient findings that they were false. Professor Richter also noted work by esteemed Evidence scholar Ed Imwinkelried positing that false accusation evidence should be admissible in sex-offense cases to create symmetry between the admissibility of a defendant's prior wrongful acts of sexual misconduct under Rule 413 and an alleged victim's prior wrongful acts of false accusation. In sex-offense cases where credibility issues are often dispositive and where a defendant's prior acts are aired before the jury, Professor Imwinkelried has argued that admission of a victim's prior falsehoods is important to create a balanced presentation. Impeachment of a victim with such prior falsehoods is often ineffective without the ability to produce extrinsic evidence following a denial.

On the other hand, Professor Richter explained that there are some serious risks associated with a false-accusations rule. First, such evidence is almost exclusively proffered in sexual-offense prosecutions that are pursued almost entirely in state court, reducing the need for a federal rule on the matter. There are some limited avenues for admitting false-accusations evidence even through the existing Federal Rules, furthering undermining the need for a bespoke provision. More importantly, a rule that allows a victim's prior false accusations to be admitted to show the falsity of a current accusation reverses longstanding prohibitions on propensity evidence and on extrinsic evidence of a testifying witness's dishonest acts. There is no evidence suggesting that victims (of sexual assault in particular) are unusually likely to fabricate accusations or to falsely accuse people repeatedly to justify the reversal of the ban on propensity evidence with respect to their conduct. Indeed, the evidence that does exist suggests a low rate of false accusations, at least in sex-offense contexts. Further, the ban on extrinsic evidence of a witness's prior dishonest acts also serves important purposes in preventing distracting detours into prior conduct. Even if a defendant can establish the falsity of a prior accusation by a preponderance, it seems likely that a victim could still deny making a false accusation and that the jury would be dragged into a dispute about a prior circumstance and the truth or falsity of a previous accusation. Most concerning is the possibility that the rule might telegraph that victims are unusually likely to make false accusations of sexual assault. Creating a rule blessing the

admission of prior false accusations could increase fishing expeditions into the past of sexual-assault victims to mine for such material. Although well-intentioned, the rule could turn back the clock on protections for victims in sexual-assault cases and deter victims from pursuing charges out of fear that their sexual history will be litigated (even in a pretrial context) for evidence of false accusations. Lastly, crafting a standard that balances the rights of victims with the constitutional rights of criminal defendants would be challenging. If the bar for admissibility is set too low, victims suffer, whereas the rights of defendants may be compromised by a standard that is too stringent.

If the Committee wishes to pursue the proposal further, Professor Richter suggested additional study. In particular, she recommended a 50-state survey in an effort to locate optimal drafting alternatives for a federal provision, a survey of sexual-offense cases under the Military Rules of Evidence, and finally exploration of empirical data regarding the incidence of false accusation in sex-offense cases.

One Committee member opined that the proposal was worth pursuing. He noted that the rule would have impact in federal sexual-offense prosecutions in Indian territory and that the lack of any clear path to admissibility under the existing Rules justified additional investment in time to explore the possibility of a new rule. Another Committee member agreed, explaining that most courts review prior false accusations evidence under Rule 412 and that many of the cases involve child victims. Another Committee member agreed, explaining that his jurisdiction adopted caselaw on the issue of false accusations prior to the adoption of the Federal Rules and that it required some legal gymnastics to reconcile judge-made exceptions allowing this evidence with the Federal Rules. Another Committee member expressed concern about any implication underlying a new rule that sexual-assault victims are more likely to fabricate and suggested that the states ought to lead in this area given their experience with this evidence. The Committee member also opined that a good cross of a testifying victim could be effective without extrinsic evidence of a false accusation but stated that the proposal was worth exploring further. Judge Bates agreed that the proposal merits further exploration but thought that getting detailed information on how the states handle this evidence would be crucial to any ultimate determination regarding a Federal Rule.

The Chair noted that there are some significant policy concerns inherent in a false-accusations rule and cautioned that the Federal Rules may not want to lead in this area when the vast majority of cases involving this evidence are prosecuted in state court. Still, he agreed that further study could be performed to ascertain whether any state has crafted an optimal approach to false-accusations evidence. Professor Richter agreed to pursue further study of state practice for the Committee's Fall 2024 meeting.

## VIII. Closing Matters

The Chair thanked everyone for attending and for their helpful input. He informed the Committee that the next meeting will be held on November 8, 2024.

Respectfully submitted,
Liesa Richter

# TAB 4

# TAB 4A

# MEMORANDUM

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

**FROM:** Hon. Jay Bybee, Chair
Advisory Committee on Appellate Rules

**RE:** Report of the Advisory Committee on Appellate Rules

**DATE:** May 13, 2024

---

## I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, April 10, 2024, in Denver, Colorado. The draft minutes from the meeting accompany this report.

The Advisory Committee seeks final approval of amendments to Rule 39, dealing with costs, and Rule 6, dealing with appeals in bankruptcy cases. These amendments were published for public comment in August of 2023, and the Advisory Committee recommends final approval as published. (Part II of this report.)

It also seeks publication of two amendments. The first proposed amendment is to Appellate Form 4, dealing with applications to proceed in forma pauperis, with a simplified version of Form 4. The second deals with amicus briefs and consists of amendments to Rule 29, along with conforming amendments to Rule 32 and the Appendix of Length Limits. (Part III of this report.)

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

- intervention on appeal;
- excessively voluminous appendices; and
- a new suggestion to amend Rule 15 to deal with premature petitions seeking review of agency actions.

The Committee also considered and removed one item from the Committee's agenda (Part V of this report):

- a new suggestion to make PACER access free.

## II. Action Items for Final Approval

### A. Costs on Appeal (21-AP-D)

In the spring of 2021, the Supreme Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court. *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). The Court also observed 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." *Id*. at 1638.

That fall, the Advisory Committee appointed a subcommittee to examine the issue, and, in June of 2023, the Standing Committee approved publication of proposed amendments to Rule 39. The proposed amended rule is included with this report in Attachment A. The Advisory Committee seeks final approval as published.

The amended Rule is designed to accomplish several things:

First, it clarifies the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. It uses the term "allocated" for the former and the term "taxed" for the latter. Rule 39(a) establishes default rules for the

allocation of costs; these default rules can be displaced by party agreement or court order.

Second, it codifies the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court.

Third, it responds to the need identified in *Hotels.com* for a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. It does this by providing for a motion for reconsideration of the allocation. To prevent delay, it provides that the mandate must not be delayed while awaiting determination of such a motion for reconsideration while making clear that the court of appeals retains jurisdiction to decide the motion.

Fourth, it makes Rule 39's structure more parallel. The current Rule lists the costs taxable in the district court but not the costs taxable in the court of appeals. The proposed amendment lists the costs taxable in the court of appeals.

The proposal does not, however, have a mechanism for making the judgment winner in the district court aware of the magnitude of the costs it might face under Rule 39 (or even the obligation to pay such costs) early enough to ask the court of appeals to reallocate the costs. While most costs on appeal are so modest that this is not a serious concern, one such cost—the premium paid for a supersedeas bond—can run into the millions of dollars. In our report requesting publication, the Appellate Rules Committee noted that it believed that the easiest time for disclosure is when the bond is before the district court for approval and had requested the Advisory Committee on Civil Rules to consider amending Civil Rule 62 to require that disclosure.

The Advisory Committee received three comments. Two of them are positive; one is negative.

The Minnesota State Bar Association's Assembly, its policy-making body, voted to support the proposed rule. The Committee on Appellate Courts of the California Lawyers Association's Litigation Section "believes that the proposal provides clarity to courts and practitioners regarding the respective authority of circuit courts and district courts to allocate and tax costs," and "cogently addresses the issues regarding FRAP 39 raised" by the Supreme Court in *Hotels.com*. And it "agrees that the Rules Committee should explore an amendment to Federal Rules of Civil Procedure 62."

Andrew Straw suggested that no costs should be allocated against a party who was allowed to proceed in forma pauperis. However, the IFP statute provides,

"Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings," 28 U.S.C. § 1915(f)(1).

The Advisory Committee does not believe that these public comments warrant any changes to the proposed amendments. Instead, it unanimously recommends final approval of the proposed amendments as published.[1]

In addition, it notes that, to the extent there are reasons not to amend Civil Rule 62(b) to require disclosure of the premium paid for a supersedeas bond, perhaps the Advisory Committee on Civil Rules might consider adding a cross-reference to Appellate Rule 39 in Civil Rule 62(b) so that litigants seeking district court approval of a supersedeas bond are alerted to this possibility.

### B. Appeals in Bankruptcy Cases (no number assigned)

These proposed amendments to Rule 6, dealing with appeals in bankruptcy cases, arose from requests by the Advisory Committee on Bankruptcy Rules. In June of 2023, the Standing Committee approved publication of proposed amendments to Rule 6. The proposed amended rule is included with this report in Attachment A. The Advisory Committee seeks final approval as published.

The proposed amendments address two different concerns.

#### Resetting Time to Appeal

The first concern involves resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. Federal Rule of Appellate Procedure 4(a)(4)(A) resets the time to appeal if various post-judgment motions are timely made in the district court. To be timely in an ordinary civil case, the motion must be made within 28 days of the judgment. Fed. R. Civ. P. 50(b), 52(b), 59. But in a bankruptcy case, the equivalent motions must be made within 14 days of the judgment. Fed. R. Bankr. P. 7052, 9015(c), 9023.

So what happens if a district court itself—rather than a bankruptcy court—decides a bankruptcy proceeding in the first instance and a post-judgment motion is made on the 20th day after judgment? Does the motion have resetting effect or not?

[1] After the meeting of the Advisory Committee, an additional comment was submitted and docketed as a new suggestion. This comment was circulated to the members of the Advisory Committee with a question whether any member wanted to reopen the matter. None did.

The proposed amendment to Appellate Rule 6(a)—the rule that deals with bankruptcy appeals where the district court exercised original jurisdiction—makes clear that it does not. It provides that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. And it warns that this time may be shorter than the time allowed under the Civil Rules. The Committee Note provides a table of the equivalent motions and the time allowed under the current version of the applicable Bankruptcy Rules.

**Direct Appeals**

The second concern involves direct appeals in bankruptcy cases. Appeals in bankruptcy are governed by 28 U.S.C. § 158. The default rule for appeals from an order of the bankruptcy court is that such appeals go either to the district court for the district where the bankruptcy court is located or (in the circuits that have established a bankruptcy appellate panel (BAP)) to the BAP for that circuit. Under § 158, the losing party then has a further appeal as of right to the court of appeals from a final judgment of the district court or BAP.

In some circumstances, however, a direct appeal to the court of appeals can be authorized under § 158(d)(2). The requirements are similar to, but looser than, the standards for certification under 28 U.S.C. § 1292(b), which permits courts of appeals to hear appeals of interlocutory orders of the district courts in certain circumstances. Moreover, the certification can be made by the bankruptcy court, district court, BAP, or the parties. Under the Bankruptcy Rules, even if a bankruptcy court order has been certified for direct appeal to the court of appeals, the appellant must still file a notice of appeal to the district court or BAP in order to render the certification effective. As with § 1292(b), the court of appeals must also authorize the direct appeal.

Under this structure, a court of appeals' decision to authorize a direct appeal does not determine whether an appeal will go forward, but instead in what court the appeal will be heard. The party asking that the appeal from the bankruptcy court be heard directly in the court of appeals might be an appellee rather than an appellant. Accordingly, the Advisory Committee on Bankruptcy Rules is seeking final approval of a clarifying amendment to Bankruptcy Rule 8006(g) providing that any party to the appeal may file a request that the court of appeals authorize a direct appeal.

Current Appellate Rule 6(c), which governs direct appeals, largely relies on a cross-reference to Rule 5, which governs appeals by permission. But the proposed amendment to the Bankruptcy Rules revealed that Appellate Rule 5 is not a good fit for direct appeals in bankruptcy cases. That's because Rule 5 was designed for the situation in which the court of appeals is deciding whether to allow an appeal at all.

But in the direct appeal context, that's not the question. Instead, in the direct appeal context, there is an appeal; the question is which court is going to hear that appeal.

More generally, experience with direct appeals shows considerable confusion in applying the Appellate Rules. This is primarily due to the manner in which Rule 6(c) cross-references Rule 5 and to its failure to take into account that an appeal of the bankruptcy court order in question is already proceeding in the district court or BAP, which results in uncertainty about precisely what steps are necessary to perfect an appeal after the court of appeals authorizes a direct appeal.

For these reasons, the proposed amendments overhaul Rule 6(c) and make it largely self-contained. Parties will not need to refer to Rule 5 unless Rule 6(c) expressly refers to a specific provision of Rule 5. Rule 6(c) makes Rule 5 inapplicable except to the extent provided for in other parts of Rule 6(c).

The proposed amendments also spell out in more detail how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted, taking into account that an appeal from the same order will already be pending in the district court or BAP. The proposed Rule 6(c)(2) permits any party to the appeal to ask the court of appeals to authorize a direct appeal. It also adds provisions governing contents of the petition, answer or cross-petition, oral argument, form of papers, number of copies, and length limits and provides for calculating time, notification of the order authorizing a direct appeal, and payment of fees. It adds a provision governing stays pending appeal, makes clear that steps already taken in pursuing the appeal need not be repeated, and provides for making the record available to the circuit clerk. It requires all parties, not just the appellant or applicant for direct appeal, to file a representation statement. Additional changes in language are made to better match the relevant statutes.

None of these are intended to make major changes to existing procedures but to clarify those procedures.

We received only one public comment. The Minnesota State Bar Association's Assembly, its policy-making body, voted to support the proposed rule. It stated that the proposed changes "will foster transparency and possibly efficiency between parties and the court." The Advisory Committee on Bankruptcy Rules has not received any comments objecting to the amendments either.

The Advisory Committee unanimously recommends final approval of the proposed amendments as published.

## III. Action Items for Approval for Publication

### A. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

In 2019, the Civil, Criminal, and Appellate Rules Committees received suggestions calling for changes to the standards for granting IFP status and for simplification of the applicable forms. That same year, an article published in the Yale Law Journal proposed similar changes, noting the degree of variation among district courts. Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478, 1482, 1522 (2019). The issue was further complicated by confusion resulting from the 1996 amendment of the governing statute, 28 U.S.C. § 1915, by the Prison Litigation Reform Act (PLRA). Hammond, 128 Yale L.J. at 1490-1492.

Only the Appellate Rules Committee is actively pursuing reforms in this area. No advisory committee is seeking to try to establish standards for granting IFP status, an issue that might not be appropriate under the Rules Enabling Act in any event. As for the applicable forms, which specify the level of detail required in an IFP application, the district courts and the courts of appeals are differently situated. The forms used in the district courts are generally produced by the Administrative Office of the U.S. Courts, and therefore not subject to the rulemaking procedures of the Rules Committees. But Appellate Form 4 is a part of the Federal Rules of Appellate Procedure, adopted pursuant to the Rules Enabling Act. For these reasons, the Advisory Committee has focused its attention on possible revisions to Form 4.

The Advisory Committee has produced a simplified Form 4 and asks that it be published for public comment. The goal of the revised Form 4 is to reduce the burden on individuals seeking IFP status while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status. The Advisory Committee circulated an earlier draft to the senior staff attorney in each of the circuits. The response was overwhelmingly positive, and the Advisory Committee made some changes to the draft Form 4 based on comments from those senior staff attorneys.

#### Historical Background

Individuals have long been able to avoid prepaying fees and costs associated with litigation if they are unable to do so because of poverty. 28 U.S.C. § 1915. *See* Act of July 20, 1892, c. 209, 27 Stat. 252 (providing this opportunity to citizen plaintiffs); Act of June 25, 1910, c. 435, 36 Stat. 866 (extending IFP status to defendants and appellants); Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590 (extending IFP status to noncitizens); *cf. Rowland v. Cal. Men's Colony*, 506 U.S. 194 (1993) (holding that only natural persons qualify for IFP status).

In 1948, the Supreme Court explained that a person need not be destitute or a public charge to qualify for IFP status because "[t]he public would not benefit if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." *Adkins v. DuPont Co.*, 335 U.S. 331, 339 (1948). The Court observed that an affidavit in support of an application for IFP status is sufficient if it "states that one cannot because of his poverty, pay or give security for the costs . . . and still be able to provide himself and dependents with the necessities of life." *Id.* at 339. For years, the Court accepted an affidavit with those words and no more as sufficient. *See* Stern & Gressman's Supreme Court Practice § 8.7 (11th edition 2019).

When the Federal Rules of Appellate Procedure took effect in 1968, Form 4 contained five questions. 28 U.S.C. appendix (1964 edition, supp. I, 1968). In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), which amended 28 U.S.C. § 1915. In 1998, Form 4 was revised and became a much more detailed questionnaire, including numerous questions about an applicant's spouse. 28 U.S.C. appendix (1994 edition, supp. V, 1995-2000).

The amendment to § 1915 produced a statute that makes little sense. It provides, in relevant part:

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

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The Advisory Committee believes that proposed Form 4, which calls for a statement of "the total value of all your assets" is consistent with the statutory provision calling for a "statement of all assets," even though it does not call for an enumeration of those assets (and assuming that § 1915 requires all persons, not just all prisoners, to submit such an affidavit).

The Advisory Committee also believes that the statute does not require that Form 4 include an intrusive inquiry into information about an applicant's spouse. Prior to 1998, Form 4 did not include such questions, and nothing in the PLRA refers

to spouses. Of course, there may be situations in which a spouse's income or assets are relevant. *See Escobedo v. Applebees*, 787 F.3d 1226, 1236 (9th Cir. 2015), but the same is true of other family members that existing Form 4 does not ask about. *See*, *e.g.*, *Zhu v. Countrywide Realty Co.*, 148 F. Supp. 2d 1154, 1156 (D. Kan. 2001) (close family members); *Williams v. Spencer*, 455 F. Supp. 205, 209 (D. Md. 1978) (parents of minors).

Nothing in proposed Form 4 would preclude a court from making further inquiry where appropriate. For example, if an applicant stated that he had little or no income or assets but substantial expenses, a court might inquire how those expenses were being paid. But based on the experience in the courts of appeals, the Advisory Committee does not believe that such cases are sufficiently common to warrant the detail required by current Form 4.

The foregoing analysis demonstrates that the streamlined proposal for Form 4 is consistent with the provisions of § 1915. Alternatively, if there were any question about the requirements of the statute, the level of detail required in an application for IFP status is a proper subject for the Rules Enabling Act process—as the history of Form 4 reveals—and a revised Form 4 can supersede any contrary requirement of the PLRA. 28 U.S.C. § 2072(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); *Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999) (holding that a 1998 amendment to Federal Rule of Appellate Procedure 24 superseded provisions of the Prison Litigation Reform Act).

The proposed Form 4 would call for all persons, not just prisoners, to complete the form and require a statement of "the total value" of a person's assets, rather than an enumerated list of assets. Prisoners would continue to be required to provide statements from their institutional accounts. 28 U.S.C. § 1915(a)(2). The Advisory Committee believes the changes to Form 4 would serve the interests of the public, litigants, and the courts.

**Proposed Form 4**

Proposed Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information. The Advisory Committee learned from the various circuits that IFP status is denied far more frequently for lack of a non-frivolous issue on appeal than for lack of indigency. For that reason, the first page of proposed Form 4 informs the applicant of the need to show that there is a non-frivolous issue on appeal and visually highlights the requirement to state such issues at the outset. Page two contains eight questions. Questions one and two ask about monthly income, first from work and then from any other source. Questions three and four ask about

costs (a topic not covered in the 1968 form), first for housing and then for any other necessary expenses. Questions five and six are devoted to assets and debt. For questions two through six, the proposed form includes appropriate illustrations, such as unemployment benefits, social security, childcare, transportation, bank accounts, credit cards, and student loans. Question seven asks how many people the applicant supports. Question eight asks about receipt of certain public benefits, which may provide a means-test verified by other government agencies that might yield a shortcut for approving eligibility. After informing prisoners of the need to provide a certified statement of their institutional accounts, the proposed form ends with space for an applicant to provide additional information.

The Advisory Committee unanimously approved the proposed revised Form 4 with the recommendation that it be published for public comment. It is included in Attachment B to this report.

### B. Amicus Curiae Briefs (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-A; 23-AP-B; 23-AP-E; 23-AP-I; 23-AP-K)

After years of careful consideration, the Advisory Committee recommends publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs. Conforming amendments to Rule 32(g) and the Appendix of Length Limits are also proposed.

#### Background

In October 2019, after learning of a bill introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists, the Advisory Committee appointed a subcommittee to address amicus disclosures. In September 2020, the Clerk of the Supreme Court wrote to the Standing Committee on Rules of Practice and Procedure, attaching his correspondence with the Congressional sponsors of that bill. He noted that Appellate Rule 29 includes disclosure requirements similar to those of Supreme Court Rule 37.6, and that the Committee might wish to consider whether to amend Rule 29, which would in turn "provide helpful guidance" on whether Supreme Court Rule 37.6 should be amended. 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 the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

Appellate Rule 29(a)(4)(E) currently requires that most amicus briefs include 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.

Significantly, the current rule requires disclosure of earmarked contributions not only by parties to the case, but by nonparties as well—with the exception of such contribution by the amicus itself, its members, or its counsel.

The Advisory Committee's early focus was on a close analysis of the proposed AMICUS Act and the concerns of its sponsors, including that parties could fund amicus briefs, that donors could anonymously fund a party or multiple amici, and that the existing rule was inequitable because it prohibited crowdfunding with small anonymous donations. *See* Spring 2021 agenda book at 133. At the same time, the Advisory Committee was also focused on respect for the First Amendment, asking "whether more expansive disclosure requirements could benefit the courts and the public without infringing on constitutional rights." *Id*. at 138 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) and *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958)).

The Advisory Committee determined early on that, unlike the proposed AMICUS Act, any additional disclosure requirements should apply to all non-government amici, not just to repeat filers. It also determined early on that amicus briefs are significantly different from lobbying. Amicus briefs are filed with a court, available to the public, and the arguments made by amici can be rebutted by the parties. Lobbying activity, by definition, consists of non-public attempts to influence the legislative or executive branch. *See* 2 U.S.C. § 1602(8)(B) (excluding communications "distributed and made available to the public" or "submitted for inclusion in the public record of a hearing" from the definition of "lobbying contact").

The Advisory Committee also readily concluded that any possible loophole that could be produced by a narrow reading of the phrase "preparing or submitting" a brief was easily remedied by clarifying that every step of the brief writing process was covered.

Similarly straightforward was the conclusion that parties should not be able to evade disclosure of earmarked contributions by making earmarked contributions to amicus organizations of which they are members. That is, the specific disclosure requirement for parties in current Rule 29(a)(4)(E)(ii) should trump the general exception for members of an amicus in current Rule 29(a)(4)(E)(iii)—and if there were any doubt about this, the Rule could be amended to make it clear. Almost as easy was the idea that there should be some de minimis threshold for earmarked contributions by nonparties.

Several issues proved far more challenging.

One such issue was whether there should be additional disclosure requirements concerning the relationship between a party and an amicus, including non-earmarked contributions to an amicus by a party and, if so, at what level of contribution should disclosure be triggered.

A second such issue was whether there should be additional disclosure requirements concerning the relationship between a nonparty and an amicus, including non-earmarked contributions to an amicus by a nonparty and, if so, at what level of contribution should disclosure be triggered.

The third, and perhaps the most difficult, was whether to retain the existing exception for earmarked contributions by members of an amicus.

In addressing these issues, and in proposing all these amendments, the Advisory Committee seeks to improve the integrity and fairness of the federal judicial process. By providing more information about amici, these amendments would place judges, parties, and the public in a better position to assess the independence and credibility of the arguments and perspectives offered by amici. By clarifying arguably unclear language and closing potential loopholes, these amendments would reduce opportunities for evasion and gamesmanship. At the same time, the Advisory Committee has been careful to avoid placing unnecessary burdens on amici, their members, and their contributors, and kept in mind their First Amendment interests. The First Amendment cases discussed below arose in markedly different circumstances than the ones presented by these amendments. Those cases involved situations where disclosure was required because an entity engaged in political speech or solicited contributions as a charitable organization. These proposed amendments are far more limited, modifying disclosure requirements that already exist for those who choose to submit amicus briefs to assist a court in deciding a case.

**The AFP Decision**

The Advisory Committee was aware in the spring of 2021 of the pendency of *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). When the Committee met again in the fall of 2021 after that case was decided, it considered an analysis of that decision and focused on the government's interest in amicus briefs, its interest in disclosure by amici, and the burdens on amici from disclosure—including both the administrative burden of compliance and the possibility that a potential amicus might decline to file a brief rather than disclose what it did not want to disclose. *See* Fall 2021 agenda book at 164, 166.[2]

In *AFP*, the Supreme Court held California's charitable disclosure requirement to be facially unconstitutional. *AFP*, 141 S. Ct. at 2389. 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." *Id*. at 2383 (cleaned up) (opinion of Roberts, C.J.).[3] "While exacting 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.* (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 2385.

The Court concluded that California's disclosure regime did not satisfy the narrow tailoring requirement. It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* at 2385-86. But it found "a dramatic mismatch" between that interest and the state's disclosure requirements.

---

[2] Some might even decline to join an association for fear that the organization might file an amicus brief that requires disclosure.

[3] 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.

*Id.* at 2386. 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. Moreover, the state "had not even considered alternatives to the current disclosure requirement" that might be less burdensome. *Id.* A facial challenge was appropriate because the "lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience." *Id.* at 2387.

A fuller understanding of the First Amendment limits in this area can be gained by considering both the Supreme Court cases on which *AFP* built and the subsequent court of appeals cases applying *AFP*.

**Pre-*AFP* Cases**

The leading case prohibiting compelled disclosure because of a chilling effect on freedom of association is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). As Chief Justice Roberts described it:

> *NAACP v. Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. In response, NAACP members were threatened with economic reprisals and violence. As part of an effort to oust the organization from the State, the Alabama Attorney General sought the group's membership lists. We held that the First Amendment prohibited such compelled disclosure. We explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and we noted "the vital relationship between freedom to associate and privacy in one's associations." Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest "sufficient to justify the deterrent effect" of disclosure—we concluded that the State's demand violated the First Amendment.

*AFP*, 141 S. Ct. at 2382 (citation omitted).

*NAACP* did not use the term "exacting scrutiny." Instead, that term can be traced to a campaign finance case, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), where the Court said, "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP*

*v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Id*. at 64 (footnote omitted).

*Buckley* refused to distinguish *NAACP* on the grounds that *NAACP* involved members while *Buckley* involved donors. The Court explained that funds are often essential to advocacy, that financial transactions can reveal much about associations and beliefs, and observed that its "past decisions have not drawn fine lines between contributors and members but have treated them interchangeably." *Buckley*, 424 U.S. at 66 (citing *United States v. Rumely*, 345 U.S. 41 (1953); *Bates v. Little Rock*, 361 U.S. 516 (1960)).

But *Buckley* did distinguish *NAACP* on a different ground and upheld the disclosure requirements of the Federal Election Campaign Act. It concluded that there were three governmental interests of sufficient importance to justify the disclosure requirements: (1) providing the electorate with information; (2) deterring corruption and avoiding the appearance of corruption; and (3) gathering the data to detect violations of contribution limits. 424 U.S. at 66-69.

The Court elaborated:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. And . . . Congress could reasonably conclude that full disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.
>
> * * *

> Third . . . disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations. . . .

424 U.S. at 66-69 (cleaned up).

Section 201 of the Bipartisan Campaign Reform Act of 2002 (BCRA) requires any person who spends more than $10,000 on electioneering communications within a calendar year to file a disclosure statement identifying the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. 2 U.S.C. § 434(f). In *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003), the Court relied on *Buckley* to uphold this requirement. *Id*. at 195 (referring to the "important state interests" in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions"). It criticized the plaintiffs for wanting to spend funds on ads referring to candidates in the sixty days before the election "while hiding behind dubious and misleading names." *Id*. at 197.

Even as *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010), overruled part of *McConnell* and held unconstitutional BCRA's restrictions on independent corporate expenditures, it continued to uphold BCRA's disclosure requirements, again relying on the public's interest "in knowing who is speaking about a candidate shortly before an election." *Id*. at 369. Noting that *McConnell* had recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed, the Court rejected Citizens United's as-applied challenge because it offered no evidence that its members may face similar threats or reprisals. *Id*. at 370.

**Post-*AFP* Cases**

In *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021), the court of appeals held that Rhode Island's campaign disclosure requirements—including disclosure of donors who contributed $1000 or more to an organization's general fund that was used to spend $1000 or more on independent expenditures or electioneering communication and on-ad disclosure of its top five donors—were constitutional under *AFP*. The court understood *AFP* to have increased the rigor of exacting scrutiny:

> Prior to the Court's recent decision in *Americans for Prosperity*, exacting scrutiny was widely understood to require only a "substantial

> relation" between the challenged regulation and the governmental interest. In refining its articulation of exacting scrutiny, the *Americans for Prosperity* Court heightened this requirement, emphasizing that in the First Amendment context, fit matters. The Court went on to say that exacting scrutiny requires a fit that is not necessarily perfect, but reasonable. A substantial relation is necessary but not sufficient for a challenged requirement to survive exacting scrutiny. And in addition, the challenged requirement must be narrowly tailored to the interest it promotes.

*Id*. at 85.

The court nevertheless concluded that the disclosure requirements were narrowly tailored. First, the challenged provisions apply only to organizations spending more than $1000 on independent expenditures or electioneering communications in a calendar year, thus tailoring the statute to reach only larger spenders in the election arena and helping the electorate understand who is speaking and properly weigh the message. Second, the temporal limitation links the disclosures to the objective of an informed electorate. Third, the definition of electioneering communication narrows the scope to the relevant electorate. Finally, the statute provides off-ramps: contribute less than $1000 or opt out of having the contribution used for independent expenditures or electioneering communication—effectively an opt-out earmark. Taken together, the statute requires "disclosure of relatively large donors who choose to engage in election-related speech." *Id*. at 88-89. And the on-ad disclosure of top donors "provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names." *Id*. at 91.

In *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023), the court of appeals affirmed the denial of a preliminary injunction against enforcement of a local law requiring the disclosure of the top three donors in all paid ads by independent expenditure committees. The court held that "[d]isclosure of who is speaking enables the electorate to make informed decisions and give proper weight to different speakers and messages," noting that "[a]n appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another." *Id*. at 505 (cleaned up).

The court upheld a secondary disclosure requirement—that is, the disclosure of the top donors to certain donors—because such disclosure was "designed to go beyond the ad hoc organizations with creative but misleading names and instead expose the actual contributors to such groups." *Id*. (cleaned up).

The court also concluded that it was not fatal to the disclosure requirement that it "goes beyond donations that are earmarked for electioneering," because it is constrained in other ways, reaching "only the top donors to a committee that is, in turn, a top donor to a primarily formed committee." *Id*. at 510.

Nine judges dissented from the denial of rehearing en banc. They agreed "that the government has an interest in informing voters about who is funding political ads." *Id.* at 526 (VanDyke, J., dissenting). That's because "learning a political advertiser's financiers can serve as a reasonable proxy for informing the voter of where the speaker falls on the political spectrum. Or as I emphasized above, channeling the Greek moralist: 'A man is known by the company he keeps.' " *Id*. at 527 (quoting Aesop, Aesop's Fables 109 (R. Worthington, trans., Duke Classics 1884)). They dissented from the extension of this principle to secondary contributors, reasoning that a "man is not known by the company of the company he keeps," and that "a voter cannot reasonably infer any relevant information about a political speaker or an advertisement by knowing the speaker's secondary contributors," who "may contribute to the primary contributor for a variety of reasons unrelated to the primary contributor's support for a political speaker." *Id*.[4]

*Smith v. Helzer*, 95 F.4th 1207 (9th Cir. 2024), largely followed *No on E* in affirming the denial of a preliminary injunction against the enforcement of an Alaska campaign finance law. One of the statutory provisions requires that donors disclose their contributions of more than $2000 in a calendar year to an entity that makes independent expenditures in an election—and do so within 24 hours of making the donation. The court rejected the argument that because the recipients are already required to report the receipt of such contributions, there is no state interest in requiring donors to also report, explaining that "[p]rompt disclosure by both sides of a transaction ensures that the electorate receives the most helpful information in the lead up to an election." *Id*. at 1216. Requiring prompt reporting at all times rather than just near elections gave the court some pause, but it ultimately concluded that it was not an onerous burden. *Id*. at 1218-19. A partial dissent concluded that the burdens on individual donors are too great and saw no justification for a year-round 24-hour reporting requirement. *Smith*, 95 F.4th at 1221 (Forrest, J., concurring in part and dissenting in part).

On the other hand, the court in *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1245 (10th Cir. 2023), concluded that the "public still has an interest in knowing who speaks through WyGO," despite its stand on gun rights being obvious from its name,

[4] A separate dissent contended that the disclosure requirements took up too much space in the ads. *No on E,* 85 F.4th at 511 (Collins, J., dissenting).

but that the state statute is not narrowly tailored as applied. The statute requires disclosure of contributions that "relate to" electioneering communication, and the identity of the contributor if the contribution exceeds $100. But this vague standard is particularly burdensome for an organization that has no way of knowing which donor contributions "relate to" a particular expense. *Id*. at 1247. The alternative of disclosing all donors who give more than $100 is not narrow tailoring. *Id*. The court explained:

> Rather than leave WyGO to twist in the wind, the statute could have outlined an earmarking system. We have already recognized the role earmarking can play in tailoring a disclosure law. . . . . It is no surprise that at least one of our district courts has found the absence of an earmarking provision central to concluding that a disclosure regime fails exacting scrutiny. *See, e.g., Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-CV-01488-PAB, 2021 WL 4060630, at *12 (D. Colo. Sept. 7, 2021). Instituting an earmarking system better serves the state's informational interest; it directly links speaker to content, whereas the Secretary's solution dilutes the statutory mission. The Secretary does not explain why this solution is beyond Wyoming's reach.

*Gray*, 83 F.4th at 1248. The Court distinguished a decision from the Court of Appeals for the Third Circuit which had upheld a disclosure requirement without an earmarking limitation (while conceding that such a limitation would result in a more narrowly tailored statute) as "a relic of pre-*[AFP]* exacting scrutiny." *Id*. at 1249 (citing *Delaware Strong Families v. Attorney General of Del.*, 793 F.3d 304 (3d Cir. 2015)).

**The Advisory Committee's Resolution**

With these First Amendment concerns in mind, the Advisory Committee resolved—at this publication for public comment stage—the three difficult issues noted above.

The starting point is the court's interest in amicus briefs in the first place: to help a court make the correct decision in a case before it. Unlike parties, a would-be amicus does not have a right to be heard in court. Amicus briefs may serve the *amicus* as a method of fundraising, as a method of showing its members that it is working on their behalf, as communication to the broader public, or as a method of advertising for the lawyers involved. But these are not the reasons that *courts* allow amicus briefs. Limitations on filing amicus briefs, whether direct prohibitions or indirect incentives caused by disclosure requirements, do not prevent anyone from speaking

out—in books, articles, podcasts, blogs, advertisements, social media, etc.—about how a court should decide a case.

For an amicus brief to be helpful to a court, the court must be able to evaluate the information and arguments presented in that brief. Disclosure requirements in connection with amicus briefs serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them.

The Advisory Committee considered the perspective that the only thing that matters in an amicus brief is the persuasiveness of the arguments in that brief, so that information about the amicus is irrelevant. But the identity of an amicus does matter, at least in some cases, to some judges. In addition, members of the public can use the disclosures to monitor the courts, thereby serving both the important governmental interest in appropriate accountability and public confidence in the courts. Disclosure is especially valuable for any amicus who uses a dubious or misleading name.

Accordingly, the Advisory Committee decided to require all amicus briefs to include "a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court." Rule 29(a)(4)(D). To deal with the possibility that an amicus might have been created for purposes of this particular case, the proposed rule also requires an amicus that has existed for less than 12 months to state the date the amicus was created. Rule 29(a)(4)(D).

In addition to the interests involved regarding any amicus brief, there are additional government interests at stake with regard to the relationship between a party and an amicus. First, in our adversary system, parties are given a limited opportunity to persuade a court and should not be able to evade those limits by using a proxy. Second, a court should not be misled into thinking that an amicus is more independent of a party than it is.

For this reason, the Advisory Committee decided to treat the relationship between parties and amici differently than the relationship between nonparties and amici.

Just as the government interests are different in the two situations, so too are the burdens of disclosure. The burdens of disclosure are far greater with regard to nonparties. There are far more nonparties than parties in any given case. The more

that an amicus has to disclose relationships with nonparties, the greater the administrative burden of identifying and producing the information. Similarly, the burden on associational rights is greater with regard to nonparties. There are far more people who might either choose not to associate with the amicus because of the risk of disclosure or whose fear of disclosure might lead the potential amicus to not submit a brief.

*Relationship between a party and an amicus.*

With regard to the relationship between a party and an amicus, the Advisory Committee concluded that two new disclosure requirements should be added. The first has been relatively uncontroversial: requiring the disclosure of whether "a party, its counsel, or any combination of parties or their counsel has a majority ownership interest in or majority control of a legal entity submitting the brief." Rule 29(b)(3). If a party has majority ownership or control of an amicus, a court should know that and be able to take that into account in evaluating the arguments in the amicus brief.

The Advisory Committee also concluded that—at some level—contributions by a party to an amicus created a sufficient risk of party influence that disclosure was warranted. There is an unavoidable trade-off here: the lower the threshold, the more information provided but the greater the burden on the amicus. The AMICUS Act would set the disclosure threshold at 3% of the revenue of the amicus. One member of the Advisory Committee, whose term has since expired, argued that the threshold should be 50%, reasoning that at any level less than that, other contributors had a greater voice than the party. Another possibility was 10%, drawing on the corporate disclosure rule, Rule 26.1.

The Advisory Committee settled on 25%, reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure, thereby enabling a judge to consider that potential influence in evaluating the brief. Rule 29(b)(4). The administrative burden of such disclosure is likely to be low: top officials at an amicus are likely to be aware of such a high-level contributor without having to do any research at all. So, too, is the burden on associational rights: An amicus would be unable to submit a brief ostensibly designed to help the court decide a case without revealing that a party to that case is a major contributor. Instead, it would have to choose between filing an amicus brief with such a disclosure or refrain from filing.

The Advisory Committee took other steps to narrowly tailor this disclosure requirement. Most obviously, but worth reiterating, disclosures are limited to those seeking to file amicus briefs. They do not reach (for example) all charities, as in *AFP*,

or all speakers. A putative amicus who refrains from filing an amicus brief to avoid disclosure is not silenced in any way. Limiting required disclosures to such high value contributions is also an important aspect of narrow tailoring to serve the goal of helping courts understand how much the party may be speaking through an amicus and properly weigh the message. In addition, the temporal limit, which requires disclosure only of contributions with the 12-month prior to the filing of the brief, serves to narrowly tailor the requirement to focus on a connection between the contribution and the filing of the brief.[5] The Advisory Committee also crafted the method of computation to relieve burdens: the threshold for disclosure is calculated using the total revenue for the prior fiscal year, making for simple and infrequent determination.

The proposed amendment requires self-disclosure by any party or counsel who knows that he should have been disclosed by an amicus but was not. This is not duplicative, but merely a backstop if an amicus fails to comply with the rule.

The Advisory Committee considered using a standard rather than a rule for disclosure of contributions, such as requiring disclosure if a party has made sufficient contributions to the amicus curiae that a reasonable person would, under the circumstances, attribute to the party a significant influence over the amicus curiae with respect to the filing or content of the brief. In a sense, such a standard would be exactly tailored to the government interest because it would require disclosure in all cases (but only those cases) where a reasonable person would see a significant influence by the party over the amicus. But the Advisory Committee rejected such an approach, precisely because of the burdens it would place on amici. It would be difficult for an amicus to be sure when disclosure would be required, leading scrupulous amici to over-disclose or unnecessarily refrain from filing. (It could also lead less scrupulous amici to under-disclose.)

*Relationship between a nonparty and an amicus.*

With regard to the relationship between a nonparty and an amicus, the Advisory Committee considered the addition of parallel disclosure requirements of major contributors to an amicus. But it decided against it. First, the information obtained would be less useful in evaluating the arguments made in an amicus brief.

[5] This temporal limitation significantly reduces the risk that someone might decline to make a significant contribution to avoid disclosure, unless they are already a party to litigation (or see it on the near horizon) in which the organization might file an amicus brief.

Entities that submit amicus briefs come in all shapes and sizes. For some, amicus briefs may be a regular and important part of what they do. For some, amicus briefs may be a rarity. Most engage in a wide variety of activities other than submitting amicus briefs. As a result, people contribute to organizations that submit amicus briefs for reasons that have nothing to do with the submission of amicus briefs, making disclosure of their identity less useful in evaluating an amicus brief—and a requirement to do so less narrowly tailored to that interest. Second, the burdens of such disclosure would be much greater. Amici would have to determine and reveal major contributors (or decide not to file to avoid disclosure) in all cases, not only when the major contributor is a party to that case. With such a broad disclosure requirement, not limited to cases in which the contributor is a party, people might decline to make significant contributions to avoid disclosure.

*Membership exception for earmarked contributions*.

Perhaps the most difficult issue the Advisory Committee faced was whether to retain the existing exception for earmarked contributions by members of an amicus. The existing rule requires the disclosure of all earmarked contributions, both by parties and nonparties. But the current rule does not require disclosure of earmarked contributions by the amicus itself, its counsel, or members of the amicus.

Disclosure of earmarked contributions by a party is not controversial. It is in the existing rule, and the proposed amendment, by treating parties and nonparties separately, makes this requirement even clearer.

In general, disclosure of earmarked contributions provides more useful information and is less burdensome than disclosure of non-earmarked contributions. Knowing who made a contribution that was earmarked for a brief provides information to evaluate that brief in a way analogous to the way that knowing who made a contribution to a candidate helps evaluate that candidate. Disclosure is less burdensome because it is limited to contributions to fund that brief, not general contributions to an organization. Limiting required disclosure to earmarked contributions is an important aspect of narrow tailoring. *See, e.g.*, *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1245 (10th Cir. 2023).

A reason to exempt members of the amicus from such disclosure, as the existing rule does, is that an organization speaks for its members and its members speak through the organization. From that perspective, one might think that no information is gained by knowing the members of the organization, and the willingness to join an organization is burdened by disclosure.

On the other hand, a member who makes earmarked contributions for a particular amicus brief deliberately stands out from other members with regard to the brief, and therefore additional information is provided by disclosure of that earmarked contribution. The views expressed in the amicus brief might be disproportionately shaped by the interests of that contributor. At the extreme, the amicus may be serving simply as a paid mouthpiece for that contributor.

For that reason, the Advisory Committee considered eliminating the member exception. But it was persuaded that doing so would unfairly distinguish between those organizations (typically larger) that regularly file amicus briefs and therefore budget for them from general revenue and those organizations (typically smaller) that do not and therefore have to pass the hat for an amicus brief.

Yet retaining the member exception as is would leave a gaping loophole in the rule: a person who wished to underwrite a brief anonymously need only join the organization to do so. To close this loophole, the Advisory Committee decided to retain the member exception, but to limit the exception to those who have been members for the prior 12 months. A new member making contributions earmarked for a particular brief is effectively treated as a non-member for these purposes and must be disclosed. This limitation is narrowly tailored to the problem and imposes a minimal burden. New members are free to join the amicus, and their general contributions are not subject to disclosure. And old members can make earmarked contributions without disclosure. It is only nonmembers and new members who choose to make contributions earmarked for a particular brief who must be identified in that brief to help the court evaluate the arguments in that brief.

That solution raised another issue: what to do with newly-formed amici? The Advisory Committee decided that requiring the disclosure of *all* earmarked contributions would be too burdensome. Doing so would effectively treat any new organization as having no members, a mere façade. Instead, the Advisory Committee decided to extend the membership exemption to these new organizations but require that they disclose the date of their formation.

The point is not to treat these new organizations more favorably than older, more established organizations. To the contrary, a requirement that such new organizations reveal themselves in this way may serve to unmask organizations established for the purpose of the litigation, particularly if there are multiple such new organizations created for the purpose of artificially creating the appearance of widespread support for a position. But some new organizations might not fit such a description, and stripping all new organizations of member protection would effectively treat all new organizations with the same broad brush. Under the

approach in the proposed rule, it is up to a new amicus to provide sufficient information about itself to inform the court's evaluation of that brief.

**Leave of Court or Consent of the Parties**

Current Rule 29(a)(2) requires that non-governmental amicus briefs receive either leave of court or consent of the parties to be filed during the initial consideration of a case on the merits. Current Rule 29(b) requires that non-governmental amicus briefs receive leave of court to be filed during consideration of whether to grant rehearing.

The Advisory Committee considered eliminating both of these requirements. The Supreme Court made such a change to its own rules, freely allowing the filing of amicus briefs. Supreme Court Rule 37.2 (effective January 1, 2023). Initially, the Advisory Committee did not see any reason not to follow the Supreme Court's lead here. But further reflection led the Advisory Committee in the opposite direction: amending Rule 29(a)(2) to require leave of court for all amicus briefs, not just those at the rehearing stage.

Amicus practice in the Supreme Court differs from that in the courts of appeals in at least two relevant ways.

First, amicus briefs in the Supreme Court, unlike those in the courts of appeals, must be in the form of printed booklets. Supreme Court Rule 33.1(a) (6 1/8 by 9 1/4 booklet using a standard typesetting process); Supreme Court Rule 37 (requiring that amicus briefs, except in connection with an application, be filed in booklet format). This operates as a modest filter on amicus briefs.

Second, under the Supreme Court's recently announced Code of Conduct, "[n]either the filing of a brief amicus curiae nor the participation of counsel for amicus curiae requires a Justice's disqualification." S. Ct. Code of Conduct, Canon 3(B)(4). Existing Federal Rule of Appellate Procedure 29(a)(2), which permits a court to prohibit the filing of or strike an amicus brief, rests on the assumption that an amicus brief can result in recusal in the courts of appeals. And that assumption reflects practice: circuit judges do recuse on the basis of amicus briefs. *See* Committee on Codes of Conduct Advisory Opinion No. 63: Disqualification Based on Interest in Amicus that is a Corporation (addressing whether recusal is required when a judge has an interest in a corporation that is an amicus curiae, but not other recusal questions that may arise in relation to amici, such as when a law firm that is on a judge's recusal list represents an amicus, or when a judge has an interest in a nonprofit organization that is an amicus).

The unconstrained filing of amicus briefs in the courts of appeals would produce recusal issues. These would be particularly acute at the rehearing en banc stage, making it especially important to retain the requirement of court permission at that stage. Yet amicus briefs filed without court permission can cause problems at the panel stage as well. The requirement of consent is not a meaningful constraint on amicus briefs because the norm among counsel is to uniformly consent without seeing the amicus brief. The clerk's office does a comprehensive conflict check, and if an amicus brief is filed during the briefing period with the consent of the parties, it could cause the recusal of a judge at the panel stage without the judge even knowing. By contrast, if the consent option is eliminated, a judge is involved in deciding whether to deny leave to file the brief or to recuse. While this does impose a burden on an amicus to make a motion, requiring the filing of a motion is hardly a severe burden on someone who seeks to participate in the court system—bearing in mind that the point of an amicus brief is to be helpful to the court. See Rule 27(a) ("An application for an order or other relief is made by motion unless these rules prescribe another form.").

**Other Matters**

Existing Rule 29(a)(5) sets the length limit for amicus briefs at the initial merits stage as one-half of the length authorized for a party's principal brief. There appear to be two reasons why it is phrased that way, rather than simply as a word limit—which is the way existing Rule 29(b)(4) is phrased for amicus briefs at the rehearing stage.

First, it preserves the ability of an amicus to rely on page limits. That seems to be of significance only to pro se litigants, and it is hard to see any reason to retain it for amici. Second, it means that the length limits for amicus briefs in other proceedings might be shorter where the length limit for party briefs is shorter than 13,000 words. But the occasion for such reductions seems sufficiently small that the Advisory Committee thinks that the simplicity of a flat number of 6,500 words is worth it. Rule 32(e) continues to permit a court of appeals, by local rule or order in a particular case, to accept documents that do not meet the length limits set by these rules, so this change does not create a problem in those circuits that generally permit party briefs that are longer than 13,000 words or amicus briefs that are longer than 6,500 words.

By limiting amicus briefs to 6,500 words, the requirement to file a certification under Rule 32(g)(1) can be simplified to require a certification in all cases, rather than just when length is computed using a word or line limit.

In the course of evaluating Rule 29, the Advisory Committee also considered other concerns that have been raised about amicus practice, including arguments

that courts sometimes inappropriately rely on waived or forfeited arguments or untested factual information in amicus briefs. But the Committee decided against dealing with such concerns by rule making. For example, some arguments cannot be waived, some forfeitures can be excused, and some factual information is properly considered as subject to judicial notice or as legislative facts rather than adjudicative facts. It would be difficult to draft a rule that accurately captured what information is and is not properly considered, and different judges on a panel might disagree. In addition, a rule that sought to bar certain arguments or information from amicus briefs would likely invite unproductive motions to strike.

The Advisory Committee unanimously recommends that the proposed amendments to Rule 29, Rule 32(g), and the Appendix of Length Limits be published for public comment. The proposed amendments are included in Attachment B to this report.

## IV. Other Matters Under Consideration

### A. Possible Rule on Intervention (22-AP-G; 23-AP-C)

The Federal Rules of Appellate Procedure do not have a rule that governs intervention on appeal. The closest is Rule 15(d), which sets a 30-day deadline for motions to intervene in a proceeding to review an agency action but does not set any standards for such intervention. In the absence of a governing rule, courts borrow from Civil Rule 24, but that rule is not crafted for intervention on appeal and contains its own ambiguities.

About a dozen years ago, the Advisory Committee explored the issue and decided not to take any action. Since then, the Supreme Court has observed that there is no appellate rule on this question. *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1010 (2022). Twice in recent years it has granted cert to address intervention on appeal, but both cases became moot. An academic brief in one of those cases suggested rule making and included a list of items that rule makers might consider.

A subcommittee of the Advisory Committee has produced a working draft to guide discussion. The basic principle is to follow the general approach of the courts of appeals and limit intervention on appeal to exceptional cases for imperative reasons. The Advisory Committee does not want to encourage circumvention of district court discretion or the standard of review. And it does not want to replicate the ambiguity of Civil Rule 24—or take a position on the proper interpretation of that Rule.

The Advisory Committee is not proposing a new rule at this time, and it may yet conclude that no amendment is warranted. The Department of Justice has

highlighted three concerns. First, the district court is where the scope of an action should be shaped, and an appeal should remain focused on the correctness of the district court decision. A rule on intervention might skew incentives and encourage parties to wait until an appeal to intervene. Second, existing parties should generally be able to make strategic decisions whether to appeal at all or to limit any appeal they take. Third, to the extent that the current desire to intervene is driven by courts issuing remedies that reach beyond the parties to the case, limitations on that practice would reduce the need for a rule on intervention, so waiting to see if such limitations are imposed may be appropriate.[6]

The Advisory Committee will gather information about existing intervention practice, including from Circuit Clerks and the Department of Justice, and perhaps with the help of the Federal Judicial Center.

[6] Since the meeting of the Advisory Committee, five justices have expressed doubts about the propriety of remedies that reach beyond the parties to the case. *Labrador v. Poe by & through Poe*, 144 S. Ct. 921 (2024) (Gorsuch, J., joined by Thomas and Alito, JJ.) (criticizing the "universal injunction"); *id.* at 931 (Kavanaugh, J., joined by Barrett, J.) (noting that "prohibiting nationwide or statewide injunctions may turn out to be the right rule as a matter of law").

Here is the working draft that was before the Advisory Committee for discussion:

| | |
|---|---|
| Rule 7.1 Intervention on Appeal | It is not clear where a new rule should be located. Its placement might depend, in part, on its scope.<br><br>Current Rule 15(d) provides for a motion to intervene in a proceeding to review or enforce an agency order. Should a new rule apply only to appeals from lower courts, leaving in place existing practice regarding direct review of agency action?<br><br>Should a new rule be limited to civil cases?<br><br>If the scope of a new rule is limited along these lines, should there be a provision or committee note making clear that existing practices in those areas are left in place, to avoid an implication that a new rule covers the field and prohibits intervention in cases not covered by the new rule? |
| (a) Motion to Intervene. The preferred method for a nonparty to be heard is by filing an amicus brief under Rule 29. Intervention on appeal is reserved for exceptional cases. A person may move to intervene on appeal by filing a motion in accordance with Rule 27. The motion must | |
| (1) be timely filed; | The subcommittee thinks that it makes sense to a have a timeliness requirement in subsection (a) that is focused on the timeliness of the motion to intervene in terms of the appeal itself. Because of the many different events that might trigger the need to intervene, the subcommittee has not attempted to set a more precise timeframe. |

| | |
|---|---|
| | The current working draft borrows "timely" from FRCP 24. Would the use of the same term as in the FRCP tend to be confusing or clarifying? |
| (2) show that the movant meets the requirements of (b); and<br><br>(3) specify and explain the movant's legal interest required by (c). | |
| (b) Criteria.<br><br>A court of appeals may permit a movant to intervene on appeal who | FRCP 24 distinguishes between intervention as of right and permissive intervention.<br><br>Intervention as of right under FRCP 24(a) is not as absolute as it may seem, because it remains subject to a timeliness requirement. And permissive intervention under FRCP 24(b) requires the permission of the court.<br><br>The subcommittee considered creating a parallel structure, with both intervention as of right and permissive intervention, but thinks that it is better not to do so. Instead, working draft avoids the terms "as of right" and "permissive," and treats all intervention on appeal as subject to the discretion of the court of appeals. As discussed below, that discretion may be constrained by some statutes. |
| (1) demonstrates a compelling reason why intervention was not sought at a prior stage of the litigation or, if it was sought previously, provides a compelling explanation of how circumstances have changed;<br><br>(2) has a legal interest as described in (c); | The subcommittee thinks that it makes sense to have a separate timeliness requirement in subdivision (b), this one focused on timeliness in relation to the proceedings at a prior stage of the litigation. |

| | |
|---|---|
| (3) is so situated that disposing of the appeal in the movant's absence may as a practical matter impair or impede the movant's ability to protect that interest; | This language is drawn from FRCP 24(a) dealing with intervention as of right and equivalent language in FRCP 19(a) dealing with persons who are required to be joined if feasible.<br><br>Does such a provision belong in an appellate rule? On appeal, there will be a particular order or judgment that binds the particular parties and is under review.<br><br>If it is deleted, does it make it too easy to qualify for intervention?<br><br>It does seem important to allow someone who is a required party under FRCP 19 but was ignored in the district court to be able to intervene at least for the purpose of seeking a remand to consider its interests. Perhaps this concern would be better addressed directly with a specific provision in (c). |
| (4) shows that existing parties will not adequately protect that interest;<br><br>(5) shows that submission of an amicus brief would be insufficient to protect that interest;<br><br>(6) shows that existing parties will not be unfairly prejudiced by permitting intervention; and<br><br>(7) in any civil action of which the district courts have original jurisdiction founded solely on section 1332 of title 28, shows that intervention would be consistent with the | |

| | |
|---|---|
| jurisdictional requirements of section 1367(b) of title 28. | |
| (c) Legal Interests. The following legal interests support intervention on appeal: | The point of this subdivision is to insist that a proposed intervenor have a legally protected interest to vindicate in the case, not merely some more generalized interest in how the appeal is decided.<br><br>Merely having such an interest, however, does not mean that intervention must be granted. The criteria in subdivision (b) must also be met, and even then, the court of appeals has discretion.<br><br>At the last meeting, some members of the Advisory Committee found the prior version of (c) to be difficult to parse. This draft is an attempt to make it easier to follow. Is it easier to follow? |
| (1) a claim by the intervenor to a property interest in the property that is the subject of the action; | These two kinds of claims are moved to the top because they are the classic kind of interest that one might seek to protect by intervening. |
| (2) a claim by the intervenor that is being litigated on behalf of the proposed intervenor by a party acting in a representative capacity; | The interests of those whose rights are being litigated by a representative, such as when a trustee is litigating on behalf of beneficiaries or a named representative is litigating on behalf of a class, have long been considered a legal basis for intervention. |
| (3) a claim by an intervenor that can be currently asserted against an existing party; | If a proposed intervenor has a live claim against an existing party, that is a legally-protected interest. |

| | |
|---|---|
| (4) a defense by an intervenor to a claim by an existing party that could be currently asserted against the intervenor; | It would seem that if an existing party has a live claim against a proposed intervenor, but the existing party has not yet asserted the claim, the proposed intervenor has a legally-protected interest. That represents the classic case for a declaratory judgment: a would-be defendant (say, an insurance company), rather than wait to be sued (say, by someone claiming to be a beneficiary), goes to court first.<br><br>Perhaps this should be deleted, on the theory that any such intervention should have been sought below. But if the criteria of subdivision (b) are met—including the compelling reason or explanation required by (b)(1)—should intervention for such a person be flatly foreclosed?<br><br>Perhaps the provision is too broad when applied to the government as a party. If so, should it be limited to private parties?<br><br>Or should it not be so limited, leaving the government to rely on other criteria to defeat intervention when appropriate? |
| (5) a claim by an intervenor that could be asserted against an existing party if the current case resulted in a judgment sought by an existing party; | This provision allows for the assertion of a contingent claim, loosely analogous to an impleader claim under FRCP 14. The idea is that if the judgment sought in this case gives rise to a claim by a proposed intervenor against an existing party, it might be more efficient to hear the competing claims in a single case.<br><br>Again, meeting this interest would not itself mandate intervention. The court of appeals would continue to have discretion under the criteria in subdivision (b).<br><br>This provision might be most useful in cases involving review of administrative action, although |

| | |
|---|---|
| | its usefulness is not limited to such cases.[7] If a new rule does not apply to such cases, perhaps it could be deleted.<br><br>There is no proposal of a further provision concerning a contingent claim by an existing party against a proposed intervenor. That seems a contingency too far, because it is contingent not only on the outcome of the appeal, but also the |

[7] Professor Nelson observes:

> [I]magine that A is suing B for an injunction that would require B to behave in a particular way, but C believes that this behavior would violate C's rights in such a way as to give C a claim for relief against B. Even if that claim is not currently ripe (because B does not want to behave in the way that allegedly would violate C's rights), C's potential claim against B might still support intervention; if the court were to enter the injunction that A is seeking and if B were to comply with it, C would have a ripe claim for relief against B at that point, and the "interest" underlying that claim might be enough to support intervention now. . . .
>
> Suppose that a federal agency conducts a rulemaking process, during which A and B disagree about the content of the rule that the agency should promulgate; A supports Option #1 and B supports Option #2. Ultimately, the agency selects Option #1, and B sues the United States under the cause of action for judicial review that the Administrative Procedure Act has been understood to supply. To decide whether Rule 24(a) entitles A to intervene, courts could ask whether A would have a cause of action for judicial review if the agency were to do what B is seeking. To be sure, A does not *currently* have such a cause of action; the agency did what A wanted, and A wants the court to uphold the agency's rule. But if the court were to set aside the rule and force the agency to select Option #2 instead, the Administrative Procedure Act might then enable A to sue the United States for judicial review of the agency's revised rule. Rather than making these suits proceed sequentially, courts could conclude that A is eligible to intervene in the current litigation.

Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 389 (2020).

| | |
|---|---|
| | further contingency of an existing party seeking to bring a claim against the proposed intervenor.<br><br>That is, if an intervenor is saying, "If one of the existing parties wins the judgment it is seeking, I will have a claim against a party and I want to assert it now," intervention might well be warranted. But if an intervenor is saying, "If one of the existing parties wins the judgment it is seeking, a party have a claim against me, and if that party sues me, I have a defense," intervention should not be permitted. |
| (6) being a person who should have been joined if feasible under FRCP 19; | Is it best to say this directly as the kind of legal interest that supports intervention?<br>Perhaps so, if (b)(3) is deleted. |
| (7) But the precedential effect of a decision, standing alone, is not a sufficient legal interest. | Given the restrictive account of what legal interests support intervention, is this necessary? Is it worth it for emphasis? |
| (d) Governments, Agencies, and Officials.<br><br>(1) The United States, a State, or a tribal government may move to intervene to defend any law it has enacted or action it or one of its agencies or officers has taken.<br><br>(2) An agency or officer of the United States, of a State or of a tribal government may also move to intervene to defend any law it has enacted or action it or one of its agencies or officers has taken, if that agency or officer is authorized by the applicable | There are statutes that provide for a right to intervene in a court of appeals. E.g., 35 U.S.C. § 143 ("The Director [of the United States Patent and Trademark Office] shall have the right to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board in a derivation proceeding under section 135 or in an inter partes or post-grant review under chapter 31 or 32."); 28 U.S.C. § 2403 (in any case "in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality"). The working draft uses the word "may," reflecting that courts applying these statutes typically require timeliness.<br>The working draft includes tribal governments. |

| | |
|---|---|
| law to defend the law or action. | |
| (3) The United States may move to intervene to defend its foreign relations interests. | |
| (4) The United States, a State, or a tribal government may also move to intervene under (a), (b), and (c). | The point is to make clear that the special provisions for government intervention are not exclusive, so that governments can also protect their proprietary rights in the same way that any private litigant can. |
| (5) A motion under (d)(1) through (d)(3) need not comply with (a)(2), (a)(3), (b), or (c). | When the special provisions for government intervention apply, the motion to intervene must be timely. But the other requirements do not.<br><br>Should any other requirements also apply to the government? |
| (e) Disposition of Motion. The court may grant the motion, deny the motion, or transfer the motion to the district court. If the court grants the motion, the intervenor becomes a party for all purposes, unless the court orders otherwise. Denial of a motion to intervene does not preclude the filing of an amicus brief under Rule 29. | The subcommittee thinks that the default should be that intervention is for all purposes. This both underscores the distinction between an amicus and a party. It also means that a court need not delineate the scope of intervention any time it grants a motion to intervene. The court can, however, if it chooses, limit the scope of intervention. If a party wants to intervene for a limited purpose, it should so specify. |

### B. Appendices

In the spring of 2018, the Advisory Committee decided not to act on a concern that appendices were too long and contained irrelevant information. Instead, it put the matter off for three years in the hope that changing technology might solve the problem with briefs that cite to the electronic record of the district court. In the spring of 2021, the Committee again put the matter off for three years for similar reasons.

The Advisory Committee is gathering information from circuit clerks before deciding how to proceed.

### C. New Suggestions

The Advisory Committee has received one new suggestion that remains under consideration.

Judge Randolph has suggested that Rule 15 be amended in a way similar to the way in which Rule 4 was amended in 1993. Prior to that 1993 amendment, premature notices of appeal from district courts under Rule 4 would self-destruct if a party filed certain post-judgment motions in the district court, requiring the filing of a new notice of appeal. Something similar happens on review of agency actions under Rule 15, under what is known as the "incurably premature" doctrine.

Judge Randolph writes that this doctrine "deserves reconsideration, either by our court en banc or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure." *Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023) (Randolph, J., concurring).

A subcommittee has been created to explore this suggestion.

The Advisory Committee has also received several comments on the proposed amendments to Rule 29, dealing with amicus briefs. Because these comments were submitted before a proposed amendment was published for public comment, they have been docketed as separate suggestions, but the Advisory Committee has treated them as comments.

## V. Item Removed from the Advisory Committee Agenda

The Advisory Committee considered a suggestion by Andrew Shaw (23-AP-J) to make access to PACER free. The Advisory Committee, without dissent, voted to remove the suggestion from the agenda, viewing it as not a matter for rule making.

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

**Rule 6. Appeal in a Bankruptcy Case or Proceeding**

**(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case or Proceeding.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules. But the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal

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

Rules of Bankruptcy Procedure, which may be shorter than the time allowed under the Civil Rules.

**(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case or Proceeding.**

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 158(a) or (b), but with these qualifications:

* * * * *

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as

used in any applicable rule, means ''bankruptcy appellate panel''; and

* * * * *

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for Rehearing.**

* * * * *

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in ~~compliance~~ accordance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal.

The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

* * * * *

(C) **Making the Record Available.**

* * * * *

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy

of the docket entries be made available in place of the redesignated record. But at any time during the appeal's pendency, any party may request ~~at any time during the pendency of the appeal~~ that the redesignated record be made available.

(D) **Filing the Record.** When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date as noted ~~on the docket~~ serves as the filing date of the record. The circuit clerk must immediately notify all parties of that ~~the filing~~ date.

**(c) Direct Appeal ~~Review~~ from a Judgment, Order, or Decree of a Bankruptcy Court by ~~Permission~~ Authorization Under 28 U.S.C. § 158(d)(2).**

(1) **Applicability of Other Rules.** These rules apply to a direct appeal from a judgment, order, or decree of a bankruptcy court by ~~permission~~ authorization under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5~~(a)(3)~~ (except as provided in this Rule 6(c)), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, ''district court'' or ''district clerk'' includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk~~; and~~

~~(C) the reference to ''Rules 11 and 12(c)'' in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).~~

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(c)(1), the following rules apply:

(A) **Petition to Authorize a Direct Appeal.** Within 30 days after a certification of a bankruptcy court's order for direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) becomes effective under Bankruptcy Rule 8006(a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk under Bankruptcy Rule 8006(g).

(B) **Contents of the Petition.** The petition must include the material required by Rule 5(b)(1) and an attached copy of:

(i) the certification; and

(ii) the notice of appeal of the bankruptcy court's judgment, order, or decree filed under Bankruptcy Rule 8003 or 8004.

(C) **Answer or Cross-Petition; Oral Argument.** Rule 5(b)(2) governs an answer or cross-petition. Rule 5(b)(3) governs oral argument.

(D) **Form of Papers; Number of Copies; Length Limits.** Rule 5(c) governs the required form, number of copies to be filed, and length limits

applicable to the petition and any answer or cross-petition.

(E) **Notice of Appeal; Calculating Time.** A notice of appeal to the court of appeals need not be filed. The date when the order authorizing the direct appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(F) **Notification of the Order Authorizing Direct Appeal; Fees; Docketing the Appeal.**

(i) When the court of appeals enters the order authorizing the direct appeal, the circuit clerk must notify the bankruptcy clerk and the district court clerk or

bankruptcy-appellate-panel clerk of the entry.

(ii) Within 14 days after the order authorizing the direct appeal is entered, the appellant must pay the bankruptcy clerk any unpaid required fee, including:

- the fee required for the appeal to the district court or bankruptcy appellate panel; and
- the difference between the fee for an appeal to the district court or bankruptcy appellate panel and the fee required

for an appeal to the court of appeals.

(iii) The bankruptcy clerk must notify the circuit clerk once the appellant has paid all required fees. Upon receiving the notice, the circuit clerk must enter the direct appeal on the docket.

(G) **Stay Pending Appeal.** Bankruptcy Rule 8007 applies to any stay pending appeal.

~~(A)~~(H) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal. If a party has already filed a document or completed a step required to assemble the record for the appeal to the district court or

bankruptcy appellate panel, the party need not repeat that filing or step.

~~(B)~~(I) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available. When the court of appeals enters the order authorizing the direct appeal, the bankruptcy clerk must make the record available to the circuit clerk.

~~(C)~~ ~~**Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending appeal.~~

~~(D)~~(J) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date as noted ~~on the docket~~ serves as

the filing date of the record. The circuit clerk must immediately notify all parties of that ~~the filing~~ date.

~~(E)~~(K) **Filing a Representation Statement.** Unless the court of appeals designates another time, within 14 days after ~~entry of~~ the order ~~granting permission to appeal~~ authorizing the direct appeal is entered, the attorney for each party to the appeal ~~the attorney who sought permission~~ must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

**Committee Note**

**Subdivision (a).** Minor stylistic and clarifying changes are made to subdivision (a). In addition, subdivision (a) is amended to clarify that, when a district court is exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334, the time in which to file post-judgment motions that can reset the time to appeal under Rule 4(a)(4)(A) is controlled by the Federal Rules of

Bankruptcy Procedure, rather than the Federal Rules of Civil Procedure.

The Bankruptcy Rules partially incorporate the relevant Civil Rules but in some instances shorten the deadlines for motions set out in the Civil Rules. *See* Fed. R. Bankr. P. 9015(c) (any renewed motion for judgment under Civil Rule 50(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 7052 (any motion to amend or make additional findings under Civil Rule 52(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 9023 (any motion to alter or amend the judgment or for a new trial under Civil Rule 59 must be filed within 14 days of entry of judgment).

Motions for attorney's fees in bankruptcy cases or proceedings are governed by Bankruptcy Rule 7054(b)(2)(A), which incorporates without change the 14-day deadline set in Civil Rule 54(d)(2)(B). Under Appellate Rule 4(a)(4)(A)(iii), such a motion resets the time to appeal only if the district court so orders pursuant to Civil Rule 58(e), which is made applicable to bankruptcy cases and proceedings by Bankruptcy Rule 7058.

Motions for relief under Civil Rule 60 in bankruptcy cases or proceedings are governed by Bankruptcy Rule 9024. Appellate Rule 4(a)(4)(A)(vi) provides that a motion for relief under Civil Rule 60 resets the time to appeal only if the motion is made within the time allowed for filing a motion under Civil Rule 59. In a bankruptcy case or proceeding, motions under Civil Rule 59 are governed by Bankruptcy Rule 9023, which, as noted above, requires such motions to be filed within 14 days of entry of judgment.

| Civil Rule | Bankruptcy Rule | Time Under Bankruptcy Rule |
|---|---|---|
| 50(b) | 9015(c) | 14 days |
| 52(b) | 7052 | 14 days |
| 59 | 9023 | 14 days |
| 54(d)(2)(B) | 7054(b)(2)(A) | 14 days |
| 60 | 9024 | 14 days |

Of course, the Bankruptcy Rules may be amended in the future. If that happens, the time allowed for the equivalent motions under the applicable Bankruptcy Rule may change.

**Subdivision (b).** Minor stylistic and clarifying changes are made to the header of subdivision (b) and to subdivision (b)(1). Subdivision (b)(1)(C) is amended to correct the omission of the word "bankruptcy" from the phrase "bankruptcy appellate panel." Stylistic changes are made to subdivision (b)(2).

**Subdivision (c).** Subdivision (c) was added to Rule 6 in 2014 to set out procedures governing discretionary direct appeals from orders, judgments, or decrees of the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2).

Typically, an appeal from an order, judgment, or decree of a bankruptcy court may be taken either to the district court for the relevant district or, in circuits that have established bankruptcy appellate panels, to the bankruptcy appellate panel for that circuit. 28 U.S.C. § 158(a). Final orders of the district court or bankruptcy appellate panel resolving appeals under § 158(a) are then appealable as of right to the court of appeals under § 158(d)(1).

That two-step appeals process can be redundant and time-consuming and could in some circumstances potentially jeopardize the value of a bankruptcy estate by impeding quick resolution of disputes over disposition of estate assets. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress enacted 28 U.S.C. § 158(d)(2) to provide that, in certain circumstances, appeals may be taken directly from orders of the bankruptcy court to the courts of appeals, bypassing the intervening appeal to the district court or bankruptcy appellate panel.

Specifically, § 158(d)(2) grants the court of appeals jurisdiction of appeals from any order, judgment, or decree of the bankruptcy court if (a) the bankruptcy court, the district court, the bankruptcy appellate panel, or all parties to the appeal certify that (1) "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"; (2) "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions"; or (3) "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken" *and* (b) "the court of appeals authorizes the direct appeal of the judgment, order, or decree." 28 U.S.C. § 158(d)(2).

Bankruptcy Rule 8006 governs the procedures for certification of a bankruptcy court order for direct appeal to the court of appeals. Among other things, Rule 8006 provides that, to become effective, the certification must be filed in the appropriate court, the appellant must file a notice of appeal of the bankruptcy court order to the district court or bankruptcy appellate panel, and the notice of appeal must become effective. Fed. R. Bankr. P. 8006(a). Once the certification becomes effective under Rule 8006(a), a

petition seeking authorization of the direct appeal must be filed with the court of appeals within 30 days. *Id.* 8006(g).

Rule 6(c) governs the procedures applicable to a petition for authorization of a direct appeal and, if the court of appeals grants the petition, the initial procedural steps required to prosecute the direct appeal in the court of appeals.

As promulgated in 2014, Rule 6(c) incorporated by reference most of Rule 5, which governs petitions for permission to appeal to the court of appeals from otherwise non-appealable district court orders. It has become evident over time, however, that Rule 5 is not a perfect fit for direct appeals of bankruptcy court orders to the courts of appeals. The primary difference is that Rule 5 governs discretionary appeals from district court orders that are otherwise non-appealable, and an order granting a petition for permission to appeal under Rule 5 thus initiates an appeal that otherwise would not occur. By contrast, an order granting a petition to authorize a direct appeal under Rule 6(c) means that an appeal that has already been filed and is pending in the district court or bankruptcy appellate panel will instead be heard in the court of appeals. As a result, it is not always clear precisely how to apply the provisions of Rule 5 to a Rule 6(c) direct appeal.

The new amendments to Rule 6(c) are intended to address that problem by making Rule 6(c) self-contained. Thus, Rule 6(c)(1) is amended to provide that Rule 5 is not applicable to Rule 6(c) direct appeals except as specified in Rule 6(c) itself. Rule 6(c)(2) is also amended to include the substance of applicable provisions of Rule 5, modified to apply more clearly to Rule 6(c) direct appeals. In addition, stylistic and clarifying amendments are made to conform to other provisions of the Appellate Rules and Bankruptcy

Rules and to ensure that all the procedures governing direct appeals of bankruptcy court orders are as clear as possible to both courts and practitioners.

**Subdivision (c)—Title.** The title of subdivision (c) is amended to change "Direct Review" to "Direct Appeal" and "Permission" to "Authorization," to be consistent with the language of 28 U.S.C. § 158(d)(2). In addition, the language "from a Judgment, Order, or Decree of a Bankruptcy Court" is added for clarity and to be consistent with other subdivisions of Rule 6.

**Subdivision (c)(1).** The language of the first sentence is amended to be consistent with the title of subdivision (c). In addition, the list of rules in subdivision (c)(1)(A) that are inapplicable to direct appeals is modified to include Rule 5, except as provided in subdivision (c) itself. Subdivision (c)(1)(C), which modified certain language in Rule 5 in the context of direct appeals, is therefore deleted. As set out in more detail below, the provisions of Rule 5 that are applicable to direct appeals have been added, with appropriate modifications to take account of the direct appeal context, as new provisions in subdivision (c)(2).

**Subdivision (c)(2).** The language "to the rules made applicable by (c)(1)" is added to the first sentence for consistency with other subdivisions of Rule 6.

**Subdivision (c)(2)(A).** Subdivision (c)(2)(A) is a new provision that sets out the basic procedure and timeline for filing a petition to authorize a direct appeal in the court of appeals. It is intended to be substantively identical to Bankruptcy Rule 8006(g), with minor stylistic changes made in light of the context of the Appellate Rules.

**Subdivision (c)(2)(B).** Subdivision (c)(2)(B) is a new provision that specifies the contents of a petition to

authorize a direct appeal. It provides that, in addition to the material required by Rule 5, the petition must include an attached copy of the certification under § 158(d)(2) and a copy of the notice of appeal to the district court or bankruptcy appellate panel.

**Subdivision (c)(2)(C).** Subdivision (c)(2)(C) is a new provision. For clarity, it specifies that answers or cross-petitions are governed by Rule 5(b)(2) and oral argument is governed by Rule 5(b)(3).

**Subdivision (c)(2)(D).** Subdivision (c)(2)(D) is a new provision. For clarity, it specifies that the required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition are governed by Rule 5(c).

**Subdivision (c)(2)(E).** Subdivision (c)(2)(E) is a new provision that incorporates the substance of Rule 5(d)(2), modified to take into account that the appellant will already have filed a notice of appeal to the district court or bankruptcy appellate panel. It makes clear that a second notice of appeal to the court of appeals need not be filed, and that the date of entry of the order authorizing the direct appeal serves as the date of the notice of appeal for the purpose of calculating time under the Appellate Rules.

**Subdivision (c)(2)(F).** Subdivision (c)(2)(F) is a new provision. It largely incorporates the substance of Rules 5(d)(1)(A) and 5(d)(3), with some modifications.

Subdivision (c)(2)(F)(i) now requires that when the court of appeals enters an order authorizing a direct appeal, the circuit clerk must notify the bankruptcy clerk and the clerk of the district court or the clerk of the bankruptcy appellate panel of the order.

Subdivision (c)(2)(F)(ii) requires that, within 14 days of entry of the order authorizing the direct appeal, the appellant must pay the bankruptcy clerk any required filing or docketing fees that have not yet been paid. Thus, if the appellant has not yet paid the required fee for the initial appeal to the district court or bankruptcy appellate panel, the appellant must do so. In addition, the appellant must pay the bankruptcy clerk the difference between the fee for the appeal to the district court or bankruptcy appellate panel and the fee for an appeal to the court of appeals, so that the appellant has paid the full fee required for an appeal to the court of appeals.

Subdivision (c)(2)(F)(iii) then requires the bankruptcy clerk to notify the circuit clerk that all fees have been paid, which triggers the circuit clerk's duty to docket the direct appeal.

**Subdivision (c)(2)(G).** Subdivision (c)(2)(G) was formerly subdivision (c)(2)(C). It is substantively unchanged, continuing to provide that Bankruptcy Rule 8007 governs stays pending appeal, but reflects minor stylistic revisions.

**Subdivision (c)(2)(H).** Subdivision (c)(2)(H) was formerly subdivision (c)(2)(A). It continues to provide that Bankruptcy Rule 8009 governs the record on appeal, but adds a sentence clarifying that steps taken to assemble the record under Bankruptcy Rule 8009 before the court of appeals authorizes the direct appeal need not be repeated after the direct appeal is authorized.

**Subdivision (c)(2)(I).** Subdivision (c)(2)(I) was formerly subdivision (c)(2)(B). It continues to provide that Bankruptcy Rule 8010 governs provision of the record to the court of appeals. It adds a sentence clarifying that when the

court of appeals authorizes the direct appeal, the bankruptcy clerk must make the record available to the court of appeals.

**Subdivision (c)(2)(J).** Subdivision (c)(2)(J) was formerly subdivision (c)(2)(D). It is unchanged other than a stylistic change and being renumbered.

**Subdivision (c)(2)(K).** Subdivision (c)(2)(K) was formerly subdivision (c)(2)(E). Because any party may file a petition to authorize a direct appeal, it is modified to provide that the attorney for each party—rather than only the attorney for the party filing the petition—must file a representation statement. In addition, the phrase "granting permission to appeal" is changed to "authorizing the direct appeal" to conform to the language used throughout the rest of subdivision (c), and a stylistic change is made.

---

**Changes Made After Publication and Comment**

Two changes were made to the rule amendment after the public comment period: The reference to "this subdivision (c)" in Rule 6(c)(1)(A) was changed to "this Rule 6(c)," and the reference to "(c)(1)" in Rule 6(c)(2) was changed to "Rule 6(c)(1)."

**Summary of Public Comment**

Minnesota State Bar Association's Assembly (AP-2023-0001-0007): The proposed changes will foster transparency and possibly efficiency between parties and the court.

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

**Rule 39. Costs**

**(a) ~~Against Whom Assessed~~ Allocating Costs Among the Parties.** The following rules apply to allocating costs among the parties unless the law provides, the parties agree, or the court orders otherwise:

(1) if an appeal is dismissed, costs are ~~taxed~~ allocated against the appellant~~, unless the parties agree otherwise~~;

(2) if a judgment is affirmed, costs are ~~taxed~~ allocated against the appellant;

(3) if a judgment is reversed, costs are ~~taxed~~ allocated against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, each party bears

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

its own costs ~~costs are taxed only as the court orders~~.

**(b) Reconsideration.** Once the allocation of costs is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of the motion. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

**(c) Costs Governed by Allocation Determination.** The allocation of costs applies both to costs taxable in the court of appeals under Rule 39(e) and to costs taxable in district court under Rule 39(f).

~~(b)~~**(d) Costs For and Against the United States.** Costs for or against the United States, its agency, or officer

will be ~~assessed~~ allocated under Rule 39(a) only if authorized by law.

**(e) Costs on Appeal Taxable in the Court of Appeals.**

(1) **Costs Taxable.** The following costs on appeal are taxable in the court of appeals for the benefit of the party entitled to costs:

(A) the production of necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f);

(B) the docketing fee; and

(C) a filing fee paid in the court of appeals.

~~**(c)**~~ (2) **Costs of Copies.** Each court of appeals must, by local rule, set ~~fix~~ the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work

in the area where the clerk's office is located and should encourage economical methods of copying.

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

~~(1)~~ (A) A party who wants costs taxed in the court of appeals must—within 14 days after ~~entry of~~ judgment is entered—file with the circuit clerk and serve an itemized and verified bill of those costs.

~~(2)~~ (B) Objections must be filed within 14 days after ~~service of~~ the bill of costs is served, unless the court extends the time.

~~(3)~~ (C) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance

of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

~~(e)~~(f) **Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs ~~under this rule~~:

* * * * *

**Committee Note**

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court 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. The Court also observed 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…." *Id*. at 1638. The amendment does so. Stylistic changes are also made.

**Subdivision (a).** Both the heading and the body of the Rule are amended to clarify that allocation of the costs among the parties is done by the court of appeals. The court may allow the default rules specified in subdivision (a) to operate based on the judgment, or it may allocate them differently based on the equities of the situation. Subdivision (a) is not concerned with calculating the amounts owed; it is concerned with who bears those costs, and in what proportion. The amendment also specifies a default for mixed judgments: each party bears its own costs.

**Subdivision (b).** The amendment specifies a procedure for a party to ask the court of appeals to reconsider the allocation of costs established pursuant to subdivision (a). A party may do so by motion in the court of appeals within 14 days after the entry of judgment. The mandate is not stayed pending resolution of this motion, but the court of appeals retains jurisdiction to decide the motion after the mandate issues.

**Subdivision (c).** Codifying the decision in *Hotels.com*, the amendment also makes clear that the allocation of costs by the court of appeals governs the taxation of costs both in the court of appeals and in the district court.

**Subdivision (d).** The amendment uses the word "allocated" to match subdivision (a).

**Subdivision (e).** The amendment specifies which costs are taxable in the court of appeals and clarifies that the procedure in that subdivision governs the taxation of costs taxable in the court of appeals. The docketing fee, currently $500, is established by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913. The reference to filing fees paid in the court of appeals is not a reference to the $5

fee paid to the district court required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals. Instead, the reference is to filing fees paid in the court of appeals, such as the fee to file a notice of appeal from a bankruptcy appellate panel.

**Subdivision (f).** The provisions governing costs taxable in the district court are lettered (f) rather than (e). The filing fee referred to in this subdivision is the $5 fee required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals.

---

**Changes Made After Publication and Comment**

Three changes were made after public comment: The references to "(e)" and "(f)" in Rule 39(c) and the reference to "(a)" in Rule 39(d) were changed to "Rule 39(e)," "Rule 39(f)," and "Rule 39(a)," respectively.

**Summary of Public Comment**

Minnesota State Bar Association's Assembly (AP-2023-0001-0007): The proposed changes will foster transparency and possibly efficiency between parties and the court.

Committee on Appellate Courts of the California Lawyers Association's Litigation Section (AP-2023-0001-0008): The proposal provides clarity to courts and practitioners regarding the respective authority of courts of appeals and district courts to allocate and tax costs. It cogently addresses the issues regarding FRAP 39 raised by the Supreme Court in *Hotels.com*. The introduction of the term "allocate" achieves greater clarity for practitioners and

courts, and the codification of the holding in *Hotels.com* assists those who rarely practice in the courts of appeals. The Civil Rules Committee should explore an amendment to Federal Rule of Civil Procedure 62.

Andrew Straw (AP-2023-0001-0005): If an appeal is allowed in forma pauperis, no allocation of costs to the indigent person should be made in any case. The very risk of financial catastrophe is an unacceptable chilling of the right to appeal and thus of the First Amendment right to petition and receive a court decision.

**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.**

(1) **Applicability**. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **Purpose; When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may be of considerable help to the court. An amicus brief that does not serve this purpose—or that is redundant with another amicus brief—is disfavored. The United States ~~or~~, its officer or agency, or a state may

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

file an amicus brief without ~~the consent of the parties or~~ leave of court. Any other amicus curiae may file a brief only with ~~by~~ leave of court ~~or if the brief states that all parties have consented to its filing, but a court of appeals~~. The court may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

(3) **Motion for Leave to File.** A ~~The~~ motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason ~~why an amicus~~ the brief is helpful ~~desirable~~ and why it serves the purpose set forth in Rule 29(a)(2) ~~the matters asserted are relevant to the disposition of the case~~.

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the requirements of Rule 32,~~ T~~t~~he cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities — cases (alphabetically arranged), statutes, and other authorities, ~~— with references to~~ together with the pages ~~of the brief~~ where they are cited;

(D) a concise ~~statement~~ description of the identity, history, experience, and interests of the amicus curiae, ~~its interest in the case, and the source of its authority to file~~ together with an explanation of how the brief and the perspective of the amicus will help the court;

(E) if an amicus has existed for less than 12 months, the date the amicus was created;

~~(E)~~(F) unless the amicus is the United States, its officer or agency, or a state, the disclosures required by Rules 29(b), (c), and (e); ~~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 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;~~

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1)~~, if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus curiae must file its brief~~, accompanied by a motion to filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's

principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus curiae may file a reply brief only with the court's permission. ~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus curiae may participate in oral argument only with the court's permission.

**(b) Disclosing a Relationship Between an Amicus and a Party**. An amicus brief must disclose whether:

(1) a party or its counsel authored the brief in whole or in part;

(2) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief;

(3) a party, its counsel, or any combination of parties or their counsel has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(4) a party, its counsel, or any combination of parties or their counsel has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for the prior fiscal year.

**(c) Naming the Party or Counsel.** Any disclosure required by Rule 29(b) must name the party or counsel.

**(d) Disclosure by the Party or Counsel.** If the party or counsel knows that an amicus has failed to make the disclosure required by Rule 29(b) or (c), the party or counsel must do so.

**(e) Disclosing a Relationship Between an Amicus and a Nonparty**. An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months. If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date when the amicus was created.

~~(b)~~**(f) During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(e) governs amicus ~~filings~~ briefs filed during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in Rules 29(f)(2) and (3), and

unless a local rule or order in a case provides otherwise.

~~(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.~~

~~(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.~~

~~(4)~~(2) ~~Contents, Form, and~~ **Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

~~(5)~~(3) **Time for Filing**. An amicus curiae supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file

its brief~~, accompanied by a motion for filing when necessary,~~ no later than the date set by the court for ~~the~~ a response.

**Committee Note**

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there is an additional interest in

disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not party to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

**Subdivision (a).** The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already mentioned by the parties that may be of considerable help to the court. By contrast, if an amicus curiae brief is redundant with the parties' briefs or other amicus curiae briefs, it is a burden rather than a help. The amendment also eliminates the ability of a nongovernmental amicus to file a brief based solely on the consent of the parties. Most parties follow a norm of granting consent to anyone who asks. As a result, the consent requirement fails to serve as a useful filter. Some parties

might not respond to a request to consent, leaving a potential amicus needing to wait until the last minute to know whether to file a motion. Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs. Rule 29(a)(3) is amended to require the motion to state why the brief is helpful and serves the purpose of an amicus brief.

The amendment to Rule 29(a)(4)(D) expands the required statement regarding the identity of an amicus and its interest in the case and requires "a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(E) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (e)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change

enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

**Subdivision (b).** Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(e). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (e).

Rule 29(b)(1) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(2) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(3) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

Subdivision (b)(4) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or

counsel either has contributed (or pledged to contribute) 25% or more of the revenue of an amicus. The 25% figure is chosen because the Committee believes that someone who provides that high a percentage of the revenue of an amicus is likely to have substantial power to influence that amicus. Because the concern is about contributions (or pledges) made sufficiently near in time to the filing of the brief to influence the brief, contributions (or pledges) made within 12 months before the filing of the brief must be disclosed. To minimize the burden of disclosure on the amicus, the 25% calculation is based on the total revenue of the amicus for the prior fiscal year. This means that such a calculation of the disclosure threshold needs to be done only once a year rather than each time an amicus brief is filed. And by using the prior fiscal year, an amicus can rely on its ordinary accounting process. The term "total revenue" is used because that is the term used by a tax-exempt organization on its IRS Form 990. A non-tax-exempt entity is likely to prepare an income statement which includes its total revenue. Individual amici can rely on their total income from the prior fiscal year reported on IRS Form 1040.

**Subdivision (c)**. Subdivision (c) requires that any disclosure required by paragraph (b) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(D)(iii) that certain persons who make earmarked contributions be identified.

**Subdivision (d)**. Subdivision (d) is new. It operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

**Subdivision (e)**. Subdivision (e) focuses on the relationship between the amicus and a nonparty. It makes

several changes to the existing Rule 29(a)(4)(e)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs (and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Instead, the amendment retains the member exception, but limits it to those who have been members of the amicus for the prior 12 months. In effect, the amendment is an anti-evasion rule that treats new members of an amicus as non-members.

This then raises the question of what to do with a newly-formed amicus organization. Rather than eliminate the member exception for such organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(e) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(D) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

**Subdivision (f)**. Subdivision (f) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(f)(1) makes Rule 29(a) through (e) applicable, except as provided in the rest of Rule 29(f) or if a local rule or order in a particular

case provides otherwise. As a result, duplicative provisions are eliminated.

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

**Rule 32. Form of Briefs, Appendices, and Other Papers[2]**

* * * * *

**(g) Certificate of Compliance.**

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(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), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation.

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

[2] The changes indicated are to the revised version of Rule 32, not yet in effect.

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**

Rule 32(g) is amended to conform to amendments to Rule 29.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

| | | | | | |
|---|---|---|---|---|---|
| | | * * * | | | |
| Amicus briefs | 29 (a)(5) | • Amicus brief during initial consideration on merits | ~~One-half the length set by the Appellate Rules for a party's principal brief~~<br>6,500<br><br>2,600 | ~~One-half the length set by the Appellate Rules for a party's principal brief~~<br>Not applicable<br><br>Not applicable | ~~One-half the length set by the Appellate Rules for a party's principal brief~~<br>Not applicable<br><br>Not applicable |
| | ~~29(b)(4)~~<br>29(f)(2) | • Amicus brief during consideration of whether to grant rehearing | | | |
| | | * * * | | | |

# UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

| | | |
|---|---|---|
| <Name(s) of plaintiff(s)>, | ) | |
| | ) | |
| Plaintiff(s) | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. <Number> |
| <Name(s) of defendant(s)>, | ) | |
| | ) | |
| Defendant(s) | ) | |
| | ) | |

**AFFIDAVIT ACCOMPANYING MOTION**
**FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**

**Affidavit in Support of Motion**

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

| My issues on appeal are: |
|---|
| |
| |
| |
| |
| |
| |
| |
| |
| |

| | | |
|---|---|---|
| 1. | What is your monthly take-home pay from work? | $_____ |
| 2. | What is your monthly income from any source other than take-home pay from work (such as unemployment benefits, alimony, child support, public assistance, pension, and social security)? | $_____ |
| 3. | How much are your monthly housing costs (such as rent and utilities)? | $_____ |
| 4. | How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)? | $_____ |
| 5. | What is the total value of all your assets (such as bank accounts, investments, market value of car or house)? | $_____ |
| 6. | How much debt do you have (such as credit cards, mortgage, and student loans)? | $_____ |
| 7. | How many people (including yourself) do you support? | |
| 8. | Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)? | Yes No |

**No matter how you answered the questions above, if you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts.** If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

If there is anything else that you think explains your inability to pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)

| |
|---|
| |
| |
| |
| |
| |
| |

**Committee Note**

Revised Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information.

# TAB 4B

Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

April 10, 2024

Denver, CO

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 10, 2024, at approximately 9:00 a.m. MDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: Linda Coberly, Professor Bert Huang, Justice Leondra Kruger, Judge Sidney Thomas, and Lisa Wright.

George Hicks, Judge Carl J. Nichols and Judge Richard C. Wesley attended via Teams. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice; he attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Daniel Bress, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Alison Bruff, Counsel, RCS; Shelly Cox, Management Analyst, RCS; Zachary Hawari, Rules Law Clerk, RCS; Rakita Johnson, Administrative Assistant, RCS; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; Bridget M. Healy, Counsel, RCS; Scott Myers, Counsel, RCS; and Tim Reagan, Federal Judicial Center, attended via Teams.

## I. Introduction and Preliminary Matters

Judge Bybee opened the meeting and welcomed everyone, particularly Linda Coberly, who was attending her first meeting in person, and Rakita Johnson, a new RCS staff member. He also welcomed the observers, both those in person and those online.

Mr. Byron called attention to the rules tracking chart and noted that the Supreme Court had approved the latest round of amendments, scheduled to go into effect on December 1, 2024. (Agenda book page 21). These amendments have been sent to Congress for review and include the substantial revisions of Rules 35 and 40 that this Committee put a lot of work into.

Mr. Hawari noted that the pending legislation chart now focused on legislation that would directly or effectively amend the Federal Rules. (Agenda book page 29).

Judge Bybee noted the draft minutes of the meeting of the Standing Committee and pointed to the pages involving the Appellate Rules. (Agenda book pages 49-52).

## II. Approval of the Minutes

The minutes of the October 19, 2023, Advisory Committee meeting were approved. (Agenda book page 80).

## III. Discussion of Joint Committee Matters

Professor Struve provided an update regarding electronic filing and service for unrepresented parties, noting that she expects that the working group will meet over the summer and have a proposal at the fall meeting.

Mr. Byron presented an update concerning privacy matters. The reporters' working group has been considering the suggestion by Senator Wyden that courts require the complete redaction of social security numbers, not simply redaction of all but the last four digits. A draft rule to accomplish that in the Civil Rules and Criminal Rules is in the material. (Agenda book page 100). Other suggestions have also been received regarding privacy matters, including one from the Department of Justice regarding the use of pseudonyms rather than initials for minors. (Agenda book page 108). Rather than implement the Wyden suggestion in isolation and end up amending the privacy rules twice in rapid succession, the working group is inclined to consider a more general review of privacy concerns across all four sets of rules all at once.

This committee might want to appoint its own subcommittee, wait for another Advisory Committee to take the lead, or ask the Standing Committee to appoint a joint subcommittee, although that might be premature. Mr. Byron invited feedback, either at this meeting or afterwards.

He also noted that the Federal Judicial Center is working on an undated report on the prevalence of unredacted Social Security Numbers in court filings; that report should be available in time for the June Standing Committee meeting and before this committee in the fall. Two other phases of the FJC research will focus on other personal information, such as dates of birth, in court filings, and Social Security

Numbers in court opinions. He also anticipates that there will be a report to Congress this year pursuant to the E-Government Act.

## IV. Discussion of Matters Published for Public Comment

### A. Costs on Appeal (21-AP-D)

Judge Bybee thanked Judge Nichols for his work as the chair of the subcommittee dealing with costs on appeal. He noted that Judge Nichols was presiding over a trial today and was joining the meeting via Teams whenever possible.

The Reporter presented the report of the subcommittee. (Agenda book page 111). Proposed amendments to Rule 39 were published for public comment. (Agenda book page 119). The proposed amendments codify the holding of *Hotels.com* that the allocation of costs by the court of appeals governs in both the court of appeals and in the district court. The proposed amendments also provide the clarity of procedure that the Supreme Court noted was lacking for a party who wishes to ask the court of appeals to change that allocation.

We have received three comments, two positive, one negative. The negative comment suggests that costs should never be assessed against a litigant proceeding IFP. Considering that the statute governing IFP status allows for costs against litigants proceeding IFP, the subcommittee does not recommend any change but instead recommends final approval as published.

The Committee, without objection, gave its final approval to the amendments.

### B. Bankruptcy Appeals

The Reporter presented the report of the bankruptcy subcommittee. (Agenda book page 127). These proposed amendments to Rule 6 arose from suggestions from the Bankruptcy Rules Committee and were published for public comment. (Agenda book page 129).

They address two different circumstances. First, they clarify how certain post judgment motions interact with the time to appeal when a district court hears a bankruptcy case itself rather than referring it to a bankruptcy court. Second, they provide rules governing direct appeals from a bankruptcy court to the court of appeals. The existing rules treat such cases like other requests for permission to appeal under Rule 5. But Rule 5 is not a good fit, because it is designed for situations where the question is whether an appeal will be allowed at all, while direct bankruptcy appeals involve situations where there will be an appeal, and the question is which court will hear that appeal. The amendments benefited from the work of Danielle Spinelli, an experienced bankruptcy appeals lawyer who was on the

subcommittee but whose term has now expired. They were also worked out with the close cooperation of the reporters for the Bankruptcy Rules Committee.

We have received only one comment, and it was positive. The reporters for the Bankruptcy Rules Committee did not receive any additional comments.

The subcommittee recommends final approval as published.

The Committee, without objection, gave its final approval to the amendments.

## V. Discussion of Matters Before Subcommittees

### A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

Judge Bybee presented the report of the amicus subcommittee. (Agenda book page 152). He noted that we have been working on this since 2019. We have had good discussions here and at the Standing Committee. The subcommittee recommends that the Committee ask the Standing Committee to publish a proposed rule for public comment.

Our consideration of this matter has already produced a number of comments, including at least one received after the agenda book was put together. Because the public comment period has not opened, they have been docketed as separate suggestions. He expects a great deal more comment once something is published for public comment. Don't expect this to be like Rule 39 and Rule 6 that we just approved. Some will think that we have gone too far; others will think that we have not gone far enough.

Before opening the floor for discussion, Judge Bybee noted the ways in which the draft produced by the subcommittee differs from the draft last seen by the Advisory Committee. (Agenda book 158).

The Supreme Court no longer requires either leave of court or the parties' consent for the filing of an amicus brief. The subcommittee decided not to follow the Supreme Court's lead, but instead to require a motion. This decision was a response to a concern raised at our last meeting by a judge member that amicus briefs submitted without motions can cause recusal problems. In addition, since our last meeting, the Supreme Court has announced that its members will not recuse because of amicus briefs. That's not the practice in the courts of appeals, where a court can deny leave to file an amicus brief or strike the brief if recusal would otherwise be required.

Another issue that arose at our last meeting was what term to use in Rule 29(b)(4) to describe the funds of an amicus. After looking at various IRS forms, the subcommittee settled on the term "total revenue."

In Rule 29(e), the subcommittee decided to reduce the action level from $1000 to $100 for earmarked contributions. Stylistic changes were also made.

Judge Bybee then opened the floor for discussion, first as to the text of the proposed rule.

A judge member thanked the subcommittee for eliminating the consent option for amicus briefs. On further reflection after our last meeting, he grew concerned that amicus briefs without court permission can cause recusal problems at the panel stage, not just at the rehearing stage. The clerk's office does a comprehensive conflict check, and if an amicus brief is filed during the briefing period with the consent of the parties, it would knock out a judge without the judge even knowing. By eliminating the consent option, the motion will be forwarded to the panel. If there is somebody who would be recused, they can deny the motion, but at least we've got judges involved so they can make a decision without being automatically recused. He had been planning to suggest what the subcommittee did.

A liaison member said that the elimination of the consent option may be contentious, but it made sense to publish the proposal and get comments. It will create an additional burden on those seeking to file an amicus brief, but not a huge one.

He also raised two more minor issues. First, 29(b)(2) uses the phrase "intended to pay" while 29(e) says simply "pay"; for consistency, 29(e) should also say "intended to pay." Second, 29(b), should refer to "an amicus" rather than "the amicus," because it is common for a single amicus brief to be submitted on behalf of a number of persons.

Judge Bates suggested that 29(e) could be shortened by deleting most of the sentence that begins with the word "But" and combining it with the prior sentence, linked by the conjunction "unless."

Mr. Freeman raised a concern about the proposed change in the length of an amicus brief from one-half the length of a party's principal brief to 6,500 words, noting that while Rule 32(a)(7) sets the length of a principal brief to 13,000 words, some circuits have retained the prior length limit of 14,000 words. The Reporter replied that current Rule 29(a)(5) refers to one-half the length "authorized by these rules," which seems to be a reference to the Federal Rules of Appellate Procedure, not one-half the length authorized by local rules. And at least one court of appeals reads the rule that way: the Court of Appeals for the Seventh Circuit has a local rule that provides that an amicus brief need not comply with Rule 29(a)(5) but can contain

7,000 words. In response to a concern about whether a court of appeals can allow for longer amicus briefs, Professor Struve pointed out that Rule 32(e) permits a court of appeals to accept documents that do not meet "the length limits set by these rules," referring to all the Federal Rules of Appellate Procedure.

Mr. Freeman noted that yellow briefs—an appellant's brief in a cross appeal that combines both the response in the cross appeal and the reply in the initial appeal—can be 15,300 words. A fixed limit of 6,500 may result in more motions by an amicus to permit longer briefs.

A lawyer member turned attention to Rule 29(e) and the protection from disclosure of earmarked contributions by members of an amicus formed within the past 12 months. Does this open a loophole that might lead some to create a new entity to avoid disclosure?

A liaison member responded that this was a compromise. What to do with a new organization? It might seem draconian to require the disclosure of all members. If an organization is newly formed, that will be flagged and the brief may get less credence. The lawyer who raised the question added that an organization might want to recruit new members to fund a brief.

Judge Bybee observed that there had been a lot of back and forth on this issue. But by requiring a new organization to disclose the date of its creation, judges would know that fact and individual judges could take that into account. We will hear more about this in the comment period.

Discussion then turned to the Committee Note. The Reporter called attention to an editing error in the last paragraph discussing subdivision (b) and that it should be corrected by changing "Non-tax-exempt entities are" to "A non-tax-exempt entity is." (Agenda book page 164, line 223). He then noted that Professor Struve had raised the question of whether the second and fourth paragraphs of the Committee Note belonged in the Committee Note or were better left to the report to the Standing Committee. (Agenda book page 161). The second paragraph explains the genesis of our consideration of this issue; while Committee Notes sometimes have a passage like this—as the Committee Note to Rule 39 that was just approved discusses *Hotels.com*—this is somewhat different. The fourth paragraph explains an approach not taken. In some parts of the Committee Note, such a discussion is relevant to the narrow tailoring of the rule, but that does not seem to be so here.

A liaison member suggested greater elaboration of the constitutional issue. The *Americans for Prosperity* Case lays out a standard that could be spelled out, especially regarding 29(e).

Judge Bybee asked whether this should be added to the Committee Note or to the report to the Standing Committee. The liaison member said the Committee Note,

observing that there is already some discussion of burdens in the Committee Note, and adverting to the associational burdens would be helpful, as well as more elaboration of the ends sought to be furthered.

Professor Coquillette said that he is a textualist regarding the rules. Some people don't read the Committee Notes. Put it in the report, not the Committee Notes. In response to a question from the Reporter focused on whether a First Amendment discussion belonged in the Committee Note, Professor Coquillette noted that some might read the Committee Note with the First Amendment concerns in mind. There is no right answer. Professor Struve observed that this is an interesting question, and that she could not think of other rules where this came up.

Judge Bates expressed his concern that more attention be paid to the First Amendment issue, suggesting that the report to the Standing Committee include the Advisory Committee's assessment of these concerns. The Reporter emphasized that the subcommittee and the Advisory Committee has been focused on these concerns at every step of the way. Whether the reports in the agenda books cited the cases or not, the focus was always on closely examining the purposes sought to be served, the burdens that might be imposed, and minimizing any unnecessary burdens.

Mr. Freeman added that it was an imperfect analogy, but that the Department of Justice generally advises that such discussions be left out of an organic rule. Acknowledge in the Committee Note that these concerns have been the focus of everyone's consideration, but not the detailed discussion.

Judge Bybee noted that such a discussion would look like an advisory opinion—but we are an advisory committee. A detailed discussion runs risks. We can acknowledge the issue and let the rule speak for itself. Our deliberate decisions to be constrained because of these concerns are reflected in the drafting of the rule. There will be public comment.

A judge member turned to the second paragraph of the discussion of subdivision (e), suggesting that the first sentence make clear that the Committee considered the disclosure of nonparties who make "any" significant contributions to an amicus, "whether earmarked or not," by adding the words in quotes.

Hearing no further discussion, Judge Bybee turned to voting on the various suggestions that had been made. These changes were shown in real time on a projector screen in the room and shared via Teams with those who were remote.

In the heading of 29(b), the Committee voted, without dissent, to change the phrase "the Amicus" to "an amicus."

In the heading of 29(e), the Committee voted, without dissent, to change the phrase "the Amicus" to "an amicus."

Turning to the difference between 29(b)(2) using the phrase "intended to pay" and 29(e) using the phrase "to pay," a liaison member favored changing 29(e) because the language of 29(b)(2) is in the existing rule and we do not want to suggest a change in meaning there. A judge member added that "intended to" covers the situation where money is intended to pay for something but isn't spent for that purpose because not needed. The Committee voted, without dissent, to change the phrase "to pay" to "intended to pay."

The Committee voted, without dissent, to change:

> An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief. But an amicus brief need not disclose a person who has been a member of the amicus for the prior 12 months.

to read:

> An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months.

The Committee voted, with one opposed, to delete paragraphs two and four of the proposed Committee Note.

The Committee voted, without dissent, to change the cross-reference in the last sentence of the passage discussing subdivision (a) from "Rule 32(g)" to "Rule 32(g)(1)."

The Committee voted, without dissent, to change the word "who" to "which" in the last clause of the first paragraph discussing subdivision (b).

The Committee voted, without dissent, to correct an editing error in the last paragraph discussing subdivision (b) and change "Non-tax-exempt entities are" to "A non-tax-exempt entity is." (Agenda book page 164, line 223).

The Committee voted, without dissent, to change the second paragraph of the discussion of subdivision (e) from "the disclosure of nonparties who make significant contributions to an amicus," to "the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not."

Having deleted the second and third paragraphs of the proposed Committee Note, the Committee then revisited what would now be the opening paragraphs of the Committee Note.

A liaison member suggested saying more about the First Amendment and about other substantial interests at stake. A statement about protecting the integrity of court processes and rules could be added. As the Supreme Court sees it, it's not the interest in disclosure; it's the interest that disclosure is furthering. An academic member suggested that interests supporting the proposed amendment could be added to the paragraph that begins on line 117 of the agenda book. Mr. Freeman suggested that we might be getting out over our skis, urging that the Committee Note be general rather than try to track current First Amendment tests, which have been known to change. Given the discussion in the Committee Note of substantial interest, narrowly tailored, and avoiding unnecessary burdens, no one would be confused if we left out express mention of the First Amendment. Professor Coquillette reminded the Committee of the reasons to disfavor case citations in Committee Notes: Cases get reversed and overruled and we can't change a Committee Note without changing the Rule. These citations don't violate that principle. In response to a question whether the draft Committee Note would get in the way of a possible Department of Justice defense of these amendments, Mark Freeman said that he would prefer to omit the case citations, but is not troubled by their inclusion. He added that it was a funny string cite.

A judge member asked if we need the first paragraph at all, observing that we are laboring a lot over this one paragraph. A liaison member suggested deleting all the case citations. A different judge member expressed concern that the first paragraph sounds like we are weighing some interest against the First Amendment, suggesting that instead of "the competing interests," the paragraph should refer to the "relevant First Amendment interests." This judge also suggested using the word "promote" rather than "protect."

An academic member called attention to the phrase "competing interests," and a lawyer member suggested "various interests" instead. A liaison member suggested "unjustified burdens" rather than "unnecessary burdens."

A lawyer member suggested that the first sentence of the Committee Note is too restrictive in referring to court processes and rules. A different lawyer member noted that the first sentence is about the disclosure requirements but doesn't say anything about the change to the consent provision.

The Committee, without dissent, approved the changes to the Committee Note just discussed.

The Reporter then suggested that the citation in the discussion of subdivision (e) should also be deleted and that "6500" should be changed to "6,500" in the table of length limits on page 171 of the agenda book. The Committee voted to approve the first without dissent and accepted the second without objection.

An academic member then returned the discussion to the point a lawyer member had made that the first sentence is about disclosure and doesn't say anything about the change to the consent provision. Judge Bates suggested adding the word "primarily" to the first sentence. A liaison member noted that the Committee Note does provide a pretty full discussion of that change. A lawyer member suggested a new first sentence, before the existing first sentence: "The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements." With this change, the phrase "to Rule 29" would be removed from what would now be the second sentence. The Committee approved this addition without objection.

The resulting text then read:

**Committee Note**

> The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.
>
> The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.
>
> Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.
>
> Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. * * *

Judge Bates reminded the Committee that approval at this stage is only for publication.

No further changes were suggested. The Committee voted, without dissent, to approve the proposed amendment and Committee Note as amended and ask the Standing Committee to publish it for public comment.

The Committee then took a short break before resuming at approximately 11:20 a.m.

### B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

Lisa Wright presented the report of the IFP subcommittee. (Agenda book page 173). She noted that the agenda book included a prior report from the IFP subcommittee as well as a proposed revised Form 4. (Agenda book page 175, 179).

We have received suggestions to standardize the criteria for IFP status and to make the form less intrusive. We have not attempted to standardize the criteria but to simplify the form.

The proposed new form is a major simplification and, after consultation with the clerks and senior staff attorneys, includes what the subcommittee thinks is useful while omitting that which is not useful. It is ready for publication, notice, and comment.

Judge Bybee noted that a lot of hours have gone into this project. Ms. Dwyer added that this is a great improvement. It provides the information we need in a much faster and easier way. Thank you.

The Committee voted, without dissent, to approve the proposed revised Form 4 and its Committee Note and ask the Standing Committee to publish it for public comment.

Two members were added to the IFP subcommittee to be in place to consider any public comments: Professor Huang and Justice Kruger.

### C. Intervention on Appeal (22-AP-G; 23-AP-C)

Judge Bybee noted that we are at an early stage of this project and invited a full discussion.

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 182). He thanked the Reporter for the memo and draft rule. At our last meeting, we discussed this issue. There is currently no Appellate Rule governing intervention, so appellate courts look to the policies of Civil Rule 24. A subcommittee was created to try to put together a possible rule.

It is not clear that we should go ahead with any rule at all. But the philosophy of the working draft produced by the subcommittee includes the following:

- Continue, as current case law does, to treat intervention on appeal as rare
- Avoid reproducing the ambiguities of Civil Rule 24
- Do not take a position on the proper interpretation of Civil Rule 24
- Define the interests that support intervention

- Leave the ultimate question of intervention to the discretion of the court of appeals, so that there is no intervention as of right in the court of appeals, except as provided by statute

The working draft of the rule is presented in table form, with a description of the questions that the subcommittee is grappling with alongside particular provisions of the rule. Mr. Freeman highlighted the most significant of these questions.

One question relates to Rule 15(d), which provides that a motion to intervene in a proceeding to review or enforce an order of an administrative agency must be made within 30 days after the petition is filed. It does not, however, set a standard for intervention. Should a new rule set a standard for those proceedings as well, or be limited to cases on appeal from a trial court? Should a new rule be limited to civil cases? The Federal Rules of Criminal Procedure do not have a provision dealing with intervention, so a new rule might open new possibilities in criminal cases.

Another question deals with timeliness. The draft rule has two timeliness provisions, (a)(1) dealing with the stage of the appellate proceedings, and (b)(1) dealing with the whole litigation. In this draft, the word "timely" is used rather than "promptly," drawing on Civil Rule 24. Is that helpful or not?

Subsection (b) sets forth criteria that must be met. One criterion, (b)(3), is drawn from Civil Rule 24. Is that appropriate in an appellate rule? The precedential effect of many appellate decisions might have practical effects on many people. The criteria in (4) through (7) are relatively uncontroversial.

Subsection (c) deals with the kind of legal interests that an intervenor must have to warrant intervention. There was a lot of discussion last fall about how to frame this provision and what the particular provisions mean. We grappled with these issues as a subcommittee. Paragraphs (1) and (2) are classic grounds for intervention, and this draft moves them up to the beginning. Paragraphs (3) through (5) look to the relationship between the claim or defense of the intervenor regarding the existing parties. They are drawn from an article by Caleb Nelson that focused on intervention in the district courts.

Subsection (d) adds tribal governments. It also makes clear that governmental parties can also rely on the other provisions for intervention, eliminating the risk that such parties might not be considered "persons" within the meaning of the rule.

Subsection (e) provides for the various ways that a court of appeals can dispose of a motion to intervene, including transferring it to the district court. It also makes clear that denial of intervention does not preclude the filing of an amicus brief.

Judge Bybee opened the floor for discussion, noting that there was no need to proceed in a particular order and that people should raise whatever concerns they have.

A liaison member wondered whether the detailing of legal interests in subsection (c) was necessary, and whether (c)(5) is sufficient to cover the situation where a private party needs to intervene when the government changes its position in litigation. Ms. Dwyer noted that the timing of a motion to intervene can cause recusal problems. A lawyer member also questioned the need for (c)(5) to be so specific, emphasizing the importance of (c)(7)—that the precedential effect of a decision is not a sufficient legal interest—and suggesting that it might be made a part of subsection (a).

Mr. Freeman stated that after the subcommittee meeting, he met with the Solicitor General and the heads of other sections. The memo did a very nice job highlighting the big picture questions, leading the DOJ to have both philosophical and pragmatic concerns. After some soul searching, the DOJ is unsure whether the rule is a good idea. There is a real risk that it will lead to the filing of more motions to intervene. Right now, they are exceedingly rare, and we do not want to give the impression that they should be made more often. While the draft rule has language to discourage such motions, so do the rehearing rules, and there are lots of petitions for rehearing filed.

There are three other concerns to highlight.

The first is the nature of an appeal compared to the nature of a district court proceeding. An intervenor in the district court files its own pleadings, is involved in discovery, and has a role in defining and narrowing the controversy. Parties make tactical and strategic choices about these things in the district court.

An appeal is different. The question is whether there was error in the district court decision. It does not present an opportunity to redesign the controversy or to bring in new claims or defenses. Someone shouldn't be able to just pop in at that stage and, without bearing the risks of being a party in the district court, reshape the controversy. An appeal should be tightly tied to the judgment or order on appeal. An intervenor can file its own lawsuit. There is a risk of skewing incentives, so that a person might choose not to intervene in the district court and instead try later. He worries about gatekeeping, despite the language in the draft rule.

The second is party autonomy, bracketing the classic basis for intervention in (1) and (2). The parties get to decide whether to appeal at all and what issues to raise. An appellant can, under Rule 3, make a deliberate decision to restrict the scope of the appeal. Frequent litigants decide whether to appeal, whether to seek cert., etc., considering whether they are better off living with the result or risking a worse result on appeal. The Committee's consideration of intervention is shaped by a few high-

profile cases where there is a change in administration and a resulting change in position. That is a difficult and important problem, but it is not typical. More typical is a party deciding not to go up.

The third is more pragmatic and deals with timing. Some of the current desire to intervene is driven by courts issuing universal remedies such as injunctions and vacatur. If remedies are limited to particular parties, nonparties can simply file their own lawsuits. There may be movement in the Supreme Court regarding universal remedies, so we might want to wait to see if the concerns about intervention have any staying power.

The DOJ appreciates all the work that has been done on this issue and appreciates the opportunity to present its views.

Judge Bybee noted that this Committee had considered the issue previously, in 2010, and tabled it.

A liaison member noted that the end of the memo suggests possible research about the circumstances where motions to intervene arise. He is not so sure universal remedies are going away. Plus, state attorneys general also change position.

A judge member said that he has seen motions to intervene in a case involving a dispute about packing labels. The likely result of a rule would be more motions to intervene. A different judge member noted that sometimes an amicus with a more tangible interest is given argument time. He added that the timing issue is really important. There is a risk of gamesmanship, including motions to intervene after a decision when someone wishes that they had intervened earlier. Now, we see very few motions. The first judge added that some may move late in the game, simply to seek cert. It really hurts the parties.

Judge Bybee asked if there might be an intermediate solution to deal with cases involving a change in administration. A judge member responded that intervention is allowed in such cases. Mr. Freeman added that this can turn on the state law question of capacity to represent the state. Those cases are sui generis. The cases involving beneficiaries of trusts and class members feel different than a situation where someone is coming in and trying to add new claims; in a sense, they have been parties all along. Perhaps cases involving changes in administration could be viewed through that lens.

Judge Bybee added that where independent state officers are involved, there can be cases where the state Secretary of State and Attorney General disagree. Such cases present questions of state law. Is there a way to capture that in a rule?

Judge Bates suggested that it may be time to return to basics. What's the problem? Does the proposed rule address that problem? What are the risks of

unintended consequences? There seem to be seven different explanations of the problem.

The Reporter stated his sense that many decisions on motions to intervene would not be reported in Lexis or Westlaw and asked whether others thought that was accurate. A judge member said it was accurate, and he suggested getting data from the Ninth Circuit. A liaison member suggested data beyond the Ninth Circuit. Ms. Dwyer said that she could reach out to other circuits. Marie Leary stated that she could speak to her colleagues at the FJC about getting data from ECF; a formal request from Judge Bybee would be best. Judge Bates noted that Judge Bybee and the Reporter should make a specific request.

An academic member suggested gathering information from the D.C. Circuit in agency cases. Mr. Freeman responded that things go relatively smoothly in many such cases: the party aggrieved by the agency decision petitions for review and others who were before the administrative agency intervene to defend the agency action. He would gather anecdotal information, not hard numbers, about circumstances in which intervention is allowed, both in cases where the DOJ handles the case and where an agency has independent litigating authority. Judge Bybee noted that it would be good to get information on circumstances where someone sought intervention, thinking it appropriate, but was denied.

A liaison member noted that he sees a lot of intervention in agency cases. Mr. Freeman stated that the existing FRAP 15 says nothing about the standard for intervention and that the circuits vary. For example, the Eighth Circuit borrows from Civil Rule 24, while the D.C. Circuit in some cases allows a notice of intervention as of course. A different liaison member said that FRAP 15 cases are categorically distinct in that the proceeding in the court of appeals is the first judicial proceeding, not an appeal from a full judicial proceeding in the district court. A lawyer member observed that motions to intervene on appeal are common in class actions.

The Committee took a lunch break at approximately 12:15, with Judge Bybee noting that the discussion of intervention could continue after lunch. When the Committee resumed at approximately 1:00, the Reporter recapped the information that we would try to obtain for the next meeting: 1) Ms. Dwyer would gather information from the Ninth Circuit and ask other Clerks of other Circuits; 2) Mr. Freeman would gather information from the DOJ; 3) Judge Bybee and the Reporter would draft a formal request to the FJC. Judge Bybee added that we might also do research on published opinions and law review articles focused on intervention on appeal. In order to have time for the subcommittee to consider this information in time for inclusion in the fall agenda book, we are looking to have this information before August 1.

## VI. Discussion of Recent Suggestions

### A. Comments on Amicus Disclosure (23-AP-I, 23-AP-K; 24-AP-A)

The Reporter referred to two comments about amicus disclosure submitted by Senator Whitehouse and Representative Johnson and an article about expert information in amicus briefs submitted by Professor David DeMatteo. (Agenda book page 194). Because there is not yet a proposal published for public comment, these have been docketed as new suggestions.

He recommended that they be referred to the amicus subcommittee, and they were.

### B. PACER Access (23-AP-J)

The Reporter presented a suggestion by Andrew Shaw to make access to PACER free. (Agenda book 232). While this may be a good idea, it is not a matter for rule making.

The Committee, without dissent, voted to remove the suggestion from the agenda.

### C. Rule 15

The Reporter presented a suggestion contained in an opinion by Judge Randolph that the Committee consider amending Rule 15 in a way similar to the 1993 amendment of Rule 4. (Agenda book page 237).

Prior to the 1993 amendment of Rule 4, notices of appeal that were filed before certain post-judgment motions in the district court self-destructed, requiring a party to file a new notice of appeal after the district court decided the motion. In 1993, Rule 4 was amended to deal with this problem.

A similar problem exists under Rule 15 in agency cases. If a petition for review of agency action is filed before a motion for reconsideration by the agency, the petition is "incurably premature," and a party must file a new petition for review.

The Reporter suggested the appointment of a subcommittee to deal with this matter. Judge Bybee appointed Bert Huang, Mark Freeman, and Andrew Pincus, with Professor Huang serving as chair.

## VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 244). This matter is placed

on the agenda to provide an opportunity to discuss whether anybody has noticed things that have gone well or gone poorly with our amendments. No one raised any concerns.

## VIII. Old Business

The Reporter stated that in the spring of 2018, the Committee had decided not to act on a concern that appendices were too long and contained irrelevant information and to put the matter off for three years in the hope that changing technology might solve the problem with briefs that cite to the electronic record of the district court. In the spring of 2021, the Committee again put the matter off for three years for similar reasons. Three more years have gone by. The Reporter suggested that the Committee decide whether to form a subcommittee to address the issue, put it off again, or remove the matter from the agenda, leaving it to anyone who chooses to raise the issue again in the future.

Ms. Dwyer stated that the easily produced electronic record isn't easily produced. The Fifth Circuit appears to be most successful. There, district courts are required to create an electronic record and store it on SharePoint so the parties have access to it. But district courts in the Ninth Circuit have been less cooperative. In the Second and Ninth Circuits, there may be a new case management system built that could help. A modern cloud-based system is in the works at the AO, but it is still a couple of years off.

A judge member noted his great appreciation for the level of professionalism of Ms. Dwyer and the Clerk of his court. He's been a federal judge for 20 years and has never worked on paper. With a new filing system coming, this might be premature. He suggested that he speak to them and report back at a future meeting. Ms. Dwyer noted the resistance of solo practitioners.

A lawyer member noted differences in the practices in different circuits. When creating an appendix in the Seventh Circuit, think about what you would want the judges to have with them on the train to read. In the Second Circuit, an appendix might take up an entire shelf in an office. Risk averse lawyers over include, making it useless. If it's a substitute for the entire record, it's large and unwieldy. Just cite the ECF number. Having to create hyperlinks is a tremendous headache and very costly because of the time needed to check them. That would be a real barrier for self-represented litigants. A judge member suggested keeping an eye on the issue; maybe in the future we can just use the district court docket. Bookmarks in a PDF let him get to significant documents.

Ms. Dwyer stated that a major issue is who creates the electronic record: the lawyer, the district court, the court of appeals? There is too much divergence if done by lawyers. The Fifth Circuit does it best, with district courts doing it, enabling the briefs to link to the record.

A judge member stated that until we are further along electronically, the circuits will vary. The Court of Appeals for the Fifth Circuit bludgeoned the district courts. Mr. Freeman added that in the Fifth Circuit, so long as one uses the precisely specified citation format, software generates the hyperlinks. In the Sixth Circuit, one cites directly to the ECF; he wonders what that is like on the user end.

Judge Bybee asked Ms. Dwyer to do a survey of the circuits for the next meeting. A judge member offered his help. At a future meeting, we may create a subcommittee or postpone it again for a few more years, but for now, let's get a little bit more information.

## IX. New Business

No member of the Committee raised new business.

## X. Adjournment

Judge Bybee announced that the next meeting will be held on October 9, 2024, in Washington, D.C.

Judge Bates thanked Judge Bybee, noting that it would probably be Judge Bybee's last meeting. Judge Bates added that Judge Bybee had done a fantastic job and urged him to stay in touch.

Judge Bybee said that it was an honor to be a part of this Committee. He said that he would give his standard closing this one last time: He thanked everyone, noting that these are expensive meetings in that people put in a lot of time that they could use to do other things. But it is important. Litigation can impose great costs. If we can save some of those costs, then every minute we spend with this Committee is well worth it.

The Committee adjourned at approximately 1:30 p.m., with applause for Judge Bybee.

# TAB 5

# TAB 5A

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



# MEMORANDUM

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

**FROM:** Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

**RE:** Report of the Advisory Committee on Bankruptcy Rules

**DATE:** May 10, 2024

---

## I. Introduction

The Advisory Committee on Bankruptcy Rules met in Denver on April 11, 2024. Two Committee members attended remotely; the rest of the Committee met in person. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to give final approval to amendments to Bankruptcy Rules 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Bankruptcy Rule 8006 (Certifying a Direct Appeal to a Court of Appeals), as well as to six new Official Forms related to the proposed Rule 3002.1 amendments (Official Forms 410C13-M1, 410C13-M1R, 410C13-N,

410C13-NR, 410C13-M2, and 410C13-M2R) and amendments to Official Form 410 (Proof of Claim).

The Advisory Committee also agreed to seek publication for comment of proposed amendments to Bankruptcy Rules 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan); and Bankruptcy Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony). At the fall 2023 meeting, the Advisory Committee approved for publication amendments to Bankruptcy Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions), and those amendments are also presented to the Standing Committee at this meeting.

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

A. Items for Final Approval

Rules and Forms published for comment in August 2023:

- Rule 3002.1;
- Rule 8006;
- Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R; and
- Official Form 410.

B. Items for Publication

- Rule 3018;
- Rules 9014, 9017, and new Rule 7043;
- Rules 1007, 5009, and 9006.

Part III of this report presents four information items. The first concerns proposals regarding social-security number redactions from public court filings. The second discusses two suggestions to allow masters to be used in bankruptcy cases and proceedings. The third is a report on technical amendments conforming certain forms and their instructions to the restyled Bankruptcy Rules. The fourth concerns reconsideration of proposed amendments to Official Forms 309A and 309B.

## II. Action Items

### A. Items for Final Approval

**The Advisory Committee recommends that the following rule and form amendments and new Official Forms that were published for public comment in 2023 and are discussed below be given final approval.** Bankruptcy Appendix A includes the rules and forms that are in this group, along with summaries of the comments that were submitted.

**Action Item 1. Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case).** After proposed amendments to Rule 3002.1 were published in 2021, the Advisory Committee made significant revisions in response to the comments that were received. The rule with revised amendments was republished in 2023. Ten sets of comments concerning the rule were submitted. They ranged from addressing specific wording issues and proposed deadlines to raising some broader issues, such as the scope of the rule and whether limitations should be placed on the authority to file a motion to determine the status of a mortgage.

The Advisory Committee considered these comments during its spring meeting, along with the Consumer Subcommittee's recommendations. It now recommends that the revised rule be given final approval, with the changes to the published version of the rule discussed below.

Subdivision (a) – In General. The Advisory Committee voted to delete the word "contractual" in the first sentence of subdivision (a) so that the end of the sentence now reads, "for which the plan provides for the trustee or debtor to make payments on the debt." Several comments were submitted suggesting this deletion. They explained that sometimes home mortgages may be modified in chapter 13—such as those paid in full or short-term mortgages—and they are paid according to the terms of the plan, rather than strictly according to the terms of the contract. The Advisory Committee thought that the rule should apply in these situations and that making this change would not require republication. The Advisory Committee also approved a change to the Committee Note's discussion of subdivision (a) that clarifies that the amended rule applies to reverse mortgages.

Comments suggested other expansions of the rule's applicability that the Advisory Committee decided against. These included making the rule applicable to mortgages on property other than the debtor's principal residence and to liens not created by agreement, such as statutory liens. These suggestions may have merit, as they would assist debtors in emerging from chapter 13 with mortgages and other types of real-property liens current or paid in full. However, because proposed amendments to the rule have now been published twice, the Advisory Committee did not want to propose any changes to subdivision (a) that would require yet another publication. Members thought that expanding the rule beyond the debtor's principal residence or making it applicable to statutory liens runs that risk. Otherwise, new types of creditors could be affected who were not given notice that the rule would apply to them.

Subdivision (b) – Notice of a Payment Change; Home-Equity Line of Credit; Effect of an Untimely Notice; Objection. In response to several of the mortgage organizations' comments,

the Advisory Committee voted to state in subdivision (b)(3)(B) that a payment decrease is effective on the actual payment due date, even if that date is in the past. There are instances where a payment decrease is retroactively applied, and the debtor should get the benefit of that decrease. As revised, (b)(3)(B) would state that the effective date of the new payment amount is, "when the notice concerns a payment decrease, on the actual payment due date, even if prior to the notice."

Subdivision (f) – Motion to Determine Status; Response; Court Determination. The Advisory Committee voted to make two changes to this subdivision. First, in (f)(2) it changed the deadline for responding to a trustee's or debtor's motion from 21 to 28 days. Mortgage organizations commented that they need that amount of time to respond properly, and it is the amount of time that subdivision (g)(3) provides for responding to the trustee's end-of-case notice.

Second, the Advisory Committee agreed with the National Bankruptcy Conference's comment that the phrase "and enter an appropriate order" should be added at the end of subdivision (f)(3) to be consistent with other provisions in the rule about the court's determination.

Mortgage organizations suggested a number of limitations that they thought should be added to prevent the abusive use of this subdivision. Those restrictions included limiting the time period during which a motion to determine the status of a mortgage could be filed or limiting the number of times it could be filed, specifying potential remedies for the mortgage claimant if the provision is misused, providing that a pro se debtor must provide an attestation as to the facts set forth in the motion, and providing that it is a ground for setting aside an adverse order if the movant failed to name and serve the correct mortgage claimant/servicer. The Advisory Committee made no changes in response to these comments. If a debtor, debtor's attorney, or trustee files a motion under this provision, Rule 9011 applies and could result in sanctions if the court determines that the motion was filed "for any improper purpose" or that the factual allegations lack evidentiary support. Furthermore, relief would be available outside of this rule if an adverse order is entered against a party that was not served.

Subdivision (g) – Trustee's End-of-Case Notice of Payments Made; Response; Court Determination. The Advisory Committee voted to change the words "payments" and "paid" in the title and in subdivision (g)(1) to "disbursements" and "disbursed." That terminology better describes the role of chapter 13 trustees. The Advisory Committee also deleted two uses of "contractual" in (g)(1)(B) to be consistent with the recommended change to subdivision (a).

In subdivision (g)(1)(A), the Advisory Committee deleted "if any" after "what amount" in order to avoid suggesting that a trustee who makes no disbursements to the mortgage claim holder does not need to file an end-of-case notice. It also added to the Committee Note the statement that "If the trustee has disbursed no amounts to the claim holder under either or both categories, the notice should be filed stating $0 for the amount disbursed."

Several comments noted that in subdivision (g)(4)(A), no deadline was stated for filing a motion to determine the status of the mortgage if the claim holder responded to the trustee's notice. It merely said that the motion could be filed "[a]fter service of the response." Agreeing

with the comments, the Advisory Committee voted to rewrite the first sentence of subparagraph (A) to make a 45-day deadline applicable to that situation as well as to when the claim holder does not respond to the notice.

In subdivision (g)(4)(B), the Advisor Committee changed the time for the claim holder to respond to the motion from 21 to 28 days, just as in subdivision (f)(2).

Committee Note. In addition to the changes discussed above, the Advisory Committee made conforming changes to the Committee Note.

**Action Item 2. Rule 8006(g) (Request After Certification for a Court of Appeals to Authorize a Direct Appeal).** Last August the Standing Committee published an amendment to Fed. R. Bankr. P. 8006(g) suggested by Bankruptcy Judge A. Benjamin Goldgar to make explicit what the Advisory Committee believed was the existing meaning of the Rule—that any party to an appeal of a case that has been certified for direct appeal may submit a request to the court of appeals to accept the direct appeal under 28 U.S.C. § 158(d)(2). The form of the amendment was developed in consultation with the Advisory Committee on Appellate Rules, which was concurrently preparing an amendment to Appellate Rule 6(c) (Appeal in a Bankruptcy Case – Direct Review by Permission Under 28 U.S.C. § 158(d)(2)) to make sure the rules worked well together. Both amended rules were published at the same time.

The only comment on the published amendment was a submission from the Minnesota State Bar Association's Assembly supporting it (and the other published proposed amendments to the Bankruptcy Rules, Appellate Rules, and Civil Rules).

The Advisory Committee approved the amendment to Rule 8006(g) as published.

**Action Item 3. Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R (Rule 3002.1 Forms).** Last August the Standing Committee published for comment six new Official Forms that were proposed to implement proposed amendments to Rule 3002.1. Ten sets of comments concerning these forms were submitted.

In response to the comments submitted, the Forms Subcommittee's recommendations, changes to Rule 3002.1, and the discussion at the Advisory Committee meeting, the Advisory Committee approved the forms with the changes to the published versions discussed below.

Changes to the Motion Forms:

Official Form 410C13-M1(Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim) and Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)

- The word "paid" was changed to "disbursed" in Part 2b, d, and e. Chapter 13 trustees act as disbursement agents; they do not "pay" the mortgage.

- In Part 3a "and allowed" was deleted before "under," and the phrase "and not disallowed" was added at the end of that item. As noted by the National Bankruptcy

Conference, postpetition fees, expenses, and charges are not "allowed" under Rule 3002.1(c). If no motion is filed under Rule 3002.1(e), there is no court determination that the fees are allowed. Moreover, because the notice of fees is not subject to Rule 3001(f), the fees are not deemed allowed. If, however, the court did rule on them and disallowed them, they should not be included.

- The word "contractual" was deleted in Part 4 before "obligations." This change conforms to the change to Rule 3002.1(a).

- A new Part 5 was added in brackets to allow the trustee or debtor to add other relevant information. This change was made in order to accommodate plans that provide for a less conventional treatment of the home mortgage.

- Lines for address, phone number, and email were added after the moving party's signature to comply with Rule 9011(a).

- In addition to the changes listed above, the following change was made to Form 410C13-M2: "the" was added before "Mortgage" in the title of the form to be consistent with the other forms.

Changes to the Motion Response Forms:

Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim) and Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim)

- At the beginning of Part 2, the following sentence was added: "The total amount received to cure any arrearages as of the date of this response is $_____." This will directly respond to Part 2e of the motion.

- In Part 2, separate responses for prepetition and postpetition arrearages were created to correspond with the breakdown of those amounts in the motion.

- The direction in Part 2 was changed to "Check all that apply" since now more than one statement could be asserted.

- Part 3 was rearranged in response to comments that a payoff statement and the information requested are needed in situations in which the claim holder says that the debtor is not current, as well as when current.

- The word "contractual" was deleted before "payments" in Part 3a to conform to the change to Rule 3002.1(a).

- The second sentence of the third box in Part 3a was moved to a new viii in Part 3b as a more appropriate place to provide that information.

- In Part 4 the requirement to use the format of Official Form 410A, Part 5, was deleted. Mortgage groups commented that this format does not work for distinguishing between prepetition arrears and postpetition defaults.

- In the third bullet point of Part 4, the phrase "assessed to the mortgage" was changed to "that the claim holder asserts are recoverable against the debtor or the debtor's principal residence." This language tracks the language of Rule 3002.1(c) and is clearer.

- A catch-all provision was added in brackets as Part 5 to allow the claim holder to add other information relevant to the response.

Changes to the Trustee's Notice:
Official Form 410C13-N (Trustee's Notice of Payments Made)

- In the title, "Payments" was changed to "Disbursements" to reflect more accurately the trustee's role.

- In Part 2, the space for the date of the debtor's completion of payments was deleted. Trustees commented that the date is ambiguous and is not needed.

- The title of Part 3 was changed from "Amount Needed to Cure Default" to "Arrearages." If the debtor has been making direct payments, the trustee may not be aware of defaults.

- For the same reason, the request in Part 3 for "Allowed amount of postpetition arrearage, if any," was deleted. Also deleted was the question asking whether the debtor has cured all arrearages.

- In Part 3a and 3c, "if any" was deleted to conform to changes made to Rule 3002.1.

- In Part 3b, c, and d, "paid" was changed to "disbursed" for the reason previously stated.

- In Part 4, "contractual" was deleted for the reason previously stated.

- A check box for "other" in Part 4 was added to allow for hybrid situations.

- In Part 4, the word "made" was changed to "disbursed" in two places.

- The statement that was formerly Part 4b about the debtor being current was removed because the trustee may lack this information. Former Part 4c was changed to Part 4b, and the instruction was updated to say "…complete a and b below;" instead of a-c.

- The statement in Part 4b was changed to the date of the trustee's last disbursement, rather than the date the next mortgage payment is due. Commenters noted that by the time the notice is filed, additional payments may have already come due and might have been paid by the debtor. A statement explaining that future payments are the debtor's responsibility was added.

- In Part 5, the item "Amount of allowed postpetition fees, expenses, and charges" was deleted because the trustee may not have this information.

- The phrase "as of the date of this notice" in Part 5 was deleted as unnecessary.

Changes to the Response to Notice:
Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)

- In the title, "Payments" was changed to "Disbursements" to be consistent with the proposed change to the title of the notice.

- In the first line, the citation was corrected.

- The title of Part 2 was changed to "Arrearages" to correspond with Part 3 of the notice.

- At the beginning of Part 2, the following sentence was added: "The total amount received to cure any arrearages as of the date of this response is $_____." This will capture amounts paid by both the trustee and the debtor.

- In Part 3, "contractual" was deleted for the reason previously stated.

- Part 3 was rearranged to respond to comments that a payoff statement and the information requested are needed in situations in which the claim holder says that the debtor is not current, as well as when current.

- The second sentence of the third box in Part 3a was moved to a new viii in Part 3b as a more appropriate place for that information, and the phrase "due and owing" was changed to "remaining unpaid" to conform to the other response forms.

- In Part 4, the requirement to use the format of Official Form 410A, Part 5 was deleted. Mortgage groups commented that this format does not work for distinguishing between prepetition arrears and postpetition defaults.

- In the third bullet point of Part 4, the phrase "assessed to the mortgage" was changed to "that the claim holder asserts are recoverable against the debtor or the debtor's principal residence." This language tracks the language of Rule 3002.1(c) and is clearer.

- In Part 5, a line was added for the title of the person signing the form.

Changes to the Committee Note

Changes were made to the forms' Committee Note to conform to the changes proposed to be made to the forms and Rule 3002.1 and in response to comments.

**Action Item 4. Official Form 410 (Proof of Claim).** In August 2023 the Standing Committee published a proposed amendment to Official Form 410 based on a suggestion from Dana C. McWay, Chair of the Administrative Office of the U.S. Courts' Unclaimed Funds Expert Panel. She suggested that Part 1, Box 3 be modified to change the line referring to the uniform claim identifier so that it is no longer limited to use in chapter 13. The published amendment implemented that suggestion but went further than the suggestion, eliminating the entire phrase "for electronic payments in chapter 13." This would allow the UCI to be used for paper checks as well as electronic payments without regard to the bankruptcy chapter.

The only comment on the published amendment was a submission from the Minnesota State Bar Association's Assembly supporting it.

The Advisory Committee approved the amendment to Official Form 410 as published.

## B. Items for Publication

**The Advisory Committee recommends that the following rule amendments be published for public comment in August 2024.** Bankruptcy Appendix B includes the rules that are in this group.

**Action Item 5. Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan).** At the January Standing Committee meeting, the Advisory Committee sought publication of amendments to Rule 3018(c) in response to a suggestion from the National Bankruptcy Conference. The proposed amendments would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor's attorney or authorized agent. Conforming amendments were also proposed and approved for Rule 3018(a). The Standing Committee gave its approval.

As approved by the Standing Committee for publication, the rule provides as follows:

**Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan.**

**(a) In General.**

* * * * *

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. The court may also do so as provided in (c)(1)(B).

* * * * *

**(c) ~~Form~~ Means for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.**

(1) ***~~Form~~ Alternative Means*.**

(A) *In Writing*. Except as provided in (B), ~~An~~ an acceptance or rejection must:

(~~A~~i) be in writing;

(~~B~~ii) identify the plan or plans;

(~~C~~iii) be signed by the creditor or equity security holder—or an authorized agent; and

(~~D~~iv) conform to Form 314.

(B) *As a Statement on the Record*. The court may also permit an acceptance—or the change or withdrawal of a rejection—in a statement that is:

(i) part of the record, including an oral statement at the confirmation hearing or a stipulation; and

(ii) made by an attorney for—or an authorized agent of—the creditor or equity security holder.

(2) ***When More Than One Plan Is Distributed.*** If more than one plan is sent under Rule 3017, a creditor or equity security holder may accept or reject one or more and may indicate preferences among those accepted.

* * * * *

After the meeting a member of the Standing Committee and the committee's reporter suggested a few wording changes to the amendments. Because publication would not occur until August and both the Advisory and Standing Committees would meet again before then, the decision was made to ask the Advisory Committee to consider these additional changes. It did so at the spring meeting and approved for publication the rule as revised. It now resubmits Rule 3018(a) and (c) to the Standing Committee for approval for publication.

Proposed Changes

**1.** Because new subdivision (c)(1)(B) would allow an acceptance to be made by a written stipulation, as well as by an oral statement on the record, it was suggested that the heading for subdivision (c)(1)(A) (line 15) be changed from "*In Writing*" to "*By Ballot.*" This title would more accurately indicate the difference between subparagraphs (A) and (B).

**2.** The proposed conforming amendment to subdivision (a) (lines 9-10) says that the court may also "do so" as provided in (c)(1)(B). The language that "do so" refers to includes changing or withdrawing both acceptances and rejections, whereas (c)(1)(B) just allows changing or withdrawing rejections. Therefore, it was suggested that the sentence be changed to read, "The court may also permit the change or withdrawal of a rejection as provided in (c)(1)(B)."

**3.** In light of the second change, it was further suggested that subdivision (a)(3) be revised to read as follows:

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance ~~or rejection~~. The court may ~~also~~ permit the change or withdrawal of a rejection as provided in (c)(1)(B).

Because there is no need to address changes or withdrawals of rejections twice, the Advisory Committee agreed with this suggestion as well.

**Action Item 6. Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony)**. The National Bankruptcy Conference (NBC) submitted a suggestion (23-BK-C) to amend Bankruptcy Rules 9014 and 9017 and introduce a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases.

Currently, Rule 9017 makes applicable to bankruptcy cases Fed. R. Civ. P. 43 (Taking Testimony). Fed. R. Civ. P. 43(a) allows a court to permit testimony in open court by contemporaneous transmission from a different location "for good cause in compelling circumstances." The proposal would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would make Fed. R. Civ. P. 43 applicable in adversary proceedings; and (3) amend Rule 9014 to allow a court to "permit testimony in open court by contemporaneous transmission from a different location" but only "for cause and with appropriate safeguards."[1]

Remote hearings have become commonplace in bankruptcy practice since the COVID-19 pandemic and were justified during that period by "compelling circumstances." But bankruptcy courts have recognized that there are many advantages to remote hearings, including to the debtors. As the NBC suggestion notes, "Remote transmission of court hearings removes a barrier to access for individual debtors who are unable to travel to the federal courthouse because the travel expense, parking expense, childcare needs, lack of job leave, and no public transportation make live attendance not possible." Remote hearings also, as the NBC points out, "allow creditors who are often spread out across the country to participate in hearings when live attendance would be cost prohibitive."

[1] The restyled Bankruptcy Rules use the term "cause" rather than "good cause," so that variation from Civil Rule 43(a) is not meant to be substantive.

Unlike adversary proceedings, which are comparable to civil actions governed by Fed. R. Civ. P. 43, contested matters are often of very short duration and do not typically turn on the credibility of witnesses. Therefore, the concerns about the inability to confront witnesses in person are much less pressing for bankruptcy contested matters. The proposed amendments and new rule would retain the general rule that testimony in a contested matter will be in person, but give the court more discretion to permit remote testimony by setting a less stringent standard for allowing exceptions to the rule.

The Advisory Committee, at the request of Judge Bates, has conferred with the Committee on Court Administration and Case Management, which is also examining the issue of video conferencing in court proceedings, and has been assured that "the content of the proposed amendments do[es] not appear to create any conflict with existing Conference policy regarding remote access or remote proceedings" and that "the timing of the publication of the proposed amendments in 2024 is unlikely to hinder work on this issue."

The Advisory Committee approved the amendments to Rules 9014 and 9017 and the new Rule 7043 for publication.

**Action Item 7. Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions).** As we have previously reported, the Advisory Committee received two suggestions regarding the Bankruptcy Code's requirements that most individual debtors complete a course on personal financial management while their case is pending in order to receive a discharge. Code § 727(a)(11) provides, subject to limited exceptions, that a debtor will not receive a discharge if "after filing the petition, the debtor failed to complete an [approved] instructional course concerning personal financial management." This restriction applies to individual debtors in chapter 7, in certain chapter 11 cases (*see* § 1141(d)(3)), and in chapter 13 (*see* § 1328(g)(1)).

Rule 1007(b)(7) implements these provisions by requiring such a debtor to file a certificate of completion of the course.[2] Rule 1007(c) provides the deadline for filing the certificate: in a chapter 7 case, 60 days after the first date set for the meeting of creditors; in a chapter 11 or 13 case, no later than the date that the debtor makes the last payment as required by the plan or a motion is filed for a hardship discharge. In order to promote the debtor's compliance with these requirements, Rule 5009(b) provides that, if an individual debtor in a chapter 7 or 13 case who is required to file a certificate under Rule 1007(b)(7) fails to do so by 45 days after the first date set for the meeting of creditors, the court must promptly notify the debtor of the obligation to do so by the prescribed deadline. The notice must also explain that the failure to comply will result in the case being closed without a discharge.

[2] If Congress takes no action to the contrary, an amendment to Rule 1007(b)(7) that will change the requirement for filing a statement to requiring the filing of a certificate of course completion issued by the course provider will go into effect on December 1, 2024. This report will therefore refer to the filing of a certificate.

Professor Laura Bartell submitted a suggestion (22-BK-D) to change the timing of the reminder notice to chapter 7 and 13 debtors under Rule 5009(b). Tim Truman, a chapter 13 trustee, submitted a related suggestion (22-BK-K) to change the deadline for chapter 13 debtors to file the certificate.

The Advisory Committee supports the goal of reducing the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation of their completion of the course. Some of these debtors eventually receive a discharge after getting their cases reopened—at additional expense—but others never do, despite having satisfied all of the other requirements for receiving a discharge. The question for the Advisory Committee was how best to achieve a reduction in noncompliance. The Consumer Subcommittee considered whether changing the deadlines for filing the certificate or the timing of the reminder notice would make a difference. In the end, the Subcommittee recommended amendments to Rules 1007, 5009, and 9006, and the Advisory Committee agreed that they should be published for comment. The proposed changes consist of the following:

1. *The deadlines in Rule 1007(c) for filing the certificate of course completion would be eliminated.* The Code only requires that the course be taken before a discharge can be issued, and members of the Advisory Committee were concerned that some debtors might be deprived of a discharge merely because they failed to file their certificates by the times specified in the rules.

The Advisory Committee approved for publication an amendment to Rule 1007 to eliminate the deadlines. It would delete subdivision (c)(4), which sets out the deadlines for filing the certificate of course completion in chapter 7, 11, and 13 cases. If this amendment is approved, references to the deadlines in Rule 9006(b) and (c) would also be deleted.

2. *Rule 5009(b) would provide for two reminder notices to be sent, rather than one.* This change would allow one notice to be sent early in the case—when the debtor would be more likely to be reachable and still represented by counsel—and another toward the end of the case before eligibility for a discharge would be determined. The first notice would be sent to any chapter 7 or chapter 13 debtor for whom a certificate of course completion has not been filed within 45 days after the petition was filed. This date will be 21 to 50 days earlier than Rule 5009(b)'s current requirement.[3]

The second notice in a chapter 7 case would be sent to any debtor for whom a certificate has not been filed within 90 days after the petition was filed, and it would advise the debtor that the case is subject to dismissal without the entry of a discharge if the certificate is not filed within the next 30 days.

[3] Under the current rule, the 5009(b) notice is sent to debtors for whom a certificate has not been filed within 45 days after the first date set for the meeting of creditors. Under Rule 2003(a), the U.S. trustee must call the meeting between 21 and 40 days after the order for relief in a chapter 7 case and between 21 and 50 days after the order for relief in a chapter 13 case.

In a chapter 13 case, the second notice would be sent as part of the closing process. The proposed amendment would require the notice to be sent to any debtor for whom a certificate has not been filed when the trustee files a final report and final account. It would advise the debtor that the case is subject to being closed without the entry of a discharge at the end of 60 days.

## III. Information Items

**Information Item 1. Suggestions to Remove Redacted Social Security Numbers from Filed Documents and to amend Rule 2002(o) with Respect to Captions.** Senator Ron Wyden of Oregon sent a letter to The Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be "scrubbed of personal information before they are publicly available." Portions of this letter, suggesting that the Rules Committees reconsider a proposal to redact the entire social security number ("SSN") from court filings, have been filed as a suggestion with each of the Rules Committees.

The Bankruptcy Rules Committee also received a suggestion from the Clerk of Court for the Bankruptcy Court for the District of Minnesota, in which clerks of court for eight other bankruptcy courts in the Eighth Circuit joined, suggesting that Rule 2002(n) (which will be Rule 2002(o) after the restyled rules become effective) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005.[4] The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting that of the Clerk of Court for the Minnesota Bankruptcy Court and her colleagues.

With the assistance of the Federal Judicial Center, the Advisory Committee has distributed two surveys seeking reactions on these proposals from bankruptcy clerks, debtor attorneys, chapter 12/13 trustees, creditor attorneys, chapter 7 trustees, various tax authorities and representatives of the National Association of Attorneys General.

The Advisory Committee will analyze the responses and consider further action, if any, on the suggestions.

**Information Item 2. Use of Masters in Bankruptcy Cases.** Rule 9031 (as restyled) provides: "Fed. R. Civ. P. 53 does not apply in a bankruptcy case." As declared by its title, the effect of this rule is that "Using Masters [Is] Not Authorized" in bankruptcy cases. Since the rule's promulgation in 1983, the Advisory Committee has been asked on several occasions to propose an amendment to allow the appointment of masters in certain circumstances, but each time the Advisory Committee has decided not to do so. Now two new suggestions to amend Rule 9031 have been submitted to the Advisory Committee, one by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey (24-BK-A) and the other by the American Bar Association (24-BK-C).

[4] Rule 1005 requires the caption to include the following information about the debtor: name, employer identification number, last four digits of the SSN or individual debtor's taxpayer identification number, any other federal taxpayer-identification number, and all other names used within eight years before the filing of the petition.

Chief Judge Kaplan suggests that Rule 9031 be amended to provide that Civil Rule 53 applies in bankruptcy cases and proceedings. He explains that his suggestion arises out of discussions at a recent conference on the intersection of bankruptcy and MDLs, as well as his experience with his own caseload and his observation of other complex chapter 11 cases. He writes that "bankruptcy judges handling mass tort chapter 11 bankruptcies, together with large financial institution and cryptocurrency filings, have struggled to employ the tools available under the Code and bankruptcy rules to address complex issues such as corporate asset valuations, claim estimations, fraudulent transfer litigation and challenges to prefiling liability management transactions." Chief Judge Kaplan suggests that the "appointment of a special master would relieve the burden on the bankruptcy courts, allowing the chapter 11 case to proceed without being held hostage to litigation/discovery 'overload.'"

The ABA's suggestion involves the amendment of two rules and the addition of another.[5] It would amend Rule 9031 to allow courts—"to the extent needed to facilitate the preservation of the estate"—to order the appointment of masters in the same manner and subject to the same limitations and requirements as set forth in Civil Rule 53(a)-(g)(1). It would add a new Rule 7053, applicable to adversary proceedings, that would read similarly. Finally, the ABA proposes amending Rule 9014(c) to include Rule 7053 in the list of Part VII rules generally applicable in contested matters. It argues, among other things, that much has changed since 1983 when Rule 9031 was promulgated. Bankruptcy and district judges now actively manage their cases. "In 2024, bankruptcy judges will administer billions of dollars in dispute in a fair, efficient, and economical manner day after day. Amending Rule 9031 would give them additional tools to do so."

After a full discussion at the spring meeting, a consensus emerged that the Business Subcommittee should gather more information and proceed to consider the suggestions. It was suggested that we seek the assistance of the FJC on a potential survey of bankruptcy judges on whether they have ever needed the use of a master and how they proceeded without one. District judges might also be surveyed about their use of and the expense of masters. Carly Giffin of the FJC suggested starting with interviews of a group of judges before drafting a survey in order to determine what questions to ask.

**Information Item 3. Technical Amendments to Forms to Conform to Restyled Bankruptcy Rules.** The amendments to the Federal Rules of Bankruptcy Procedure to reflect the restyling project are scheduled to become effective on December 1, 2024. Because certain of the Official Forms and Director's Forms and their instructions explicitly refer to, or quote language from, Bankruptcy Rules that have been restyled, conforming changes need to be made to those forms and instructions. Amendments are needed for Official Form 410 (Proof of Claim); to the instructions to Official Forms 309A-I (Notice of Case), 312 (Order and Notice for Hearing on Disclosure Statement), 313 (Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan), 314 (Ballot for Accepting or Rejecting Plan), 315 (Order Confirming Plan), 318 (Discharge of Debtor in a Chapter 7 Case), and 420A (Notice of Motion or Objection); to Director's Forms 1040 (Adversary Proceeding Cover Sheet) and 2630

[5] The ABA has also suggested that the Civil Rules Committee propose an amendment to Civil Rule 53, changing the terminology from "master" to "court-appointed neutral."

(Bill of Costs); and to the instructions for Forms 2070 (Certificate of Retention of Debtor in Possession), 2100A/B (Transfer of Claim Other Than For Security and Notice of Transfer of Claim Other Than for Security), 2300A (Order Confirming Chapter 12 Plan), and 2500E (Summons to Debtor in Involuntary Case).

The Advisory Committee gave final approval to the revisions to those forms and instructions. The conforming change to Official Form 410 is included with the amendment discussed at Action Item 4. The changes to the form instructions and to the Director's Forms require no further action.

**Information Item 4. Reconsideration of proposed amendments to Official Forms 309A and 309B.** At the fall 2022 Advisory Committee meeting, the Advisory Committee approved for publication an amendment to Official Form 309A (Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline) and Official Form 309B (Notice of Chapter 7 Bankruptcy Case —Proof of Claim Deadline Set). The amendment added to the section on deadlines in each form a reminder to debtors of the deadline for filing a certificate of completion of a course on personal financial management.

Because the Consumer Subcommittee was still considering related rule amendments, the proposed amendments to Forms 309A and 309B were held back in order to allow any rule and form amendments to be presented to the Standing Committee as a package. At the fall 2023 Advisory Committee meeting, the Consumer Subcommittee presented amendments to Rules 1007(c), 5009(b), and 9006(b) and (c), which were approved for publication. As discussed at Action Item 7, the proposed amendment to Rule 1007(c) would eliminate the deadlines for filing certificates of completion of a course in personal financial management. In light of that change, the Advisory Committee voted at the spring meeting to withdraw the amendments to Forms 309A and 309B.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**[1]

**Rule 3002.1. ~~Notice Relating to~~ Chapter 13 ~~Claims~~ Claim Secured by a Security Interest in the Debtor's Principal Residence ~~in a Chapter 13 Case~~**[2]

**(a) In General.** This rule applies in a Chapter 13 case to a claim that is secured by a security interest in the debtor's principal residence and for which the plan provides for the trustee or debtor to make ~~contractual installment~~ payments on the debt. Unless the court orders otherwise, the ~~notice~~ requirements of this rule cease when an order terminating or annulling the automatic stay related to that residence becomes effective.

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

[2] The changes indicated are to the restyled version of Rule 3002.1, not yet in effect.

**(b) Notice of a Payment Change; Home-Equity Line of Credit; Effect of an Untimely Notice; Objection.**

(1) ***Notice by the Claim Holder—In General.*** The claim holder must file a notice of any change in the payment amount, ~~of an installment payment~~ including ~~any change~~ one resulting from an interest-rate or escrow-account adjustment. ~~At least 21 days before the new payment is due, the~~ The notice must be ~~filed and~~ served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

Except as provided in (b)(2), it must be filed and served at least 21 days before the new payment is due. ~~If the claim arises from a home-equityline of credit, the court may~~

~~modify this requirement.~~

(2) ***Notice of a Change in a Home-Equity Line of Credit.***

(A) *Deadline for the Initial Filing; Later Annual Filing.* If the claim arises from a home-equity line of credit, the notice of a payment change must be filed and served either as provided in (b)(1) or within one year after the bankruptcy-petition filing, and then at least annually.

(B) *Content of the Annual Notice.* The annual notice must:

(i) state the payment amount due for the month when the notice is filed; and

(ii) include a reconciliation amount to account for any

overpayment or underpayment during the prior year.

(C) *Amount of the Next Payment.* The first payment due at least 21 days after the annual notice is filed and served must be increased or decreased by the reconciliation amount.

(D) *Effective Date.* The new payment amount stated in the annual notice (disregarding the reconciliation amount) is effective on the first payment due date after the payment under (C) has been made and remains effective until a new notice becomes effective.

(E) *Payment Changes Greater Than $10.* If the claim holder chooses to give

annual notices under (b)(2) and the monthly payment increases or decreases by more than $10 in any month, the holder must file and serve (in addition to the annual notice) a notice under (b)(1) for that month.

(3) ***Effect of an Untimely Notice.*** If the claim holder does not timely file and serve the notice required by (b)(1) or (b)(2), the effective date of the new payment amount is as follows:

(A) when the notice concerns a payment increase, on the first payment due date that is at least 21 days after the untimely notice was filed and served; or

(B) when the notice concerns a payment decrease, on the actual payment due date, even if it is prior to the notice.

(~~2~~4) ***Party in Interest's Objection.*** A party in interest who objects to ~~the~~ a payment change noticed under (b)(1) or (b)(2) may file and serve a motion to determine ~~whether the change is required to maintain payments under § 1322(b)(5)~~the change's validity. Unless the court orders otherwise, if no motion is filed ~~by~~ before the day ~~before~~ the new payment is due, the change goes into effect on that date.

**(c) Fees, Expenses, and Charges Incurred After the Case Was Filed; Notice by the Claim Holder.** The claim holder must file a notice itemizing all fees, expenses, and charges incurred after the case was filed that the holder asserts are recoverable

against the debtor or the debtor's principal residence. Within 180 days after the fees, expenses, or charges ~~were~~ are incurred, the notice must be filed and served on the individuals listed in (b)(1).~~:~~

- ~~the debtor;~~
- ~~the debtor's attorney; and~~
- ~~the trustee.~~

**(d) Filing Notice as a Supplement to a Proof of Claim.** A notice under (b) or (c) must be filed as a supplement to ~~the~~ a proof of claim using Form 410S-1 or 410S-2, respectively. The notice is not subject to Rule 3001(f).

**(e) Determining Fees, Expenses, or Charges.** On a party in interest's motion ~~filed within one year after the notice in (c) was served~~, the court must, after notice and a hearing, determine whether paying any claimed fee, expense, or charge is required by the

underlying agreement and applicable nonbankruptcy law. ~~to cure a default or maintain payments under § 1322(b)(5).~~The motion must be filed within one year after the notice under (c) was served, unless a party in interest requests and the court orders a shorter period.

**(f) Motion to Determine Status; Response; Court Determination.**

(1) ***Timing; Content and Service.*** At any time after the date of the order for relief under Chapter 13 and until the trustee files the notice under (g)(1), the trustee or debtor may file a motion to determine the status of any claim described in (a). The motion must be prepared using Form 410C13-M1 and be served on:

- the debtor and the debtor's attorney, if the trustee is the movant;
- the trustee, if the debtor is the movant; and
- the claim holder.

(2) ***Response; Content and Service.*** If the claim holder disagrees with facts set forth in the motion, it must file a response within 28 days after the motion is served. The response must be prepared using Form 410C13-M1R and be served on the individuals listed in (b)(1).

(3) ***Court Determination.*** If the claim holder's response asserts a disagreement with facts set forth in the motion, the court must, after notice and a hearing, determine the status of the claim and enter an appropriate order. If the claim holder does not respond to the

motion or files a response agreeing with the facts set forth in it, the court may grant the motion based on those facts and enter an appropriate order.

**(f~~g~~) ~~Notice of the Final Cure Payment.~~ Trustee's End-of-Case Notice of Disbursements Made; Response; Court Determination.**

(1) ~~*Contents of a Notice*~~ ***Timing and Content***. Within ~~30~~ 45 days after the debtor completes all payments due to the trustee under a Chapter 13 plan, the trustee must file a notice:

(A) stating ~~that the debtor has paid in full the~~ what amount ~~required~~ the trustee disbursed to the claim holder to cure any default ~~on the claim~~and whether it has been cured; ~~and~~

(B) ~~informing~~ stating what amount the trustee disbursed to the claim holder

for payments that came due during the pendency of the case and whether such payments are current as of the date of the notice; and

(C) informing the claim holder of its obligation to ~~file and serve a response~~ respond under (g)(3).

(2) ***~~Serving the Notice~~ Service.*** The notice must be prepared using Form 410C13-N and be served on:

- the claim holder;
- the debtor; and
- the debtor's attorney.

(3) ***Response.*** The claim holder must file a response to the notice within 28 days after its service. The response, which is not subject to Rule 3001(f), must be filed as a supplement to the claim holder's proof of

claim. The response must be prepared using Form 410C13-NR and be served on the individuals listed in (b)(1).

~~(3) ***The Debtor's Right to File.*** The debtor may file and serve the notice if:~~

~~(A) the trustee fails to do so;~~

~~(B) and the debtor contends that the final cure payment has been made and all plan payments have been completed.~~

(4) ***Court Determination of a Final Cure and Payment.***

(A) *Motion*. Within 45 days after service of the response under (g)(3) or after service of the trustee's notice under (g)(1) if no response is filed by the claim holder, the debtor or trustee may file a motion to determine whether the debtor has cured all

defaults and paid all required postpetition amounts on a claim described in (a). The motion must be prepared using Form 410C13-M2 and be served on the entities listed in (f)(1).

(B) *Response.* If the claim holder disagrees with the facts set forth in the motion, it must file a response within 28 days after the motion is served. The response must be prepared using Form 410C13-M2R and be served on the individuals listed in (b)(1).

(C) *Court Determination.* After notice and a hearing, the court must determine whether the debtor has cured all defaults and paid all required postpetition amounts. If the

claim holder does not respond to the motion or files a response agreeing with the facts set forth in it, the court may enter an appropriate order based on those facts.

~~**(g) Response to a Notice of the Final Cure Payment.**~~

~~**(1)** ***Required Statement.*** Within 21 days after the notice under (f) is served, the claim holder must file and serve a statement that:~~

~~(A) indicates whether:~~

~~(i) the claim holder agrees that the debtor has paid in full the amount required to cure any default on the claim; and~~

~~(ii) the debtor is otherwise current on all payments under § 1322(b)(5); and~~

~~(B) itemizes the required cure or~~

~~postpetition amounts, if any, that the claim holder contends remain unpaid as of the statement's date.~~

~~(2) ***Persons to be Served.*** The holder must serve the statement on:~~

- ~~the debtor;~~
- ~~the debtor's attorney; and~~
- ~~the trustee.~~

~~(3) ***Statement to be a Supplement.*** The statement must be filed as a supplement to the proof of claim and is not subject to Rule 3001(f).~~

~~**(h) Determining the Final Cure Payment.** On the debtor's or trustee's motion filed within 21 days after the statement under (g)is served, the court must, after notice and ahearing, determine whether the debtor has cured the default and made all required postpetition payments.~~

**(~~i~~h) Claim Holder's Failure to Give Notice or**

**Respond**. If the claim holder fails to provide any information as required by ~~(b), (c), or (g)~~this rule, the court may, after notice and a hearing, ~~take one or both of these actions~~do one or more of the following:

(1) preclude the holder from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding in the case—unless the court determines that the failure was substantially justified or is harmless; ~~and~~

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure; and

(3) take any other action authorized by this rule.

**Committee Note**

The rule is amended to encourage a greater degree of compliance with its provisions and to allow assessments of a mortgage claim's status while a chapter 13 case is pending in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. Stylistic changes are made throughout the rule, and its title and

subdivision headings have been changed to reflect the amended content.

Subdivision (a), which describes the rule's applicability, is amended to delete the words "contractual" and "installment" in the phrase "contractual installment payments" in order to clarify and broaden the rule's applicability. The deletion of "contractual" is intended to make the rule applicable to home mortgages that may be modified and are being paid according to the terms of the plan rather than strictly according to the contract, including mortgages being paid in full during the term of the plan. The word "installment" is deleted to clarify the rule's applicability to reverse mortgages. They are not paid in installments, but a debtor may be curing a default on a reverse mortgage under the plan. If so, the rule applies.

In addition to stylistic changes, subdivision (b) is amended to provide more detailed provisions about notice of payment changes for home-equity lines of credit ("HELOCs") and to add provisions about the effective date of late payment change notices. The treatment of HELOCs presents a special issue under this rule because the amount owed changes frequently, often in small amounts. Requiring a notice for each change can be overly burdensome. Under new subdivision (b)(2), a HELOC claimant may choose to file only annual payment change notices—including a reconciliation figure (net overpayment or underpayment for the past year)—unless the payment change in a single month is for more than $10. This provision also ensures at least 21 days' notice before a payment increase takes effect.

As a sanction for noncompliance, subdivision (b)(3) now provides that late notices of a payment increase do not go into effect until the first payment due date after the required notice period (at least 21 days) expires. The claim

holder will not be permitted to collect the increase for the interim period. There is no delay, however, in the effective date of an untimely notice of a payment decrease. It may even take effect retroactively, if the actual due date of the decreased payment occurred before the claim holder gave notice of the change.

The changes made to subdivisions (c) and (d) are largely stylistic. Stylistic changes are also made to subdivision (e). In addition, the court is given authority, upon motion of a party in interest, to shorten the time for seeking a determination of the fees, expenses, or charges owed. Such a shortening, for example, might be appropriate in the later stages of a chapter 13 case.

Subdivision (f) is new. It provides a procedure for assessing the status of the mortgage at any point before the trustee files the notice under (g)(1). This optional procedure, which should be used only when necessary and appropriate for carrying out the plan, allows the debtor and the trustee to be informed of any deficiencies in payment and to reconcile records with the claim holder in time to become current before the case is closed. The procedure is initiated by motion of the trustee or debtor. An Official Form has been adopted for this purpose. The claim holder then must respond if it disagrees with facts stated in the motion, again using an Official Form to provide the required information. If the claim holder's response asserts such a disagreement, the court, after notice and a hearing, will determine the status of the mortgage claim. If the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under subdivision (g), within 45 days after the last plan payment is made to the trustee, the trustee must file an

End-of-Case Notice of Disbursements Made. An Official Form has been adopted for this purpose. The notice will state the amount that the trustee has paid to cure any default on the claim and whether the default has been cured. It will also state the amount that the trustee has disbursed on obligations that came due during the case and whether those payments are current as of the date of the notice. If the trustee has disbursed no amounts to the claim holder under either or both categories, the notice should be filed stating $0 for the amount disbursed. The claim holder then must respond within 28 days after service of the notice, again using an Official Form to provide the required information.

Either the trustee or the debtor may file a motion for a determination of final cure and payment. The motion, using the appropriate Official Form, may be filed within 45 days after the claim holder responds to the trustee's notice under (g)(1), or, if the claim holder fails to respond to the notice, within 45 days after the notice was served. If the claim holder disagrees with any facts in the motion, it must respond within 28 days after the motion is served, using the appropriate Official Form. The court will then determine the status of the mortgage. A Director's Form provides guidance on the type of information that should be included in the order.

Subdivision (h) was previously subdivision (i). It has been amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule. Stylistic changes have also been made to the subdivision.

---

**Changes Made After Publication and Comment**

The changes are listed at Action Item 1 of the report.

**Summary of Public Comment**

**BK-2023-0002-0003 – Michael Gieseke.** The remedy for a creditor's failure to respond to a motion to determine the status of a mortgage claim—granting the facts set forth in the motion—may not be adequate. In some cases the moving trustee or debtor may not be able to allege that the payments are current. Perhaps an alternative remedy similar to that in FRBP 3002.1(i)— allowing the court to award other appropriate relief, including reasonable expenses and attorney's fees caused by the creditor's failure to respond—would compel compliance and assist such debtors in obtaining the requested information.

**BK-2023-0002-0008 – Minnesota State Bar Association.** It supports the proposed amendments to Rule 3002.1.

**BK-2023-0002-0009 – National Bankruptcy Conference.**

**(a):** Supports the deletion of "installment" and the Committee Note statement that rule applies to reverse mortgages. Should also delete "contractual." This change would make all claims secured by a security interest in the debtor's principal residence that are being paid in a chapter 13 case subject to Rule 3002.1. Mortgage holders and servicers have successfully argued that Rule 3002.1 does not apply in chapter 13 cases in which the mortgage is being paid in any manner other than according to strict "contractual" terms, such as with full payment and short term mortgage cases.

**(b):** Form 410-S1 should be modified to provide for the new HELOC disclosures. Alternatively, the form instructions should indicate that, notwithstanding Rule 9009(a), the claim holder is permitted to alter the form to make the disclosures.

**(e):** Under the current rule, courts have held that the procedure set out in (e) based on the filing of a motion in a contested matter is not exclusive and does not preclude the debtor or trustee from seeking a determination related to disputed fees in an adversary proceeding, particularly when other claims seeking recovery of money damages that must be filed as an adversary proceeding are being asserted against the creditor. While the proposed amendments to Rule 3002.1(e) appear to be stylistic, they could be construed as changing the provision from a permissive to mandatory procedure by providing that a motion (and only a motion) "must" be filed, and that the motion must be filed within one year unless the court orders a shorter period. Thus, we suggest that the existing language in Rule 3002.1(e) not be changed. In addition we suggest that the court be authorized to extend the period for determining fees, expenses, or charges beyond a year (". . . the court orders a shorter or longer period.").

**(f):** In (f)(3) we suggest changing the language in the second sentence as follows: "the court may grant the motion based on those facts and enter an appropriate order." That would make the provision consistent with the first sentence and other provisions in the rule.

**(g):** Some chapter 13 trustees refuse to file the current notice of final cure. Simply changing the rule to state that the trustee "must" file the End-of-Case Notice is not likely to increase compliance. Thus, we propose that the option for the debtor to file and serve the notice to begin the end-of-

case procedure as set out in the current rule should be retained in Rule 3002.1(g). This will ensure that debtors will have the opportunity for an end-of-case court determination of final cure if the trustee fails to initiate the process. We also suggest that "within" in the first sentence of proposed (g)(4)(A) be changed to "no later than." To be consistent and to avoid any ambiguity, the first sentence of (g)(4)(C) should include at the end the following: "and enter an appropriate order."

**(h):** Now that the proposed changes to Rule 3002.1 provide for the entry of appropriate court orders at various stages, non-compliance with Rule 3002.1 may include not only the failure to provide information required by the rule but also the failure to comply with orders entered under Rule 3002.1. Thus, we suggest that (h) include sanction provisions similar to FRCP 37(b)(2) for failure to comply with a court order entered under the rule. Suggested change:

**(h) Claim Holder's Failure to Give Notice, ~~or~~ Respond, or Comply with a Court Order.** If the claim holder fails to provide any information as required by this rule, or to comply with any order entered under this rule, the court may, after notice and a hearing, do one or more of the following:

(1) preclude the holder from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding in the case—unless the court determines that the failure was substantially justified or is harmless;

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure; and

(3) ~~take any other action authorized by this rule~~ issue further just orders, including:

(A) directing that the matters embraced in the order or other designated facts be taken as established for purposes of a contested matter or adversary proceeding arising in or related to the case;

(B) prohibiting the claim holder from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; or

(C) treating as contempt of court the failure to obey any order.

**BK-2023-0002-0010 – Aderant.**

**(b):** In Rule 3002.1(b)(3)(A), triggering the time from the date the untimely notice was "filed and served" is problematic. The notice may not be filed and served simultaneously. To avoid any confusion, we suggest the proposed rule be revised to refer simply to the date of filing of the notice.

To provide consistency with language used throughout the rest of Rule 3002.1, we suggest that Rule 3002.1(b)(3)(B) be revised to state that the effective date is "on the first payment due date after the date of filing of the notice." This will also avoid any confusion as to what is considered the "date of the notice."

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).**

**(a):** The proposed revisions continue to make the rule applicable only to the debtor's principal place of residence. The Southern District of Florida has a local Rule that makes the provisions of Rule 3002.1 applicable to any real property in which the debtor has an ownership interest. Would the

Rules Committee consider expanding the applicability of the Rule? If so, the NACTT Subcommittee suggests that this provision be permissive rather than mandatory as to real property that is not the principal place of residence.

Another issue is that the update to subsection (a) of the rule removes the word "installment." This does not completely clarify what types of transactions are subject to the rule, such as reverse mortgages; statutory liens like tax lien transferees and HOA liens; and total debt plans (a plan in which the entire debt owed on the mortgage is paid through the plan), cramdowns, or nontraditional liens on primary residences. As to reverse mortgages, the Committee Note indicates that the provisions of the rule are applicable to these types of loans. However, members of the subcommittee have pointed out that they do not believe the language of the proposed rule applies to reverse mortgages because, although there are contractual financial obligations in a reverse mortgage, like the obligation of the mortgagor to pay taxes and insurance, those payments are not made to the mortgage claimant and, therefore, proposed Rule 3002.1 would not apply to reverse mortgages.

As to liens that are statutory in nature, because of the definition of "security interest" in § 101(51) of the Bankruptcy Code as a lien created by an agreement, holders of liens that are statutory, like tax lien transferees, HOA and condominium lienholders, and mechanic and materialman lien holders, often assert that they are not required to comply with Rule 3002.1. Yet these claimants routinely assess charges against the debtor, such as attorney fees and inspection fees. These lienholders often do not file an application for payment of fees, expenses, or charges from the estate and simply wait until the conclusion of the case to collect these postpetition charges. If these claim holders were subject to Rule 3002.1, the debtor would be aware of

the postpetition charges as they are incurred, could pay those charges through a modified Chapter 13 plan, would have the chance to dispute the charges in the bankruptcy court, and could emerge from the bankruptcy truly current on all payments on their principal residence.

As to total debt claims (and also reverse mortgages), the mortgage claimant may make postpetition payments for taxes and insurance to protect the claimant's position if the debtor does not make these payments. Servicers/attorneys do not have a definitive answer as to whether a Notice of Postpetition Fees, Expenses, and Charges under Rule 3002.1(c) is required for recovery of these post-petition escrow advances, or if another procedure is more appropriate (i.e. a motion for reimbursement, a Rule 2016(a) application, or a motion for relief). Clarity would be appreciated.

**(b):** Mortgage claimants would appreciate clarification in (b)(3)(B) that a payment decrease is effective on the actual payment due date, even if that date is in the past. There are instances where the payment decrease is retroactively applied, and the debtor should get the benefit of that decrease. Examples are PMI (private mortgage insurance) or MIP (mortgage insurance premium) decreases, which retroactively reduce the payment due to delays in receipt and application of payments for a given month. If the trustee has disbursed funds to a mortgage claimant and the amount that should have been disbursed is later decreased because of a Notice of Payment Change filed after the disbursement, the trustee should be allowed, but not obligated, to recover the difference or adjust any subsequently made payment by subtracting any overage on the payment from the subsequent payment.

Subdivision (b)(4), like the current rule, states that if a motion to determine a payment change's validity is not filed

prior to the effective date of the payment change, the change goes into effect. That is a short period of time to get that motion filed. In reality, debtors file a motion to determine the validity of a payment change much later, since there is no deadline for filing that motion. The motion is often filed after other Notices of Payment Change have been filed, creating confusion and complicating the process. We suggest amending this provision to provide for a three-to-six month deadline for filing a motion to determine the validity of a payment change to add some finality to the process.

Mortgage claimants also request that there be a deadline for filing an objection to the claimant's proof of claim. The suggestion is one year from the date of filing of the proof of claim unless an earlier deadline is set by local rule or general order. If the loan is consensually modified, the suggested objection period to an amended proof of claim would be a year from the date that the amended proof of claim is filed.

**(e):** Mortgage claimants suggest a shorter time deadline for a party-in-interest to file a motion to determine fees, expenses or charges. A year is a long time, particularly as a case nears conclusion. A shorter time frame, like 60 to 90 days, would be very helpful, would give the bankruptcy court an opportunity to resolve the issues between the debtor and mortgage claimant before the conclusion of the case, and would add some finality to the process. Additionally, there is nothing in the proposed rule that requires the debtor to state how and when the fees, expenses or charges will be paid. Mortgage claimants would appreciate knowing how the debtor intends to make these payments.

**(f):** Mortgage claimants support allowing the debtor or trustee to file this motion to be informed of any deficiencies and to reconcile payments as needed and appropriate, but

would also like (b)(1) to include clear limitations to help curb misuse. They recommend the following:

> (1) Defining the timeframe for when a debtor or trustee may file this motion. Replace the phrase "At any time" with, for example, "At any time between 18-36 months after the date of the order for relief . . .".
>
> (2) Alternatively, specifying the frequency with which the debtor or trustee may file this motion in a case.
>
> (3) Specifying potential remedies for the mortgage claimant if the provision is misused or used in a vexatious manner.
>
> (4) Providing that a pro se debtor must provide an attestation as to the facts set forth in the motion.
>
> (5) Providing that it is a ground for setting an adverse order aside if the movant has failed to name and serve the correct mortgage claimant/servicer with the Motion to Determine Status, based on the documents filed in the case as of the time the motion is filed and served.

One member of the subcommittee stated that in a direct pay situation, the debtor should be responsible for filing the motion, rather than the trustee.

We suggest that the response deadline be 28 days, rather than 21, to match the response deadline on an End-of-Case Notice of Payments Made [see proposed 3002.1 (g)(3)]. The work required for a response to either motion is substantially the same, and 28 days appears to be a more appropriate response deadline.

**(g):** Clarify whether the trustee must file an End-of-Case Notice when the claim secured by the principal residence is modified in the plan and not paid per the contract, like in a total debt case. Also clarify if the trustee is required to file the End of Case Notice if the trustee did not make any disbursements to the mortgage claimant because the plan provided that payments to cure any arrearage and ongoing payments were to be disbursed by the debtor.

Subdivision (g)(4) provides that "after service of the response … the debtor or the trustee ***may*** file a motion to determine whether the debtor has cured all defaults and paid all required postpetition amounts on a claim." What if neither the debtor nor the trustee files this motion? For example, if a creditor files a "disagreed" response to the Notice of Payments Made, the proposed rule does not mandate a motion to resolve the disagreement. If the debtor and trustee just allow the case to discharge, what is the controlling status of the account? The rule should clarify.

In (g)(4), the time for filing the Motion to Determine Final Cure is somewhat confusing. It is clear that if the claimant does not file the required response, the deadline for filing the motion to determine final cure must be filed within 45 days after service of the trustee's notice under (g)(1). It is not clear what the deadline is if the claimant files the required response. The provision just states that it can be filed "After the service of the response under (g)(3)" but does not provide an actual deadline. Clarify what the deadline is.

Mortgage claimants request a provision that it is a ground for setting an adverse order aside if the movant has failed to name and serve the correct mortgage claimant/servicer with either (1) the Trustee's End-of-Case Notice of Payments Made or (2) the Motion to Determine Final Cure and

Payment of Mortgage Claim, based on the documents filed in the case as of the time the motion is filed and served.

Additionally, 3002.1(g)(3) provides that the mortgage claimant must file a response to the Trustee's End-of-Case Notice as a supplement to the proof of claim. This provision of the Rule is not new, but there has always been confusion over exactly what this means. "Response" indicates it is a document to be filed in the main case, which is where most of us would assume that a response to a notice or motion would be filed. "Supplement to the proof of claim" indicates that the document should be filed in the claims record. It would add clarity to state that the response must be filed in the main case and will be construed as a supplement to the proof of claim.

**BK-2023-0002-0012 – Pam Bassel.**

**(a):** Although it is clear from the Committee Note that the rule is supposed to apply to reverse mortgages, it is not clear from the language of the rule itself. Lender representatives argue that although there are contractual financial obligations in reverse mortgage agreements, like paying *ad valorem* taxes and maintaining insurance, these payments are not made to or through the mortgage lender, making Rule 3002.1 inapplicable to reverse mortgages. Another proposed addition to the rule is simply to clarify that application of the rule ceases when the plan term ceases.

The suggested language to clarify these points is:

> (a) **IN GENERAL**. This rule applies in a chapter 13 case to secured claims which are secured by the debtor's principal place of residence when the plan provides that the trustee or the debtor will make payments required by a contract with the claimant, whether the

payments are made to the claimant or to some other entity. Unless the court orders otherwise, the notice requirements of this rule cease to apply at the earlier of an order terminating or annulling the automatic stay becoming effective with respect to the residence that secures the claim or the conclusion of the chapter 13 plan term.

Lender representatives have also asked if the rule applies to total debt plans in which the debtor pays the balance owed on the loan before the end of the case, generally in monthly payments through the plan that are not in the same amount or paid on the same date set out in the contract between the debtor and the mortgage claimholder. Additionally, there is no escrow component in the payments made pursuant to a total debt plan. Because of these differences, total debt payments are not contractual payments, and the rule would not be applicable in total debt cases. If that is so, can that be stated in the rule so there is no confusion and no inconsistency in court holdings on that point?

**(g):** The trustee's End-of-Case Notice of Payments Made requires the trustee to state what amount, if any, the trustee has paid to the mortgage claimant on postpetition contractual payments, to cure a default, or to pay postpetition fees, expenses, and charges. In a total debt case, the trustee will have made payments to the claimant, but those will not be payments of this type. Please clarify if trustees are required to file a Notice of Payments Made when the claim is not paid per the contract, as in a total debt case.

Subdivision (g)(3) provides that the mortgage claimant must file a response to the trustee's Notice of Payments Made as a supplement to the proof of claim. This provision of the rule is not new, but there has always been confusion over exactly what this means. It seems that a response to a notice

or motion should be filed in the main case, but a "supplement to the proof of claim" should be filed in the claims record. It would add clarity to state that the response must be filed in the main case and will be construed as a supplement to the proof of claim.

In (g)(4)(A), it is clear that if the claimant does not file the required response, the deadline for filing the motion to determine final cure must be filed within 45 days after service of the trustee's Notice of Payments Made. It is not clear what the deadline is if the claimant files the required response. The provision just states that it can be filed "[a]fter the service of the response under (g)(3,)" but it does not provide an actual deadline. The suggested revision to (g)(4)(A) is:
Within 45 days after service of the response under (g)(3) or, if no response is filed, within 45 days after service of the trustee's notice under (g)(1), the debtor or trustee may file a motion to determine . . . .

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.**

**(a):** The proposed revisions continue to make the rule applicable only to the debtor's principal place of residence. We suggest that the rule be made to allow, but not require, notices with respect to real property that is not the principal place of residence. The critical issue is to make clear that a lender or loan servicer that provides Notices of Payment Change or Notices of Fees, Expenses, and Charges regarding property that is not the principal place of residence should not, as has been the case in some districts, be sanctioned for simply providing these notices. Frequently the real property in question is income producing, which income may be relied upon by the debtor to fund the plan, and notices under Rule 3002.1 could be of assistance.

The removal of the word "installment" does not completely clarify what types of transactions are subject to the rule, such as reverse mortgages; statutory liens, like tax lien transferees and HOA liens; total debt plans; cramdown; and nontraditional liens on primary residences. As to reverse mortgages, the Committee Note indicates that the rule is applicable to these types of loans, but we believe that it is not. Although there are contractual financial obligations in a reverse mortgage, like the obligation of the mortgagor to pay taxes and insurance, those payments are not made to the mortgage claimant, and therefore proposed Rule 3002.1 would not apply. As to total debt claims (and also reverse mortgages), the mortgage claimant may make postpetition payments for taxes and insurance to protect the claimant's position if the debtor does not make them. Servicers/attorneys do not have a definitive answer as to whether a Notice of Postpetition Fees, Expenses and Charges under Rule 3002.1(c) is required for recovery of these postpetition escrow advances, or if another procedure is more appropriate (i.e. motion for reimbursement, Rule 2016(a), application, or a motion for relief). Clarity would be appreciated.

**(b):** Subdivision (b)(3)(B) concerns the effective date of a payment decrease and currently provides that the effective date of a payment decrease is the "first payment due date after the date of the notice." We suggest that it provide that a payment decrease is effective on the actual payment due date, even if that date is in the past.

Subdivision (b)(4) has no deadline to file a motion to determine the validity of a payment change. We suggest amending this provision to provide for a three-to-six-month deadline for filing a motion to determine the validity of a payment change to add some finality to the process.

**(e):** We suggest a shorter time deadline for a party-in-interest to file a motion to determine fees, expenses, or charges. In the average case 60 days from the date the creditor's notice is filed is an adequate period of time for the diligent debtor and debtor's counsel to file the motion, and that would give the bankruptcy court an opportunity to resolve the issues before the conclusion of the case. Additionally, there is nothing in the proposed rule that requires the debtor to state how and when the fees, expenses or charges will be paid. This often results in objections to the notice of final cure that could otherwise be avoided.

**(f):** This new procedure could be initiated by either the trustee or the debtor at any time during the case until the trustee files a (g)(1) notice at the end of the case. There is no limit on the number of times this procedure can be used. The Committee Note states that this "should be used only when necessary and appropriate," which seems to recognize the potential for misuse or vexatious behavior, but the Note on its own will not prevent potential abuse. We suggest the following changes:

(1) Define the timeframe for when a debtor or trustee may file this motion. Replace "At any time" with something like "At any time between 18-36 months after the date of the order for relief . . .".

(2) Alternatively, specify the frequency with which the debtor or the trustee may file this motion in a case, such as no more than twice per case.

(3) Specify potential remedies for the mortgage claimant if the provision is misused or used in a vexatious manner.

(4) Provide that a pro se debtor must provide an attestation as to the facts set forth in the motion.

(5) Provide that it is a ground for setting an adverse order aside if the movant has failed to name and serve the correct mortgage claimant/servicer with the motion, based on the documents filed in the case as of the time the motion is filed and served.

Subdivision (b)(2) requires a response within 21 days. We suggest that, because this review and investigation as to the status of payments is substantially similar to that required by 3002.1(f)(1), the response period here should also be 28 days.

**(g):** Subdivision (g)(3) states the trustee "must" file the notice, and the creditor "must" file a response, and the pleadings "must" be on the official forms. However, (g)(4)(A) says the debtor or trustee "may" file a motion to determine. What if neither debtor nor the trustee files this motion? Mortgage claimants may be left with uncertainty as to the status of a claim after the case closes. The proposed rule should be amended to provide clarity.

We request a provision that it is a ground for setting an adverse order aside if the movant has failed to name and serve the correct mortgage claimant/servicer with either (1) the Trustee's End-of-Case Notice of Payments Made or (2) the Motion to Determine Final Cure and Payment of Mortgage Claim, based on the documents filed in the case as of the time the motion is filed and served.

Additionally, 3002.1(g)(3) provides that the mortgage claimant must file a response to the Trustee's End-of-Case Notice as a supplement to the proof of claim. "Response" indicates it is a document to be filed in the main case, while "Supplement to the proof of claim" indicates that the document should be filed in the claims record. It would add clarity to state that the response must be filed in the main

case and will be construed as a supplement to the proof of claim.

**BK-2023-0002-0014 – Mortgage Bankers Assoc.**

**(f):** Under the changes to Rule 3002.1(f), the debtor or trustee may file a Motion to Determine Status at any time after the date of the order for relief until the trustee files the notice under a Rule 3002.1(g)(1). There is no limit to the number of times either the debtor or trustee may make such a request. Yet, despite being subject to an unlimited number of such motions during the pendency of a single chapter 13 case, the mortgage servicer would be bound to respond to each request if it disagrees with the facts asserted therein. Then, for every disagreement, the parties must attend a hearing for an adjudication on the dispute. This change will needlessly add operational complexity for servicers and significantly increase the amount of attorney's fees for little benefit. In order to avoid misuse, debtors and trustees should be limited to two requests during this timeframe.

Debtors will not be prejudiced by restricting the number of times a motion under 3002.1(f) can be filed. They already have access to much of the information that claim holders must provide in Form 410C13-NR. The Consumer Financial Protection Bureau requires that servicers provide debtors with a modified monthly billing statement for closed-end mortgage that contains much of the information required in Form 410C13-NR.2 Each month, the billing statements are required to provide detailed information regarding post-petition payments (next due date, payment amount, past-due total, etc.) as well as pre-petition payments (amount received since last statement, amount received since the beginning of the bankruptcy case, and the current balance of the arrearage). Then, mortgage servicers are *also* required to file post-petition fee notices that itemize all post-petition

fees that it seeks to recover from the mortgagor pursuant to Rule 3002.1(c).Thus, the stated goal of this new provision—"to give the debtor an opportunity to cure any post-petition defaults"—is already served on a routine, monthly basis.

**(g):** Clarify the Procedures Used to Determine a Final Cure. Rule 3002.1(g)(4) says the debtor or trustee may file a Motion for Final Cure, allowing the court to rule whether the debtor has cured the mortgage default. While 3002.1(g)(4) is clear, the procedural requirements for filing the motion open the door to unfair treatment for the mortgage claim holder. The first requires the trustee to file a Notice of Payments Made, utilizing form 410C13-N. Then the mortgage claim holder must file a response, using form 410C13-NR within 28 days. If the claim holder fails to file a response, the trustee or debtor have 45 days to file the Motion for Final Cure. If the claim holder does file a response, then the trustee or debtor has an unlimited timeframe to file the Motion for Final Cure. This deadline difference in the rule provides an unworkable timeframe for resolving the status of the debt and bringing finality to the proceedings.

To prevent this uncertainty, debtors or trustees should be required to file a motion under 3002.1(g)(4) within 45 days after serving Form 410C13-N, regardless of whether they receive a response from the claim holder. Further, the rule should be expanded to give finality to the mortgage claim process as to all parties involved. Failure of the debtor or trustee to file a Final Cure motion within the 45-day period should be given the same preclusive effects of 3002.1(h) by preventing the introduction of evidence at any future hearing and the granting of appropriate sanctions.

Additionally, the rule should specify that a claim holder does not need to respond to a motion to determine whether the

debtor has cured if they agree with the facts asserted. Proposed Rule 3002.1(h) allows the court to take several actions if a claim holder does not provide information required under the rule. The rule should state that a failure to file Form 410C13-M2R or respond to a motion to determine whether the debtor has cured does not trigger a hearing under Rule 3002.1(h).

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.**

**(b):** We support the amendment to reduce the need to send monthly Notice of Payment Changes (NPC) for small payments changes associated with HELOCs. However, automating this process will be complex. Moreover, mortgage claim holders often continue to send monthly billing statements for HELOCs with the actual amount due each month to debtors in bankruptcy. These monthly billing statements will become inconsistent with the NPCs under this proposal. This amendment should be clear that claim holders that choose to use the HELOC reconciliation process are permitted to continue to send billing statements with the actual payment due versus having to match the amount identified in the NPC.

With respect to subdivision (b)(3)(B), we request a clarification on how to address an untimely decrease in payment that is retroactive to a prior month.

**BK-2023-0002-0016 – N.D. Ga. Chapter 13 Trustees.**

**(a):** We agree with the comment submitted by the National Bankruptcy Conference recommending that the term "contractual" be deleted from Rule 3002.1(a). While the majority of the chapter 13 cases we administer involving mortgages provide for the debtor to make postpetition

payments directly to the mortgage lender, we do administer chapter 13 plans that provide for the entire mortgage balance to be paid by the chapter 13 trustee. Because the mortgage debt in these cases is paid according to the terms of the chapter 13 plan rather than under the contractual terms of the mortgage, the use of the term "contractual" in the rule could be interpreted to mean that it does not apply in these circumstances. Such an interpretation would thwart the intent of Rule 3002.1 in providing debtors with finality with regard to the mortgage at the end of a chapter 13 case.

**(g):** In 3002.1(g)(1) we propose extending the time for chapter 13 trustees to file the End-of-Case Notice of Payments Made from 45 days to 60 days after the debtor completes all payments due to the trustee under a chapter 13 plan. In determining if the debtor has completed all payments due under the plan, the trustee must audit the case, review the payments to all creditors, and ensure that the last payment made to the trustee is in good funds. Also the additional information required by the proposed Official Form 410C13-N imposes additional administrative burdens on trustees, particularly those in direct-pay jurisdictions. An extension of this time requirement would help relieve these administrative burdens on the trustee. While we believe that in the vast majority of cases the notice would be filed within 45 days at our current case load, we believe additional time is necessary for some cases and if/when our caseloads increase, it may become more needed.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

## Rule 8006. Certifying a Direct Appeal to the Court of Appeals[2]

* * * * *

**(g) Request After Certification for ~~Leave to Take a Direct Appeal to~~ a Court of Appeals ~~After Certification~~ to Authorize a Direct Appeal.** Within 30 days after the certification has become effective under (a), ~~a request for leave to take a direct appeal to a court of appeals must be filed~~ any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk in accordance with Fed. R. App. P. 6(c).

---

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

[2] The changes indicated are to the restyled version of Rule 8006, not yet in effect.

**Committee Note**

Rule 8006(g) is revised to clarify that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal.

---

**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

**BK-2023-0002-0008 – Minnesota Bar Association Assembly.** Supports the amendments to Rule 8006.

Official Form 410C13-M1 (12/25)

United States Bankruptcy Court

_____ District of _____

In re _____, Debtor Case No. _____
Chapter 13

**Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim**

The [trustee/debtor] states as follows:

1. The following information relates to the mortgage claim at issue:

**Name of Claim Holder:**_____ **Court claim no**. (if known):_____

**Last 4 digits** of any number used to identify the debtor's account: ___ ____ ____ ____

**Property address:** _____

_____
City State ZIP Code

2. As of the date of this motion, [I have/the trustee has] disbursed payments to cure arrearages as follows:

a. Allowed amount of the prepetition arrearage, if any: $ _____

b. Total amount of the prepetition arrearage disbursed, if known: $ _____

c. Allowed amount of postpetition arrearage, if any: $ _____

d. Total amount of postpetition arrearage disbursed, if known: $ _____

e. Total amount of arrearages disbursed: $ _____

3. As of the date of this motion, [I have/the trustee has] disbursed payments for postpetition fees, expenses, and charges as follows:

a. Amount of postpetition fees, expenses, and charges noticed under Rule 3002.1(c) and not disallowed: $ _____

b. Amount of postpetition fees, expenses, and charges disbursed: $ _____

4. As of the date of this motion, [I have/the trustee has] made the following payments on the postpetition obligations: $ _____

[5. If needed, add other information relevant to the motion.]

6. I ask the court for an order under Rule 3002.1(f)(3) determining the status of the mortgage claim addressed by this motion and whether the payments required by the plan to be made as of the date of this motion have been made.

Signed: _____ Date: ____/____/_____

(Trustee/Debtor)

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Official Form 410C13-M1R (12/25)

United States Bankruptcy Court
_____ District of _____

In re _____, Debtor Case No. _____
Chapter 13

**Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim**

_____ (claim holder) states as follows:

1. The following information relates to the mortgage claim at issue:

**Name of Claim Holder:**_____ **Court claim no**. (if known):_____

**Last 4 digits** of any number used to identify the debtor's account: ___ ____ ____ ____

**Property address:** _____

_____
City State ZIP Code

2. Arrearages

The total amount received to cure any arrearages as of the date of this response is

$_____.

Check all that apply:

- ❑ As of the date of this response, the debtor has paid in full the amount required to cure any arrearage on this mortgage claim.
- ❑ As of the date of this response, the debtor has not paid in full the amount required to cure any prepetition arrearage on this mortgage claim. The total prepetition arrearage amount remaining unpaid as of the date of this response is:

  $ _____.
- ❑ As of the date of this response, the debtor has not paid in full the amount required to cure any postpetition arrearage on the mortgage claim. The total postpetition arrearage amount remaining unpaid on the date of this response is:

  $ _____.

3. Postpetition Payments

(a) Check all that apply:

- ❑ The debtor is current on all postpetition payments, including all fees, charges, expenses, escrow, and costs.
- ❑ The debtor is not current on all postpetition payments. The debtor is obligated for the postpetition payment(s) that first became due on: ____/_____/_____.
- ❑ The debtor has fees, charges, expenses, negative escrow amounts, or costs due and owing.

(b) The claim holder attaches a payoff statement and provides the following information as of the date of this response:

i. Date last payment was received on the mortgage: ____/_____/_____

ii. Date next postpetition payment from the debtor is due: ____/_____/_____

iii. Amount of the next postpetition payment that is due: $_____

iv. Unpaid principal balance of the loan: $_____

v. Additional amounts due for any deferred or accrued interest: $_____

vi. Balance of the escrow account: $_____

vii. Balance of unapplied funds or funds held in a suspense account: $_____

viii. Total amount of fees, charges, expenses, negative escrow amounts, or costs remaining unpaid: $_____

4. Itemized Payment History

Include if applicable:

Because the claim holder asserts that the arrearages have not been paid in full or states that the debtor is not current on all postpetition payments or that fees, charges, expenses, escrow, and costs are due and owing, the claim holder attaches an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:

- all prepetition and postpetition payments received;
- the application of all payments received;
- all fees, costs, escrow, and expenses that the claim holder asserts are recoverable against the debtor or the debtor's principal residence; and
- all amounts the claim holder contends remain unpaid.

[5. If needed, add other information relevant to the response.]

_____ Date ____/_____/_____
Signature

Print _____ Title _____
Name

Company _____

If different from the notice address listed on the proof of claim to which this response applies:

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

The person completing this response must sign it. Check the appropriate box:

- ❑ I am the claim holder.
- ❑ I am the claim holder's authorized agent.

Official Form 410C13-M2 (12/25)

United States Bankruptcy Court

_____ District of _____

In re _____, Debtor Case No. _____
Chapter 13

**Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim**

The [trustee/debtor] states as follows:

1. The following information relates to the mortgage claim at issue:

**Name of Claim Holder:**_____ **Court claim no**. (if known):_____

**Last 4 digits** of any number used to identify the debtor's account: ___ ____ ____ ____

**Property address:** _____

_____
City State ZIP Code

2. As of the date of this motion, [I have/the trustee has] disbursed payments to cure arrearages as follows:

a. Allowed amount of the prepetition arrearage, if any: $ _____

b. Total amount of the prepetition arrearage disbursed, if known: $ _____

c. Allowed amount of postpetition arrearage, if any: $ _____

d. Total amount of postpetition arrearage disbursed, if known: $ _____

e. Total amount of arrearages disbursed $ _____

3. As of the date of this motion, [I have/the trustee has] disbursed payments for postpetition fees, expenses, and charges as follows:

a. Amount of postpetition fees, expenses, and charges noticed under Rule 3002.1(c) and not disallowed: $ _____

b. Amount of postpetition fees, expenses, and charges disbursed: $ _____

4. As of the date of this motion, [I have/the trustee has] made the following payments on the postpetition obligations: $ _____

[5. If needed, add other information relevant to the motion.]

6. I ask the court for an order under Rule 3002.1(g)(4) determining whether the debtor has cured all arrearages, if any, and paid all postpetition amounts required by the plan to be made as of the date of this motion.

Signed: _____
(Trustee/Debtor)

Date: ____/____/_____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Official Form 410C13-M2R (12/25)

United States Bankruptcy Court
_____ District of _____

In re _____, Debtor Case No. _____
Chapter 13

**Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim**

_____ (claim holder) states as follows:

1. The following information relates to the mortgage claim at issue:

**Name of Claim Holder:**_____ **Court claim no**. (if known):_____

**Last 4 digits** of any number used to identify the debtor's account: ___ ____ ____ ____

**Property address:** _____

_____
City State ZIP Code

2. Arrearages

The total amount received to cure any arrearages as of the date of this response is

$_____.

Check all that apply:

- ❑ As of the date of this response, the debtor has paid in full the amount required to cure any arrearage on this mortgage claim.
- ❑ As of the date of this response, the debtor has not paid in full the amount required to cure any prepetition arrearage on this mortgage claim. The total prepetition arrearage amount remaining unpaid as of the date of this response is:

  $ _____.
- ❑ As of the date of this response, the debtor has not paid in full the amount required to cure any postpetition arrearage on this mortgage claim. The total postpetition arrearage amount remaining unpaid as of the date of this response is:

  $ _____.

3. Postpetition Payments

(a) Check all that apply:

- ❑ The debtor is current on all postpetition payments, including all fees, charges, expenses, escrow, and costs.
- ❑ The debtor is not current on all postpetition payments. The debtor is obligated for the postpetition payment(s) that first became due on: ____/_____/_____.
- ❑ The debtor has fees, charges, expenses, negative escrow amounts, or costs due and owing.

(b) The claim holder attaches a payoff statement and provides the following information as of the date of this response:

i. Date last payment was received on the mortgage: ___/___/____

ii. Date next postpetition payment from the debtor is due: ___/___/____

iii. Amount of the next postpetition payment that is due: $_____

iv. Unpaid principal balance of the loan: $_____

v. Additional amounts due for any deferred or accrued interest: $_____

vi. Balance of the escrow account: $_____

vii. Balance of unapplied funds or funds held in a suspense account: $_____

viii. Total amount of fees, charges, expenses, negative escrow amounts, or costs remaining unpaid: $_____

4. Itemized Payment History

Include if applicable:

Because the claim holder disagrees that the arrearages have been paid in full or states that the debtor is not current on all postpetition payments or that fees, charges, expenses, escrow, and costs are due and owing, the claim holder attaches an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:

- all prepetition and postpetition payments received;

- the application of all payments received;
- all fees, costs, escrow, and expenses that the claim holder asserts are recoverable against the debtor or the debtor's principal residence; and
- all amounts the claim holder contends remain unpaid.

[5. If needed, add other information relevant to the response].

_____ Date ____/_____/_____
Signature

Print _____ Title _____
Name

Company _____

If different from the notice address listed on the proof of claim to which this response applies:

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

The person completing this response must sign it. Check the appropriate box:

- ❑ I am the claim holder.
- ❑ I am the claim holder's authorized agent.

**Fill in this information to identify the case:**

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

Official Form 410C13-N

# Trustee's Notice of Disbursements Made

12/25

**The trustee must file this notice in a chapter 13 case within 45 days after the debtor completes all payments due to the trustee. Rule 3002.1(g)(1).**

## Part 1: Mortgage Information

**Name of claim holder:** _____

**Court claim no**. (if known): _____

**Last 4 digits** of any number you use to identify the debtor's account: ____ ____ ____ ____

**Property address:**

_____
Number Street

_____

_____
City State ZIP Code

## Part 2: Statement of Completion

The debtor has completed all payments due the trustee under the chapter 13 plan. A copy of the trustee's disbursement ledger for all payments to the claim holder is attached or may be accessed here: _____ (web address).

## Part 3: Arrearages

| | Amount |
|---|---|
| a. Allowed amount of prepetition arrearage: | $ _____ |
| b. Total amount of prepetition arrearage disbursed by the trustee: | $ _____ |
| c. Total amount of postpetition arrearage disbursed by the trustee: | $ _____ |
| d. Total amount of arrearages disbursed by the trustee: | $ _____ |

**Part 4: Postpetition Payments**

*Check one:*

❑ Postpetition payments are made by the debtor.

❑ Postpetition payments are paid through the trustee.

❑ Other: _____

**If the trustee has disbursed postpetition payments, complete a and b below; otherwise leave blank.**

a. Total amount of postpetition payments disbursed by the trustee as of date of notice: $ _____

b. The last ongoing mortgage payment disbursed by the trustee was the payment due on _____. All subsequent ongoing mortgage payments must be made directly by the debtor to the mortgage claimant.

**Part 5: Postpetition Fees, Expenses, and Charges**

Amount of postpetition fees, expenses, and charges disbursed by the trustee: $ _____

**Part 6: A Response Is Required by Bankruptcy Rule 3002.1(g)(3)**

**Within 28 days after service of this notice, the holder of the claim must file a response using Official Form 410C13-NR.**

✘ _____ Date ____/____/_____
Signature

Trustee _____
First Name Middle Name Last Name

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

**Fill in this information to identify the case:**

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

Official Form 410C13-NR

# Response to Trustee's Notice of Disbursements Made

**12/25**

**The claim holder must respond to the Trustee's Notice of Payments Made within 28 days after it was served. Rule 3002.1(g)(3).**

## Part 1: Mortgage Information

**Name of claim holder:** _____

**Court claim no**. (if known): _____

**Last 4 digits** of any number you use to identify the debtor's account: ____ ____ ____ ____

**Property address:**

_____
Number Street

_____

_____
City State ZIP Code

## Part 2: Arrearages

The total amount received to cure any arrearages as of the date of this response: $_____.

*Check all that apply:*

- ❑ The amount required to cure any prepetition arrearage has been paid in full.
- ❑ The amount required to cure the prepetition arrearage has not been paid in full. Amount of prepetition arrearage remaining unpaid as of the date of this notice: $ _____.
- ❑ The amount required to cure any postpetition arrearage has been paid in full.
- ❑ The amount required to cure the postpetition arrearage has not been paid in full. Amount of postpetition arrearage remaining unpaid as of the date of this notice: $ _____.

**Part 3: Postpetition Payments**

(a) *Check all that apply:*

☐ The debtor is current on all postpetition payments, including all fees, charges, expenses, escrow, and costs.

☐ The debtor is not current on all postpetition payments. The claim holder asserts that the debtor is obligated for the postpetition payment(s) that first became due on: ____/_____/_____.

☐ The debtor has fees, charges, expenses, negative escrow amounts, or costs due and owing.

(b) The claim holder attaches a payoff statement and provides the following information as of the date of this response:

i. Date last payment was received on the mortgage: ____/_____/_____

ii. Date next postpetition payment from the debtor is due: ____/_____/_____

iii. Amount of the next postpetition payment that is due: $_____

iv. Unpaid principal balance of the loan: $_____

v. Additional amounts due for any deferred or accrued interest: $_____

vi. Balance of the escrow account: $_____

vii. Balance of unapplied funds or funds held in a suspense account: $_____

viii. Total amount of fees, charges, expenses, negative escrow amounts, or costs remaining unpaid: $_____

**Part 4 Itemized Payment History**

If the claim holder disagrees that the prepetition arrearage has been paid in full, states that the debtor is not current on all postpetition payments, or states that fees, charges, expenses, escrow, and costs are due and owing, it must attach an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:

- all prepetition and postpetition payments received;
- the application of all payments received;
- all fees, costs, escrow, and expenses that the claim holder asserts are recoverable against the debtor or the debtor's principal residence; and
- all amounts the claim holder contends remain unpaid.

**Part 5: Sign Here**

The person completing this response must sign it. Check the appropriate box:

❑ I am the claim holder.

❑ I am the claim holder's authorized agent.

**I declare under penalty of perjury that the information provided in this response is true and correct to the best of my knowledge, information, and reasonable belief.**

✘ _____ Date ____/_____/_____
Signature

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

## Committee Note

Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R are new. They are adopted to implement new and revised provisions of Rule 3002.1 that prescribe procedures for determining the status of a home mortgage claim in a chapter 13 case.

Official Forms 410C13-M1 and 410C13-M1R implement Rule 3002.1(f). Form 410C13-M1 is used if either the trustee or the debtor moves to determine the status of a home mortgage at any time during a chapter 13 case prior to the trustee's Notice of Disbursements Made. If the trustee files the motion, she must disclose the payments she has made to the holder of the mortgage claim so far in the case. If the debtor, rather than the trustee, has been making the postpetition payments, the trustee should state in part 4 that she has paid $0. If the debtor files the motion, he should provide information about any payments he has made and any payments made by the trustee of which the debtor has knowledge.

Within 28 days after service of the trustee's or debtor's motion, the holder of the mortgage claim must file a response, using Official Form 410C13-M1R, if it disputes any facts set forth in the motion. *See* Rule 3002.1(f)(2). The claim holder must indicate whether the debtor has paid the full amount required to cure any arrearage and whether the debtor is current on all postpetition payments. The claim holder must provide a payoff statement, and, if the claim holder says that the debtor is not current on all payments, it must attach an itemized payment history for the postpetition period.

Official Form 410C13-N is to be used by a trustee to provide the notice required by Rule 3002.1(g)(1) to be filed at the end of the case. This notice must be filed within 45

days after the debtor completes all payments due to the trustee, and it requires the trustee to report on the amounts the trustee paid to cure any arrearage, for postpetition mortgage obligations, and for postpetition fees, expenses, and charges. The trustee must also provide her disbursement ledger for all payments she made to the claim holder or provide the web address where it can be accessed.

Within 28 days after service of the trustee's notice, the holder of the mortgage claim must file a response using Official Form 410C13-NR. *See* Rule 3002.1(g)(3). The claim holder must indicate whether the debtor has paid the full amount required to cure any arrearage and whether the debtor is current on all postpetition payments. It must also provide a payoff statement. If the claim holder says that the debtor is not current on all payments, it must attach an itemized payment history for the postpetition period. The response, which is not subject to Rule 3001(f), must be filed as a supplement to the claim holder's proof of claim.

Official Forms 410C13-M2 and 410C13-M2R implement Rule 3002.1(g)(4). Form 410C13-M2 is used if either the trustee or the debtor moves at the end of the case to determine whether the debtor has cured all arrearages and paid all required postpetition amounts. If the trustee files the motion, she must disclose the payments she has made to the holder of the mortgage claim. If the debtor, rather than the trustee, has been making the postpetition payments, the trustee should state in part 4 that she has paid $0. If the debtor files the motion, he should provide information about any payments he has made and any payments made by the trustee of which the debtor has knowledge.

Within 28 days after service of the trustee's or debtor's motion, the holder of the mortgage claim must file a response, using Official Form 410C13-M2R, if it disputes

any facts set forth in the motion. *See* Rule 3002.1(g)(4)(B). The claim holder must indicate whether the debtor has paid the full amount required to cure any arrearage and whether the debtor is current on all postpetition payments. The claim holder must provide a payoff statement, and, if the claim holder says that the debtor is not current on all payments, it must attach an itemized payment history for the postpetition period.

---

**Changes Made After Publication and Comment**

The changes are listed at Action Item 3 of the report.

**Summary of Public Comment**

**General Comments**

**BK-2023-0002-0007 – Kurt Anderson.** The entire form numbering system needs to be revamped to track with the rules numbering. It is confusing for a non-regular practitioner on a specific issue such as this one—despite references in the rules themselves—to try to correlate a 400 series form with a 3000 series rule.

**BK-2023-0002-0008 – Minnesota State Bar Association Assembly.** We support the proposed new forms.

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** It would be helpful to have a set of instructions for the forms.

**BK-2023-0002-0014 – Mortgage Bankers Assoc.** Prepare instructions for the forms.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc**. Consider better ways to exchange data anticipated by this proposed rule. One suggestion is to leverage the National Data Center for the electronic exchange of information required for determinations of status and final cure. The electronic exchange of information is efficient and cost-effective and allows for automated analysis of data and identification of variances. Also provide line-by-line instructions on what information needs to be provided, and define terms.

**Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)**

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** This form should require a debtor to sign an oath or affidavit to ensure the accuracy of the information provided and to deter abuse.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** This form should require a debtor to execute an affidavit or oath.

Part 2

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define the following terms: "prepetition arrearage" (Do postpetition arrearages that are reported as supplements to the proof of claim become prepetition arrearages? If not, where are they reported?); "allowed amount of postpetition arrearage" and "total amount of postpetition arrearage" (Do these amounts include all delinquent postpetition payments, including agreed orders related to postpetition amounts due? Do these amounts include approved postpetition fees that remain unpaid?);

"total amount of arrearages paid" (Is that the sum of 2.b. and 2.d.?).

Part 3

**BK-2023-0002-0009 – National Bankruptcy Conference.** Part 3.a. asks the debtor or trustee to state the amount of postpetition fees, expenses, and charges noticed and allowed under Rule 3002.1(c). Postpetition fees, expenses, and charges are not "allowed" under Rule 3002.1(c). If no motion is filed under Rule 3002.1(e), there is no court determination that the fees are allowed. Moreover, because the notice of fees is not subject to Rule 3001(f), the fees are not deemed allowed.

**Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)**

Part 2

**BK-2023-0002-0009 – National Bankruptcy Conference.** Unlike the motion form (M1), Part 2 of this response form does not require a breakdown of arrearages between prepetition and postpetition. That breakdown would be helpful and would make this form consistent with Form 410C13-NR (Response to Trustee's Notice of Payments Made).

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define "any arrearage." (Is this just prepetition arrearages, or does it include delinquent postpetition payments? Should just be prepetition, and postpetition amount should be reported in Part 3).

Part 3

**BK-2023-0002-0009 – National Bankruptcy Conference.** Consistent with our suggestion that "contractual" be deleted in Rule 3002.1(a), we suggest that the references to "postpetition contractual payments" be changed to "postpetition payments."

This part would provide more helpful responses if the information were requested in the following three categories: 1) the debtor is current on all postpetition payments (which would be limited to periodic payments for principal, interest and escrow), 2) the debtor is not current on all postpetition payments, and 3) the debtor has fees, expenses and costs due and owing. By including fees, costs and expenses as part of the "postpetition contractual payments," the proposed form fails to distinguish between our designated categories 1 and 3.

The claim holder is required to provide a payoff statement and important account information about the status of the loan only if the debtor is current with postpetition payments. If the claim holder believes the debtor is not current, then it need only provide the date of the postpetition payment that first became due. Access to detailed information about the status of the loan by the trustee and debtor is even more critical when a default is being asserted.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** With respect to the requirement that the responding creditor attach a payoff statement in support of its response, such requirement is somewhat onerous and exceeds the scope of a typical Notice of Final Cure/Motion to Determine inquiry, which is usually limited to the whether the subject loan is current. The recommendation is that the requirement be removed.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define "negative escrow amount." When should it be reported here rather than on the line for "balance of the escrow account"?

Part 4

**BK-2023-0002-0009 – National Bankruptcy Conference.** The claim holder is required to disclose in a payment history, if applicable, the amounts for "all fees, costs, escrow and expenses assessed to the mortgage." It is not clear what "assessed to the mortgage" means. Change to: "all fees, costs, escrow and expenses assessed to the debtor."

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** The requirement to use the format of the Official 410A, Part 5 for the payment history should be deleted, or the forms should state that the claim holder may use the Official 410A format but is not required to do so. Questions and confusion may arise, in part, because Part 5 of the 410A is intended to capture a prepetition payment history and does not lend itself to distinguishing between outstanding prepetition arrears from any postpetition delinquency.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** Rather than requiring the respondent to use the format of Form 410A, Part 5, this form should just ask for a payment history. The Part 5 format does not distinguish between prepetition arrears and postpetition defaults. Remove the requirement to use that format, or specify that the claim holder "may" use the Official 410A format but is not required to do so.

**BK-2023-0002-0014 – Mortgage Bankers Assoc.** Either remove the requirement to use the format of Form 410A,

Part 5; make using the form optional; or explain how this information can be provided on the form.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Do not require a specific form or format to report the information requested in this section.

**Official Form 410C13-N (Trustee's Notice of Payments Made)**

Part 2

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** Part 2 asks for the date the debtor completed all payments due to the trustee. What date is to be given: the date the debtor submitted the payment to the trustee, the date the trustee received the payment, or the date the trustee was assured that the payment was made with good funds following the expiration of any applicable payment hold? Is the date even needed?

**BK-2023-0002-0016 – N.D. Ga. Chapter 13 Trustees.** Eliminate the requirement of entering the date of the debtor's last payment to complete the chapter 13 plan. This information may not always be easily discernible, and the inclusion of this date does not seem to serve any function. There is also a contradiction between the form and the committee note with regard to the second sentence of Part 2. While the Official Form states that the trustee may attach a disbursement ledger for the claimant *or* provide the web address where such a ledger may be found, the committee note at lines 38 and 39 states that the ledger must be attached to the form.

Part 3

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** In a non-conduit plan, the trustee may not know whether a postpetition payment default has occurred and therefore may not know if there is a postpetition arrearage, the amount of that arrearage, or whether that arrearage has been cured. This would make it impossible to complete Part 3 accurately.

**BK-2023-0002-0012 – Pam Bassel.** The trustee may not know about postpetition arrearages if the debtor has been making mortgage payments directly.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define the following terms: "prepetition arrearage" (Do postpetition arrearages that are reported as supplements to the proof of claim become prepetition arrearages? If not, where are they reported?); "amount of postpetition arrearages" and "total amount of postpetition arrearages" (Do these amounts include all delinquent postpetition payments, including agreed orders related to postpetition amounts due? Do these amounts include approved postpetition fees that remain unpaid?); and "total amount of arrearages paid" (Is that the sum of 3.b. and 3.d.?).

**BK-2023-0002-0016 – N.D. Ga. Chapter 13 Trustees.** Lines b, c, d, and e are problematic for trustees with direct-pay mortgage cases. While it is common for postpetition mortgage arrearages to arise in direct-pay cases, how these are addressed can vary greatly. Because of this, a trustee in such a jurisdiction may simply lack the knowledge, without conducting extensive research, to correctly complete this part of the form.

Part 4

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** There could be confusion as to how the trustee is to complete this part of form in the situation in which a postpetition payment default occurs and the debtor modifies the plan to pay the defaulted payments through disbursements by the trustee. Which box should the trustee mark when a portion of the postpetition payments were disbursed directly by the debtor to the mortgage claimant and part of the postpetition payments was disbursed by the trustee? The trustee will also not be in a position to state whether the debtor is current on all of the postpetition contractual payments or when the next mortgage payment is due. With respect to stating when the next mortgage payment is due, there can be confusion because by the time the trustee files the Notice of Payments Made, other ongoing contractual payments will have come due and may have been paid by the debtor following completion of the plan payments. It is unclear what "next" means in that situation. It would be better to ask for the date of the next payment following completion of the plan or the date of the trustee's last payment pursuant to the plan.

**BK-2023-0002-0012 – Pam Bassel.** Part 4 contains a statement about when the next mortgage payment is due. Even when a conduit trustee has made all the postpetition contractual payments, by the time the trustee files the Notice of Payments Made, other ongoing contractual payments will have come due and may have been paid by the debtor following completion of the plan payments. Suggested change: c. The last ongoing mortgage payment made by the trustee was the payment due on _____. All subsequent ongoing mortgage payments must be made directly by the debtor to the mortgage claimant.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** An issue with stating when the next mortgage payment is due, even when the trustee has made all the postpetition contractual payments, is that by the time the trustee files the Notice of Payments Made, other ongoing contractual payments will have come due and may have been paid by the debtor following completion of the plan payments. Ask instead for the date the next mortgage payment following the completion of the plan is due.

**BK-2023-0002-0014 – Mortgage Bankers Assoc.** Part 4 of this form requires the claim holder to state when the next mortgage payment is due. However, by the time a debtor receives this form, it is possible that this next payment date has already passed. The form should specify which of the next possible due dates to use.

**BK-2023-0002-0016 – N.D. Ga. Chapter 13 Trustees.** As outlined in our comment regarding the rule, we suggest that the term "contractual" be removed from this part of the form. Furthermore, we suggest adding a third and maybe a fourth checkbox. This third checkbox could be used for other scenarios that do not lend themselves to the first two checkboxes. Such a scenario could include total debt claims in which the trustee is paying the entire mortgage debt, but as provided for in the chapter 13 plan rather than the mortgage contract. A third checkbox might be "Trustee paid claim in full," and fourth might be "Other."

Part 5

**BK-2023-0002-0009 – National Bankruptcy Conference.** Delete "allowed."

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** In non-conduit

jurisdictions, the trustee does not track the allowed amount or payment of postpetition fees, expenses, and charges. While the trustee could insert -0- in the blank next to "Amount of postpetition fees, expense, and charges paid by the trustee as of the date of notice," the trustee will not be able to state the allowed amount of those fees, expenses, and charges.

**BK-2023-0002-0012 – Pam Bassel.** In direct pay cases, the trustee does not track the allowed amount or payment of post-petition fees, expenses, and charges. Suggested change: Delete the line reading, "Amount of allowed postpetition fees, expenses, and charges," or change the language to read, "Amount of allowed postpetition fees, expenses, and charges to be paid by the trustee."

**BK-2023-0002-0016 – N.D. Ga. Chapter 13 Trustees.** Delete this part of the form for direct pay cases. The first line of this part requires the trustee to list the total amount of allowed postpetition fees, charges, and expenses. However, lenders are already required to file notices of these fees, charges, and expenses under Rule 3002.1(c). Furthermore, it is the practice in our jurisdiction for the trustee to not automatically pay these post-petition fees, charges, and expenses unless specifically directed to do so by the chapter 13 plan or an order of the court. Requiring the trustee to tally and list them when they are already in the record is burdensome and unnecessary.

**Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)**

Part 2

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Indicate whether "the amount to cure the postpetition arrearage" includes unpaid fees and charges.

Part 3

**BK-2023-0002-0006 – January Bailey.** In addition to stating the unpaid principal balance, the claim holder should have to check a box indicating whether this balance matches the amortization schedule from the note or the last loan modification. Sometimes the lender says that the debtor is now current, but it has applied payments differently, and the principal balance remaining does not match what the amortization schedule would have been.

**BK-2023-0002-0009 – National Bankruptcy Conference.** Consistent with our suggestion that "contractual" be deleted in Rule 3002.1(a), we suggest that the references to "postpetition contractual payments" be changed to "postpetition payments."

This part would provide more helpful responses if the information were requested in the following three categories: 1) the debtor is current on all postpetition payments (which would be limited to periodic payments for principal, interest and escrow), 2) the debtor is not current on all postpetition payments, and 3) the debtor has fees, expenses and costs due and owing. By including fees, costs and expenses as part of the "postpetition contractual payments," the proposed form fails to distinguish between our designated categories 1 and 3.

The claim holder is required to provide a payoff statement and important account information about the status of the loan only if the debtor is current with postpetition payments. If the claim holder believes the debtor is not current, then it need only provide the date of the postpetition payment that first became due. Access to detailed information about the status of the loan by the trustee and debtor is even more critical when a default is being asserted.

**BK-2023-0002-0012 – Pam Bassel.** Part 3 should be rearranged slightly. As the form is currently drafted, the respondent must provide the detailed information in the seven lines in Part 3 only if the respondent agrees that the account is current and in good standing. However, the information in those seven lines is also very useful if the respondent asserts that the debtor is not current on all postpetition payments or that the debtor owes fees, charges, expenses, negative escrow amounts, or other costs.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** With respect to the requirement that the responding creditor attach a payoff statement in support of its response, such requirement is somewhat onerous and exceeds the scope of a typical Notice of Final Cure/Motion to Determine inquiry, which is usually limited to the whether the subject loan is current. The recommendation is that this requirement be removed.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define "negative escrow amount." When should it be reported here rather than on the line for "balance of the escrow account"?

Part 4

**BK-2023-0002-0009 – National Bankruptcy Conference.** The claim holder is required to disclose in a payment history, if applicable, the amounts for "all fees, costs, escrow and expenses assessed to the mortgage." It is not clear what "assessed to the mortgage" means. Change to: "all fees, costs, escrow and expenses assessed to the debtor."

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** The requirement to use the format of the Official 410A, Part 5 for the payment

history should be deleted, or the forms should state that the claim holder may use the Official 410A format but is not required to do so. Questions and confusion may arise, in part, because Part 5 of the 410A is intended to capture a prepetition payment history and does not lend itself to distinguishing between outstanding prepetition arrears from any postpetition delinquency.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** Rather than requiring the respondent to use the format of Form 410A, Part 5, these forms should just ask for a payment history. The Part 5 format does not distinguish between prepetition arrears and postpetition defaults.

**BK-2023-0002-0014 – Mortgage Bankers Assoc.** Either remove the requirement to use the format of Form 410A, Part 5; make using the form optional; or explain how this information can be provided on the form.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Do not require a specific form or format to report the information requested in this section.

## Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** This form should require a debtor to sign an oath or affidavit to ensure the accuracy of the information provided and to deter abuse.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** This form should require a debtor to execute an affidavit or oath.

Part 2

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define the following terms: "prepetition arrearage" (Do postpetition arrearages that are reported as supplements to the proof of claim become prepetition arrearages? If not, where are they reported?); "allowed amount of postpetition arrearage" and "total amount of postpetition arrearage" (Do these amounts include all delinquent postpetition payments, including agreed orders related to postpetition amounts due? Do these amounts include approved postpetition fees that remain unpaid?); "total amount of arrearages paid" (Is that the sum of 2.b. and 2.d.?).

Part 3

**BK-2023-0002-0009 – National Bankruptcy Conference.** Part 3.a. asks the debtor or trustee to state the amount of postpetition fees, expenses, and charges noticed and allowed under Rule 3002.1(c). Postpetition fees, expenses, and charges are not "allowed" under Rule 3002.1(c). If no motion is filed under Rule 3002.1(e), there is no court determination that the fees are allowed. Moreover, because the notice of fees is not subject to Rule 3002.1(f), the fees are not deemed allowed.

**Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim)**

Part 2

**BK-2023-0002-0009 – National Bankruptcy Conference.** Unlike the motion form (410C13-M2), Part 2 of this response form does not require a breakdown of arrearages between prepetition and postpetition. That breakdown

would be helpful and would make this form consistent with Form 410C13-NR (Response to Trustee's Notice of Payments Made).

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define "any arrearage." (Is this just prepetition arrearages, or does it include delinquent postpetition payments? Should just be prepetition, and postpetition amount should be reported in Part 3).

Part 3

**BK-2023-0002-0009 – National Bankruptcy Conference.** Consistent with our suggestion that "contractual" be deleted in Rule 3002.1(a), we suggest that the references to "postpetition contractual payments" be changed to "postpetition payments."

This part would provide more helpful responses if the information were requested in the following three categories: 1) the debtor is current on all postpetition payments (which would be limited to periodic payments for principal, interest and escrow), 2) the debtor is not current on all postpetition payments, and 3) the debtor has fees, expenses and costs due and owing. By including fees, costs and expenses as part of the "postpetition contractual payments," the proposed form fails to distinguish between our designated categories 1 and 3.

The claim holder is required to provide a payoff statement and important account information about the status of the loan only if the debtor is current with postpetition payments. If the claim holder believes the debtor is not current, then it need only provide the date of the postpetition payment that first became due. Access to detailed information about the status of the loan by the trustee and debtor is even more critical when a default is being asserted.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** With respect to the requirement that the responding creditor attach a payoff statement in support of its response, such requirement is somewhat onerous and exceeds the scope of a typical Notice of Final Cure/Motion to Determine inquiry, which is usually limited to the whether the subject loan is current. The recommendation is that the requirement be removed.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Define "negative escrow amount." When should it be reported here rather than on the line for "balance of the escrow account"?

Part 4

**BK-2023-0002-0009 – National Bankruptcy Conference.** The claim holder is required to disclose in a payment history, if applicable, the amounts for "all fees, costs, escrow and expenses assessed to the mortgage." It is not clear what "assessed to the mortgage" means. Change to: "all fees, costs, escrow and expenses assessed to the debtor."

**BK-2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** The requirement to use the format of the Official 410A, Part 5 for the payment history should be deleted, or the forms should state that the claim holder may use the Official 410A format but is not required to do so. Questions and confusion may arise, in part, because Part 5 of the 410A is intended to capture a prepetition payment history and does not lend itself to distinguishing between outstanding prepetition arrears from any postpetition delinquency.

**BK-2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association.** Rather than

requiring the respondent to use the format of Form 410A, Part 5, this form should just ask for a payment history. The Part 5 format does not distinguish between prepetition arrears and postpetition defaults. Remove the requirement to use that format, or specify that the claim holder "may" use the Official 410A format but is not required to do so.

**BK-2023-0002-0014 – Mortgage Bankers Assoc.** Either remove the requirement to use the format of Form 410A, Part 5; make using the form optional; or explain how this information can be provided on the form.

**BK-2023-0002-0015 – ICE Mortgage Technology Holdings, Inc.** Do not require a specific form or format to report the information requested in this section.

**Fill in this information to identify the case:**

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

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

Case number _____

# Official Form 410

# Proof of Claim

12/24

**Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.**

**Filers must leave out or redact** information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

**Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy** (Form 309) **that you received.**

## Part 1: Identify the Claim

1. **Who is the current creditor?**

   _____
   Name of the current creditor (the person or entity to be paid for this claim)

   Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?**

   ❑ No
   ❑ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

| **Where should notices to the creditor be sent?** | **Where should payments to the creditor be sent?** (if different) |
|---|---|
| _____ Name | _____ Name |
| _____ Number Street | _____ Number Street |
| _____ City State ZIP Code | _____ City State ZIP Code |
| Contact phone _____ | Contact phone _____ |
| Contact email _____ | Contact email _____ |

Uniform claim identifier (if you use one):

__ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __

4. **Does this claim amend one already filed?**

   ❑ No
   ❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**

   ❑ No
   ❑ Yes. Who made the earlier filing? _____

**Part 2: Give Information About the Claim as of the Date the Case Was Filed**

6. **Do you have any number you use to identify the debtor?**
- ❑ No
- ❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**
- ❑ No
- ❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

_____

9. **Is all or part of the claim secured?**
- ❑ No
- ❑ Yes. The claim is secured by a lien on property.

**Nature of property:**
- ❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
- ❑ Motor vehicle
- ❑ Other. Describe: _____

**Basis for perfection:** _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

**Value of property**: $_____

**Amount of the claim that is secured:** $_____

**Amount of the claim that is unsecured:** $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

**Amount necessary to cure any default as of the date of the petition:** $_____

**Annual Interest Rate** (when case was filed)_____%
- ❑ Fixed
- ❑ Variable

10. **Is this claim based on a lease?**
- ❑ No
- ❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
- ❑ No
- ❑ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check one:*

| | **Amount entitled to priority** |
|---|---|
| ❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). | $_____ |
| ❑ Up to $3,350* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). | $_____ |
| ❑ Wages, salaries, or commissions (up to $15,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). | $_____ |
| ❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). | $_____ |
| ❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). | $_____ |
| ❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies. | $_____ |

* Amounts are subject to adjustment on 4/01/25 and every 3 years after that for cases begun on or after the date of adjustment.

## Part 3: Sign Below

**The person completing this proof of claim must sign and date it. FRBP 9011(b).**

If you file this claim electronically, FRBP 5005(a)(3) authorizes courts to establish local rules specifying what a signature is.

**A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.**

*Check the appropriate box:*

❑ I am the creditor.
❑ I am the creditor's attorney or authorized agent.
❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

❑ _____
Signature

**Print the name of the person who is completing and signing this claim:**

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

## Committee Note

The last line of Part 1, Box 3, is amended to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. In addition, a conforming amendment is made to the second paragraph of the margin note in Part 3 to conform to the restyled Rules: the reference to Rule 5005(a)(2) is changed to Rule 5005(a)(3).

---

## Changes Made After Publication and Comment

A conforming change was made to Part 3 to reflect the change of Rule 5005(a)(2) to Rule 5005(a)(3) in the rule as restyled.

## Summary of Public Comment

**BK-2023-0002-0008 – Minnesota Bar Association Assembly.** Supports the amendments to Form 410 as published.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

## Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File[2]

* * * * *

**(b) Schedules, Statements, and Other Documents.**

* * * * *

(7) ***Personal Financial-Management Course.*** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition or the debtor is not required to complete one as a condition to discharge, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which

[1] Matter to be omitted is lined through.

[2] The changes indicated are to the restyled version of Rule 1007, not yet in effect.

§ 1141(d)(3) applies—must file a certificate of course completion issued by the provider.

* * * * *

**(c) Time to File.**

* * * * *

~~(4) *Financial-Management Course*. Unless the court extends the time to file, an individual debtor must file the certificate required by (b)(7) as follows:~~

~~(A) in a Chapter 7 case, within 60 days after the first date set for the meeting of creditors under § 341; and~~

~~(B) in a Chapter 11 or Chapter 13 case, no later than the date the last payment is made under the plan or the date a motion for a discharge is filed under § 1141(d)(5)(B) or § 1328(b).~~

* * * * *

**Committee Note**

The deadlines in (c)(4) for filing certificates of completion of a course in personal financial management have been eliminated. When Code § 727(a)(11), 1141(d)(3), or 1328(g)(1) requires course completion for the entry of a discharge, the debtor must demonstrate satisfaction of this requirement by filing a certificate issued by the course provider, unless the provider has already done so. The certificate must be filed before the court rules on discharge, but the rule no longer imposes an earlier deadline for doing so.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

**Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan[2]**

**(a) In General.**

* * * * *

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance ~~or rejection~~. The court may permit the change or withdrawal of a rejection as provided in (c)(1)(B).

* * * * *

**(c) ~~Form~~ Means for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.**

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

[2] The changes indicated are to the version of Rule 3018 on track to go into effect December 1, 2024.

(1) ~~***Form***~~ ***Alternative Means*.**

(A) *By Ballot.* Except as provided in (B), ~~An~~ an acceptance or rejection must:

(~~A~~i) be in writing;

(~~B~~ii) identify the plan or plans;

(~~C~~iii) be signed by the creditor or equity security holder—or an authorized agent; and

(~~D~~iv) conform to Form 314.

(B) *As a Statement on the Record.* The court may also permit an acceptance—or the change or withdrawal of a rejection—in a statement that is:

(i) part of the record, including an oral statement at the confirmation hearing or a stipulation; and

(ii) made by an attorney for—or an authorized agent of—the creditor or equity security holder.

(2) ***When More Than One Plan Is Distributed.*** If more than one plan is sent under Rule 3017, a creditor or equity security holder may accept or reject one or more plans and may indicate preferences among those accepted.

* * * * *

**Committee Note**

Subdivision (c) is amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance or rejection by written ballot, the rule now authorizes a court to permit a creditor or equity security holder to accept a plan by means of its attorney's or authorized agent's statement on the record, including by stipulation or by oral representation at the confirmation hearing. This change reflects the fact that disputes about a plan's provisions are often resolved after the voting deadline and, as a result, an entity that previously rejected the plan or failed to vote accepts it by the conclusion of the confirmation hearing. In such circumstances, the court is permitted to treat that change in position as a plan

acceptance when the requirements of subdivision (c)(1)(B) are satisfied.

Subdivision (a) is amended to take note of the means in (c)(1)(B) of changing or withdrawing a rejection.

Nothing in the rule is intended to create an obligation to accept or reject a plan.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

## Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied[2]

* * * * *

**(b) Chapter 7 or 13—Notice of a Failure to File a Certificate of Completion for a Course on Personal Financial Management.**

(1) ***Applicability.*** This subdivision (b) applies if an individual debtor in a Chapter 7 or 13 case is required to file a certificate under Rule 1007(b)(7). ~~and~~

(2) ***Clerk's First Notice to the Debtor.*** If the certificate is not filed ~~fails to do so~~ within 45 days after the ~~first date set for the meeting of creditors under § 341(a)~~ petition is filed. ~~The~~ the clerk must promptly notify the debtor that the case ~~will~~ can be closed without entering a discharge if the certificate is not filed ~~within the time prescribed by Rule 1007(c)~~.

(3) ***Clerk's Second Notice to the Debtor.***

(A) *Chapter 7.* In a Chapter 7 case, if the certificate is not filed within 90 days after the

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

[2] The changes indicated are to the restyled version of Rule 5009, not yet in effect.

petition is filed and the court has not yet sent a second notice, the clerk must promptly notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 30 days after the notice's date.

(B) *Chapter 13.* In a Chapter 13 case, if the certificate has not been filed when the trustee files a final report and final account, the clerk must promptly notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 60 days after the notice's date.

* * * * *

**Committee Note**

Subdivision (b) is amended in order to reduce the number of cases in which a discharge is not issued solely because a certificate of completion of a personal-financial-management course is not filed as required by Rule 1007(b)(7). When that occurs, a debtor who is otherwise entitled to a discharge must seek to have the case reopened—at added cost—in order to obtain the ultimate benefit of the bankruptcy.

Subdivision (b) now provides for two reminder notices to be sent to debtors who have not satisfied the requirement of Rule 1007(b)(7). The clerk must send the first notice to any chapter 7 or 13 debtor for whom a certificate has not been filed within 45

days after the petition was filed, an earlier date than under the prior rule. Then if a chapter 7 debtor has not complied within 90 days after the petition date and a second notice has not already been sent, the clerk must send a second reminder notice. In a chapter 13 case, as part of the case closing process, the clerk must send a second notice to any debtor who has not complied by the time the trustee files a final report and final account. Both notices must explain that the consequence of not complying with Rule 1007(b)(7) is that the case is subject to being closed without a discharge being entered.

Nothing in the rule precludes a court from taking other steps to obtain compliance with Rule 1007(b)(7) before a case is closed without a discharge.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

**Rule 7043. Taking Testimony**

Fed. R. Civ. P. 43 applies in an adversary proceeding.

**Committee Note**

Rule 7043 is new and, as was formerly true under Rule 9017, makes Fed. R. Civ. P. 43 applicable to adversary proceedings. Unlike under former Rule 9017, Fed. R. Civ. P. 43 is no longer applicable to contested matters under new Rule 7043.

[1] New material is underlined in red.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

**Rule 9006. Computing and Extending Time; Motions[2]**

* * * * *

**(b) Extending Time.**

* * * * *

(3) ***Extensions Governed by Other Rules.*** The court may extend the time to:

(A) act under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033—but only as permitted by those rules; and

(B) file the ~~certificate required by Rule 1007(b)(7), and the~~ schedules and statements in a small business

[1] Matter to be omitted is lined through.

[2] The changes indicated are to the restyled version of Rule 9006, not yet in effect.

case under § 1116(3)—but only as permitted by Rule 1007(c).

**(c) Reducing Time.**

* * * * *

(2) ***When Not Permitted.*** The court may not reduce the time to act under Rule 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2) or (c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, or 9033(b). ~~Also, the court may not reduce the time set by Rule 1007(c) to file the certificate required by Rule 1007(b)(7).~~

* * * * *

**Committee Note**

The references in (b)(3)(B) and (c)(2) to the certificate required by Rule 1007(b)(7) have been deleted because the deadlines for filing those certificates have been eliminated.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

## Rule 9014. Contested Matters[2]

* * * * *

**(d) Taking Testimony ~~on a Disputed Factual Issue~~; Interpreter.** ~~A witness's testimony on a disputed material factual issue must be taken in the same manner as testimony in an adversary proceeding.~~

(1) ***In Open Court.*** A witness's testimony on a disputed material factual issue must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For cause and with appropriate safeguards, the court may permit

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

[2] The changes indicated are to the restyled version of Rule 9014, not yet in effect.

testimony in open court by contemporaneous transmission from a different location.

(2) ***Evidence on a Motion.*** When a motion in a contested matter relies on facts outside the record, the court may hear the motion on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(3) ***Interpreter.*** Fed. R. Civ. P. 43(d) applies in a contested matter.

* * * * *

**Committee Note**

Rule 9014(d) is amended to include language from Fed. R. Civ. P. 43. That rule is no longer generally applicable in a bankruptcy case, and the reference to that rule has been removed from Rule 9017. Instead, Rule 9014(d) incorporates most of the language of Fed. R. Civ. P. 43 for contested matters, but eliminates the "compelling circumstances" standard in Fed. R. Civ. P. 43(a) for permitting remote testimony. Consistent with the other restyled bankruptcy rules, the phrase "good cause" used in Fed. R. Civ. P. 43 has been shortened to "cause" in Rule 9014(d)(1). No substantive change is intended. Under new Rule 7043, all of Fed. R. Civ. P. 43—including the "compelling circumstances" standard—continues to apply to adversary proceedings.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]**

## Rule 9017. Evidence[2]

The Federal Rules of Evidence and Fed. R. Civ. P. ~~43,~~ 44~~,~~ and 44.1 apply in a bankruptcy case.

**Committee Note**

The Rule is amended to delete the reference to Fed. R. Civ. P. 43. Under new Rule 7043, Fed. R. Civ. P. 43 is applicable to adversary proceedings but not to contested matters. Testimony in contested matters is governed by Rule 9014(d).

[1] Matter to be omitted is lined through.

[2] The changes indicated are to the restyled version of Rule 9017, not yet in effect.

# TAB 5B

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 11, 2024
Denver, CO and on Microsoft Teams

The following members attended the meeting in person:

Circuit Judge Daniel A. Bress
Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Bankruptcy Judge Michelle M. Harner
David A. Hubbert, Esq.
Bankruptcy Judge Benjamin A. Kahn
District Judge Joan H. Lefkow
Bankruptcy Judge Catherine Peek McEwen
Professor Scott F. Norberg
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Nancy Whaley, Esq.
District Judge George H. Wu

The following members attended the meeting remotely:

District Judge Jeffery P. Hopkins
Damien S. Schaible, Esq.

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
Senior District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Bankruptcy Judge Sarah Hall, acting as liaison to the Committee on the Administration of the Bankruptcy System
H. Thomas Byron III, Administrative Office
Shelly Cox, Administrative Office
Allison A. Bruff, Administrative Office
Rakita Johnson, Administrative Office
Zachary Hawari, Rules Law Clerk
Carly E. Giffin, Federal Judicial Center

Rebecca Garcia, National Association of Chapter Thirteen Trustees
Susan Steinman, American Association for Justice
John Rabiej, Rabiej Litigation Center

The following persons also attended the meeting remotely:

Professor Daniel R. Coquillette, consultant to the Standing Committee
Bridget M. Healy, Administrative Office
S. Scott Myers, Esq., Administrative Office
Susan Jensen, Administrative Office
Tim Reagan, Federal Judicial Center
Circuit Judge William J. Kayatta, liaison from the Standing Committee
Christopher Coyle, Sussman Shank LLP
Crystal Williams
Daniel Steen, Lawyers for Civil Justice
John Hawkinson, freelance journalist
Kathleen McLeroy, Calton Fields
Mathew Hindman
Lauren O'Neil Funseth, Wells Fargo
Alice Whitten, Wells Fargo
Sai
Sylvia Mayer, Mayer Law
Kaiya Lyons, American Association for Justice

**Discussion Agenda**

1. **Greetings and Introductions**

Judge Rebecca Connelly, chair of the Advisory Committee, welcomed the group and thanked everyone for joining this meeting, including those attending virtually. She thanked the members of the public attending in person or remotely for their interest. She welcomed Rakita Johnson to the administrative team.

Judge Connelly then reviewed the anticipated timing of the meeting and stated that there would be a mid-morning break and another break for lunch. In-person participants were asked to turn on their microphones when they spoke and state their name before speaking for the benefit of those not present. Remote participants were asked to keep their cameras on and mute themselves and use the raise-hand function or physically raise their hands if they wished to speak. She noted that the meeting would be recorded.

She then introduced Andrew Henderson and Jesus Cardona of the Judicial Security Division, and Mr. Henderson provided a brief security announcement.

Scott Myers reviewed the status of all pending rules and legislation. The Supreme Court has adopted all rules submitted by all advisory committees and sent them to Congress. The restyled bankruptcy rules, amendments to Bankruptcy Rules 1007(b)(7) and related rules

(eliminating the financial management course certificate); and 70001 (exempting from the list of adversary proceedings a proceeding by an individual debtor to recover tangible personal property under § 542(a)) and new Bankruptcy Rule 8023.1 (substitution of parties) with are among those rules. Zachary Hawari noted that the status of legislation that directly or effectively amends the federal rules appears in the agenda book.

2. **Approval of Minutes of Meeting Held on Sept. 14, 2023**

The minutes were approved with the correction of one reference to "Professor Harner" to "Judge Harner."

3. **Oral Reports on Meetings of Other Committees**

(A) ***Jan. 4, 2024, Standing Committee Meeting***

Judge Connelly gave the report.

(1) **Joint Committee Business**

(a) ***Joint Subcommittee on Attorney Admission***

Professor Catherine Struve gave a report on the work of the Joint Subcommittee and will be giving a similar report to the Advisory Committee at this meeting.

(b) ***Pro Se Electronic-Filing Project***

Professor Catherine Struve provided the Standing Committee a status report on the discussions of the working group considering filing methods for self-represented litigants and will be giving a similar report to the Advisory Committee at this meeting.

(c) ***Presumptive Deadline for Electronic Filing***

The E-Filing Deadlines Joint Subcommittee reported that the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees all endorsed the recommendation of the E-Filing Joint Subcommittee to take no action on the suggestion to amend the national time-computation rules to set a presumptive electronic-filing deadline earlier than midnight.

(2) **Bankruptcy Rules Committee Business**

***Approval for Publication for Public Comment***

The Standing Committee approved for publication Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed); Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and Official Form 410S1 (Notice of Mortgage Payment Change). Because additional comments were provided on Rule 3018 after

the meeting, Judge Connelly decided to bring back the revised rule to the Standing Committee with a renewed request for publication at the June meeting.

***Information Items***

Judge Connelly, Professor Gibson, and Professor Bartell also reported on six information items.

(a) Report on the Advisory Committee's reconsideration of the proposed sanctions provision in Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence).

(b) Update concerning suggestion to remove redacted social security numbers from filed documents made by Sen. Ron Wyden.

(c) Update on suggestions to eliminate requirement that all notices given under Rule 2002 comply with the caption requirements in Rule 1005.

(d) Update on proposed amendments to Rules 9014 and 9017 and creation of a new Rule 7043 dealing with remote testimony in contested matters.

(e) Update on consideration of proposed amendments to Director's Form 1340 by which applicants may seek payment of unclaimed funds.

(f) Update on consideration of suggestion regarding contempt proceedings.

(B) ***Meeting of the Advisory Committee on Appellate Rules***

The Advisory Committee on Appellate Rules met on April 10, 2024. Judge Bress provided the report.

The Appellate Committee gave final approval to the proposed amendments to Appellate Rule 6, dealing with appeals in bankruptcy cases. It also gave final approval to an amendment to Appellate Rule 39 on taxation of costs.

The Appellate Committee approved for publication amendments to Appellate Rule 29 on amicus briefs after extensive discussion. Although not recommended for publication at this stage, Appellate Form 4, dealing with in forma pauperis status, was also discussed. Other matters were referred to appropriate subcommittees.

(C) ***Meeting of the Advisory Committee on Civil Rules***

The Advisory Committee on Civil Rules met on Oct. 17, 2023, and April 9, 2024. Judge McEwen provided the report.

The Civil Committee gave final approval to proposed amendments to Civil Rules 16(b)(3) and 26(f)(3) on privilege logs. The proposed amendments require the parties to discuss the timing and method for complying with Rule 26(a)(5) on information that is privileged or subject to protection as trial-preparation material, and if there is disagreement, the issue should be raised at a pretrial conference. The proposed amendments will be referred to the Standing Committee to consider for publication. Civil Rules 16 and 26 apply in adversary proceedings in bankruptcy cases under Bankruptcy Rules 7016 and 7026 (Civil Rule 16 and Civil Rule 26(f) are not automatically adopted by reference in Bankruptcy Rule 9014 for contested matters but are subject to application by court order).

The Discovery Subcommittee noted that it is still considering a concern expressed to the Civil Committee (as well as the Bankruptcy Rules Committee) by Judge Catherine McEwen, as liaison to the Civil Rules Committee, on the manner of service of a subpoena under Civil Rule 45. The Discovery Subcommittee will be considering eliminating the requirement for in-person service in every instance. The current sketch of the proposed amendment adopts certain parts of Rule 4 (4(d), 4(e), 4(f), 4(h) and 4(i)) as permissible methods of service. Whether to include the *Mullane* language "reasonably calculated to give actual notice" in the rule or perhaps in the Advisory Committee Notes is still under consideration. In addition, the subcommittee has expanded its review of Civil Rule 45 to consider the requirement and method of delivering a witness fee as well as the amount of advance notice that should be required when documents are subpoenaed for deposition or trial. The expanded scope appeared to be well received by the full committee. Civil Rule 45 applies to adversary proceedings and contested matters in bankruptcy cases under Bankruptcy Rule 9016.

The Discovery Subcommittee is also considering proposed amendments to Civil Rule 26(c)(4) and Civil Rule 5(d)(5) dealing with filing under seal. The variations in scenarios to which sealing may be sought and applied pose a challenge to constructing proposed amendments. Both of these rules apply in adversary proceedings in bankruptcy cases. (Civil Rule 5(d)(5) does not apply in contested matters under Bankruptcy Rule 9014, but Civil Rule 26(c)(4) does). The subcommittee has more work to do on the issue.

The Rule 41 Subcommittee reported on its work considering amendments to Civil Rule 41 dealing with the scope of a voluntary dismissal and expects to bring a proposal to the full committee in October. Lawyers generally want a rule change to clarify that dismissal of a party or single claim rather than the entire "action" is permitted. Other tweaks to Rule 41 may include an earlier deadline for unilateral dismissal and a limit on who needs to sign a stipulation for dismissal. As a historical aside, the apparent original intent of the use of the word "action" in Rule 41 supports the contention that it was meant to be a cause of action, now known as a claim, and not the entire lawsuit. Civil Rule 41 applies to adversary proceedings in bankruptcy under Bankruptcy Rule 7041 and to contested matters under Bankruptcy Rule 9014.

The Rule 7.1 Subcommittee reported on its work considering whether the current disclosure requirement in Civil Rule 7.1 adequately inform judges of beneficial ownership interests in a corporate party. The Appellate Committee provided feedback, especially on whether the disclosure rule should incorporate subsidiary ownership disclosure. Bankruptcy Rule

7007.1 deals with corporate ownership statements in bankruptcy cases and is modeled on Civil Rule 7.1. The subcommittee noted the new guidance provided by the recently updated Codes of Conduct Advisory Opinion 57, which includes consideration of the subject matter of litigation if the judge is invested in industry-specific assets or mutual funds and the industry is the subject of the litigation. Another issue posing a challenge is a company's shifting ownership interests over time. The subcommittee intends to propose language to examine at the October meeting.

A Cross-Border Discovery Subcommittee was formed after the October 2023 meeting. At the April meeting, it reported on its discussions so far. It will undertake a listening tour of affected parties to determine what problems exist and how they are manifesting.

Other information items were presented to the Civil Committee: (1) a proposal to adopt a rule requiring random case assignment, (2) proposed amendments to Civil Rule 45(c) dealing with remote testimony, and (3) use of the term "master" in Civil Rule 53 and other rules and replacing it with "court-appointed neutral."

Regarding random case assignment, given the March 12, 2024, guidance memo from the Committee on Court Administration and Case Management (CACM), which is not binding on the district courts, the Civil Committee wants to monitor how the districts respond. Further, the reporters are still researching whether the Rules Enabling Act and its supersession clause would even permit rulemaking on the issue. The issue will remain on the agenda.

The proposed amendments to Rule 45(c)(1)'s subpoena power would permit, under a new subsection (C), compelled appearance at a deposition or trial remotely so long as the point of transmission is within the geographical confines of Rule 45(c)(1)(A) and (B). However, the amendment should not conflict, for purposes of a subpoena for trial, with Rule 43(a) and its requirement that remote trial testimony is appropriate only under compelling circumstances. Consequently, the amendment compelling appearance by subpoena remotely may include a limitation by cross-reference to Rule 43. Civil Rule 43 currently applies to bankruptcy cases under Bankruptcy Rules 9014(d) and 9017 (although the Bankruptcy Rules Committee is considering amendments to those rules).

The proposed nomenclature change concerning masters would affect a number of rules and statutory provisions. There is some precedent for a global nomenclature change in the rules, such as when they went gender neutral. The Civil Committee seemed to prefer "court-appointed adjunct officer" instead of "court-appointed neutral." The issue will remain on the agenda.

There were also brief reports on joint committee or working group matters – redaction of social security numbers (SSNs), e-filing by self-represented litigants, and unified bar admission in federal courts. As to the SSNs, the Committee may ask the Standing Committee to appoint a joint committee or let another committee take the lead. On e-filing, the joint committee will work on a proposal over the summer. On unified admissions the general sentiment appeared to be to leave it to the local level (state bars) to regulate the conduct of its members.

The amendment to Civil Rule 12(a) will become effective absent Congressional action on December 1, 2024. The change excepts from the deadline to file a responsive pleading any contrary statutory deadline. Bankruptcy Rule 7012 does not adopt by reference subsection (a) of Civil Rule 12. Absent any unexpected change by Congress, the Bankruptcy Committee may wish to consider a like change by grafting the exception language into Bankruptcy Rule 7012(a).

(D) ***December 7-8, 2023, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Sarah Hall provided the report.

Ther December 2023 meeting was the first meeting for the new liaison from this committee, Judge Harner, and new chair, Judge William Osteen. The Committee appreciated Judge Harner's thoughtful contributions. And Judge Osteen has hit the ground running as chair, picking up right where Judge Darrow left off. The next meeting will be held in June in Salt Lake City, Utah.

Legislative Proposal Regarding Emergency Authority and Proposed Rule 9038

Over the past several years, the Bankruptcy Committee has been regularly updated on the status of Rule 9038, the rule to address emergency measures that may be taken by the courts, which became effective on December 1, 2023. The Bankruptcy Committee appreciates the Rules Committee's work on this important effort.

Judge Isicoff previously reported that, in parallel with the Bankruptcy Rules Committee's work on Rule 9038, the Bankruptcy Committee was considering a broader legislative proposal, one that would have provided a permanent grant of authority to extend statutory deadlines and toll statutory time periods during an ongoing emergency and could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations.

The Bankruptcy Committee researched this issue in depth and solicited feedback from relevant stakeholders. Based on this research and feedback, at the December 2023 meeting, the Bankruptcy Committee ultimately determined not to recommend that the Judicial Conference pursue it in Congress. So, this proposal will not be moving forward.

Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

One proposal that has been adopted by the Judicial Conference on recommendation of the Bankruptcy Committee pertains to chapter 7 debtors' attorney fees. As Judge Isicoff has reported at previous meetings, this proposal would amend the Bankruptcy Code to (1) except from discharge chapter 7 debtors' attorney fees due under any agreement for payment of such fees; (2) add an exception to the automatic stay to allow for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees. This legislative proposal seeks to address concerns about access to justice and access to the bankruptcy system related to the compensation of chapter 7 debtors' attorneys.

As Judge Isicoff previously reported, the administrative office (AO) transmitted the legislative proposal to Congress most recently in July 2023 to coincide with the start of the new Congressional session. The proposal continues to be reviewed by Congressional staff and several bankruptcy judges and AO staff have met with members of Congress to answer questions raised in connection with this proposal. If Congress enacts amendments to the Code based on this position, at a minimum conforming changes to the Bankruptcy Rules would be required. The Bankruptcy Committee will continue to update the Rules Committee on any progress in this area.

Remote Public Access to Bankruptcy Proceedings

The Bankruptcy Committee continues to monitor the status of the work of CACM on remote public access to court proceedings.

In September, the Judicial Conference approved judges presiding over civil and bankruptcy cases to provide the public live audio access to non-trial proceedings that do not involve witness testimony. CACM recommended this revised policy change with the endorsement of the Bankruptcy Committee and the Committee on the Administration of the Magistrate Judges System. To the extent this change necessitates any revision to the Bankruptcy Rules, the Bankruptcy Committee stands ready to assist.

The Bankruptcy Committee and the CACM Committee are continuing to collaborate in considering other potential changes to the Conference's remote access policy that could affect the bankruptcy system.

Remote Testimony in Bankruptcy Contested Matters

At its December meeting, the Bankruptcy Committee reviewed suggested amendments to the Bankruptcy Rules concerning remote testimony in bankruptcy contested matters, with a focus on whether those amendments conflict with the Conference remote public access policy just referenced.

After discussion, the Bankruptcy Committee determined that the proposed amendments concerning remote testimony in bankruptcy contested matters do not conflict with existing Judicial Conference policy regarding remote access and remote proceedings. It then communicated this view, through staff, to the CACM Committee. The CACM Committee chair later sent a letter to Judge Connelly conveying the views of the two committees. The Bankruptcy Committee will continue to monitor the status of this suggestion.

Special Masters in Bankruptcy Cases

The suggestion to allow appointment of special masters in bankruptcy cases is an area in which the Bankruptcy Committee was historically very engaged.

If the Advisory Committee or the Standing Committee is interested in working with Bankruptcy Committee to evaluate this issue at any stage, the Bankruptcy Committee would be honored and happy to assist.

Judge Connelly commented that the Rules Committee has a great working relationship with the Bankruptcy Committee.

4. **Intercommittee Items**

(A) ***Report of Reporters' Privacy Rules Working Group***.

Tom Byron gave the report.

He noted that the memo describing the working group progress is included in the agenda book. The group has met a couple of times to consider Senator Wyden's suggestion about removing redacted social security numbers from filed documents and related issues concerning the privacy rules. The working group has tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules, including the pending Bankruptcy Rules Committee work.

The recommendation is to broaden the focus of the working group to include, for example, Criminal Rule 49.1 on the use of initials of a known minor instead of the minor's name. All Committees have received a suggestion to replace those initials with a pseudonym to be more protective. The Criminal Rules Committee will take the lead on this suggestion.

The working group might also look at how the current privacy rules are operating given that it is 20 years since the Rules Committees initially considered them. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy r ules includes language that could be ambiguous or overlapping, and the waiver provision in subdivision (h) might warrant clarification.

The working group would be interested in any suggestions the Rules Committees might make to guide the scope of its work.

Two related issues: First, the mandatory report to Congress required to be made every two years on the privacy rules is underway, and the Administrative Office has been working the CACM committee staff to produce a draft that will be shared with the Standing Committee at its June meeting. Second, the FJC study to update its privacy report is also progressing, with the first phase expected to be completed in time to be shared with the Standing Committee at the June meeting as well. There will be subsequent phases of that report in the future.

(B) ***Report on Unified Bar Admissions***.

Professor Struve gave the report.

The Subcommittee consists of members of the Criminal, Civil and Bankruptcy Rules Committee (Judge J. Paul Oetken representing the Bankruptcy Rules Committee and chairs that Subcommittee), and it has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district

courts which has been docketed as a suggestion before all three Committees. Most districts require admission to the bar to the state as a condition to admission to the district court in that state. This is time-consuming, expensive, and creates inappropriate hurdles to outside lawyers.

The suggestion that there be a national rule that would create a national "Bar of the District Court for the United States" administered by the Administrative Office of the U.S. Courts was rejected by the Subcommittee. In addition to its practical challenges, the Subcommittee was concerned that the Rules Enabling Act may not authorize a rule to create a new bar. The Standing Committee supported the Subcommittee's decision.

Other approaches may be more promising, including a rule that would bar U.S. district courts from having a local rule requiring (as a condition to admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.

The Subcommittee believes that there may also be other models to consider, including a extending the approach of Appellate Rule 46. The Standing Committee provided a lot of valuable feedback on the suggestion at its meeting in January. Tim Regan of the Federal Judicial Center and Zachary Hawari have provided valuable research support. Many more comments were made at the Civil Rules Committee meeting on April 9.

The Subcommittee will continue to consider the suggestion, keeping in mind the importance of providing access to attorneys without undue time and expense, the interest of the district courts in controlling who may practice before them in order to maintain the quality and integrity of the district court bar, and the effect any approach may have on court revenue.

(C) ***Report on the Work of the Pro-Se Electronic Filing Working Group***

Professor Struve gave the report.

The working group has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive a notice of electronic filing (NEF) through CM/ECF or a court-based electronic-noticing program. Professor Struve had hoped to be able to circulate a set of proposed rule amendments designed to eliminate the requirement of paper service on those receiving NEFs in time for the spring advisory committee meetings, but she is still working on them.

5. **Report by the Consumer Subcommittee**

(A) ***Recommendation of Approval of Proposed Amendments to Rule 3002.1***

Judge Harner and Professor Gibson provided the report.

Proposed amendments to Rule 3002.1 were republished for comment last August. Ten sets of comments were submitted. The Subcommittee recommended making the following changes to the published amendments:

(1) In Subdivision (a), dealing with the scope of the rule, delete the word "contractual" before the word "payment" and modify the clause to read "for which the plan provides for the trustee or debtor to make payment on the debt."

This change would allow the rule to pick up home mortgage payments that are paid according to the plan but not strictly in accordance to the terms of the contract. The Subcommittee does not think this change requires republication.

Other comments made on the republished rule were rejected which would require republication that would expand the applicability of the rule to more transactions.

The Subcommittee also declined to recommend any additional change to subdivision (a) to clarify that the rule applies to reverse mortgages for which there has been a default. Instead, it recommends an expanded discussion in the Committee Note to clarify the rule's applicability to mortgages of that type.

(2) In Subdivision (b), dealing with the required notice of payment changes by the holder of the claim, the Subcommittee recommends stating in subdivision (b)(3)(B) that a payment decrease is effective on the actual payment due date, even if that date is in the past to give the debtor the benefit of a payment decrease on a retroactive basis.

The National Bankruptcy Conference also suggested a conforming change to the related Official Form, and the change had already been made.

(3) The Subcommittee declined to make any changes to Subdivision (e) dealing with the deadline for filing a challenge to changes in fees, expenses and charges. Some commentors wanted the period to be longer and others wanted it shorter, so the Subcommittee decided not to change it.

(4) In Subdivision (f), dealing with requests for status of the mortgage and responses to those requests, the Subcommittee recommends making two changes. First, in (f)(2) it recommends extending the deadline for responding to a trustee's or debtor's motion from 21 days to 28 days. Second, the Subcommittee agreed to insert the phrase "and enter an appropriate order" at the end of the sentence for consistency.

Other comments were considered but the Subcommittee decided not to modify the rule in response.

(5) In Subdivision (g), dealing with the trustee's end-of-case notice, the Subcommittee recommends that in the title and in subdivision (g)(1) the words "payments" and "paid" be changed to "disbursements" and "disbursed." This terminology better reflects the role

of the chapter 13 trustee. The Subcommittee also recommends deleting two uses of "contractual" in (g)(1)(B) to be consistent with the recommended change to subdivision (a).

In subdivision (g)(1)(A) the Subcommittee recommends deleting "if any" after "what amount" to avoid suggesting that a trustee who makes no disbursements need not file an end-of-case notice. An addition will be made to the Committee Note to give direction on what should be reflected on the notice in such a case.

The Subcommittee also recommends that the first sentence of (g)(4)(A) be rewritten to make a 45-day deadline applicable to that situation as well as to when the claim holder does not respond to the notice.

In subdivision (g)(4)(B), the Subcommittee recommends that the time for the claimholder to response to the motion be changed from 21 to 28 days, consistent with the proposed change to (f)(2).

(6) The Subcommittee recommends no change to subdivision (h) dealing with sanctions after considering the comments on that subdivision suggesting importing sanctions for contempt. This is not violation of a court order.

The Subcommittee recommends conforming changes to the Committee Note to reflect any of the changes recommended above that are approved by the Advisory Committee.

Judge Harner again noted that the Subcommittee believes that these changes do not require republication.

Judge Kahn noted that Civil Rule 37 has a contempt remedy, and the discharge injunction under Section 524(i) of the Bankruptcy Code creates a contempt remedy. He views Rule 3002.1 as functionally the same as Section 524 in that it is aimed at protecting the discharge and expressed the view that the contempt remedy should also be available. He admitted that there may be Rules Enabling Act issues.

Professor Gibson said that in Civil Rule 37 there is a court order that is being violated, and under Rule 3002.1 the court does not enter an order. Judge Kahn remains concerned about whether we are undermining the fresh start if we don't have an enforcement mechanism. Section 524(i) gives the court contempt powers even without court order. But Professor Gibson noted that Congress can give that power where the rules do not. Judge Harner agreed with Professor Gibson's analysis on this issue. Without an order, Rule 3002.1 should not go that far. Professor Gibson noted that we are not changing the current rule on this issue.

The Advisory Committee gave final approval to the amended Rule 3002.1 and the Committee Note and directed their submission to the Standing Committee for approval.

6. **Report by the Forms Subcommittee**

(A) ***Reconsideration of Proposed Amendments to Official Forms 309A and 309B***

Judge Kahn and Professor Gibson provided the report.

At its fall meeting in 2022, the Advisory Committee approved for publication an amendment to part 9 (Deadlines) in Form 309A and 309B to set out the deadline to file the financial management course certificate and alert the debtor that the debtor must take an approved course about personal financial management and file with the court the certificate showing completion of the course unless the provider has done so.

Because the Consumer Subcommittee was considering whether the deadline in Rule 1007(c)(4) for filing the certificate of course completion should be eliminated, the Advisory Committee did not seek publication of the amended Forms for public comment in June 2023. The Consumer Subcommittee has now recommended, and the Advisory Committee has approved, amendments to Rule 1007(c)(4) eliminating a deadline for filing the certificate. The Subcommittee considered whether there should be an amended notice to the debtor reminding the debtor of the requirement for completing the course, or rather to just withdraw the previously-approved amendments to the Forms. The Subcommittee recommends the latter approach.

The Advisory Committee concurred in this recommendation.

(B) ***Recommendation for Final Approval of New Official Forms related to Proposed Rule 3002.1 Amendments***

Judge Kahn and Professor Gibson provided the report.

Last August the Standing Committee published for comment six new official forms that were proposed to implement proposed amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence). Ten sets of comments concerning these forms were submitted. The Subcommittee held two meetings to consider the comments and recommended several changes to the Forms and Committee Note as a result.

Professor Gibson discussed each change proposed to be made to each of the motion forms (Official Forms 410C13-M1 and 410C13-M2), the motion response forms (Official Forms 410C13-M1R and 410C13-M2R), the Truste's Notice (Official Form 410C13-N), the response to notice (Official Form 410C13-NR) and the Committee Note.

1. Motion Forms. The Subcommittee recommends that the following changes be made to both of these forms from the published versions:

- Change "paid" to "disbursed" in Part 2b, d, and e. Chapter 13 trustees act as disbursement agents; they do not "pay" the mortgage.

- Delete "and allowed" before "under" in Part 3a and add "and not disallowed" at the end of that item. As noted by the National Bankruptcy Conference, postpetition fees, expenses, and charges are not "allowed" under Rule 3002.1(c). If no motion is filed under Rule 3002.1(e), there is no court determination that the fees are allowed. Moreover, because the notice of fees is not subject to Rule 3001(f), the fees are not deemed allowed. If, however, the court did rule on them and disallowed them, they should not be included.

- Delete "contractual" in Part 4 before "obligations." This change conforms to a change to Rule 3002.1(a) being recommended by the Consumer Subcommittee.

- Add a new section 5 in brackets to allow the trustee or debtor to add other relevant information. This change was suggested after the Subcommittee's meetings and has not been discussed or approved by it. The Advisory Committee should consider whether this change should be made in order to accommodate plans that provide for a less conventional treatment of the home mortgage.

- Add lines for address, phone number, and email after the moving party's signature to comply with Rule 9011(a).

In addition to the changes listed above, the Subcommittee recommends the following change to Form 410C13-M2:

- Add "the" before "Mortgage" in the title of the form to be consistent with the other forms.

Nancy Whaley suggested inserting the bracketed section 5 in the forms of response as well as the forms of motion. No suggestions were made for changes to the motion forms.

2. Response Forms.

On the response forms, the Subcommittee recommends the following changes from the published versions of the forms:

- Add at the beginning of Part 2: "The total amount received to cure any arrearages as of the date of this response is $_____." This will directly respond to Part 2e of the motion.

- In Part 2, create separate responses for prepetition and postpetition arrearages to correspond with the breakdown of those amounts in the motion.

- Also in Part 2, Change the direction to "Check all that apply" since now more than one statement could be asserted.

- Put all three check boxes at the beginning of Part 3, and make that section subpart (a).

- Move the direction to attach a payoff statement to subpart (b) of Part 3, along with the seven items of information to be supplied. These changes respond to the comments that a payoff statement and the information requested are needed in situations in which the claimholder says that the debtor is not current, as well as when current.

- Delete "contractual" before "payments" in Part 3(a) for the reason previously stated.

- In Part 4 delete the requirement to use the format of Official Form 410A, Part 5. Mortgage groups commented that this format does not work for distinguishing between prepetition arrears and postpetition defaults.

- In the third bullet point of Part 4, change "assessed to the mortgage" to "that the claim holder asserts are recoverable against the debtor or the debtor's principal residence." This language tracks the language of Rule 3002.1(c) and is clearer.

Professor Gibson suggested inserting bracketed section 5 language from the motion forms into the response forms as Nancy Whaley suggested. Judge Kahn suggested putting it at the end as a new Part 5.

Scott Myers noted that the instructions have not yet been drafted, and will be drafted over the summer. They do not need to be approved by the Standing Committee. These forms are on track for an effective date of Dec. 1, 2025.

Judge McEwen expressed her view that some of the lines on postpetition arrearages in Part 2 seem to cover the same payments and are confusing. Judge Kahn said the attached payoff schedule will provide the payoff number, and the rest of the form includes various elements that go into that number. Judge McEwen remained concerned that the lines don't add up to the third box under Part 2. Judge Connelly said some companies would not count postpetition fees, taxes and other charges as arrearages.

Judge Kahn suggested moving the substance of the second sentence of the third box in Part 3(a) to become 3(b)(viii) and eliminating it in 3(a). The new (viii) would read "viii. Total amount of fees, charges, expenses, negative escrow amounts, or costs remaining unpaid: $_____." The Subcommittee was supportive of this change.

Jenny Doling suggested adding a date for the payoff number. Judge Kahn responded that the attached payoff statement will show the date. Judge McEwen continued to express the view that the postpetition arrearages should be broken down. Judge Harner said that she wanted the form to be simple enough that claim holders would be encourages to file it. Judge Kahn said that he thinks Part 2 has adequate information. The payoff statement will have the date and the amount. Judge McEwen wants them to be able to see why they are not current. Judge Harner thinks the form will not help them if they do not know it.

3. Trustee's Notice

On the trustee's notice, the Subcommittee has approved the following changes to the published version:

- In the title, change "Payments" to "Disbursements" to reflect more accurately the trustee's role.

- In Part 2, delete the space for the date of the debtor's completion of payments. Trustees commented that the date is ambiguous and is not needed

- Change the title of Part 3 from "Amount Needed to Cure Default" to "Arrearages." If the debtor has been making direct payments, the trustee may not be aware of defaults.

- Delete the request for "Allowed amount of postpetition arrearage, if any." Also delete the question asking whether the debtor has cured all arrearages. If the debtor has been making direct payments, the trustee may not be aware of this.

- In 3b, c, and d, change "paid" to "disbursed" for the reason previously stated.

- Delete the words "if any" in Part 3(a) and (c). (This change was erroneously not reflected in the version of the notice in the agenda book.)

- In Part 4, delete "contractual" for the reason previously stated.

- Add a check box for "other" to allow for hybrid situations.

Since the meeting of the Subcommittee, Judge Connelly suggested that 4(b) should be deleted. This is a statement made after the final disbursement has cleared. In that 45 days after the debtor completes all payments due to the trustee when the trustee must file this notice under Rule 3002.1(g), another mortgage payment may become due and the trustee may not know whether the debtor is current when the trustee notice is sent. Existing (c) will be redesignated as (b).

Judge McEwen asked whether payments should be changed to disbursements in Part 4. Judge Connelly thinks payments is the correct term here. This is not the action of the trustee as in Part 3. However, the suggestion was made to change the word "made" to "disbursed" in 4(a) and the language before 4(a).

- Change the statement in Part 4c to the date of the trustee's last disbursement, rather than when the next mortgage payment is due. Commenters noted that by the time the notice is filed, additional payments may have already come due and might have been paid by the debtor. Add a statement explaining that future payments are the debtor's responsibility.

- In Part 5, delete "Amount of allowed postpetition fees, expenses, and charges." The trustee may not have this information.

- Delete "as of the date of this notice" as unnecessary.

Professor Gibson asked Nancy Whaley whether the open-ended bracketed language was needed in trustee's notice. Ms. Whaley said this could be addressed in the instructions inviting additional information in any area.

4. Response to Trustee's Notice.

As to the response to the trustee's notice, the Subcommittee recommends the following changes to the published version of the form:

- In the title, change "Payments" to "Disbursements" to be consistent with the proposed change to the title of the notice.

- In the first line, correct the citation. Change to Rule 3002.1(g)(3).

- Change the title of Part 2 to "Arrearages" to correspond with Part 3 of the notice.

- Add at the beginning of Part 2: "The total amount received to cure any arrearages as of the date of this response is $_____." This will capture amounts paid by both the trustee and the debtor.

- In Part 3, delete "contractual" for the reason previously stated.

- Put all three check boxes at the beginning of Part 3 and make that section subpart (a). Move the direction to attach a payoff statement to subpart (b), along with the seven items of information to be supplied. These changes respond to the comments that a payoff statement and the information requested are needed in situations in which the claim holder says that the debtor is not current, as well as when current.

- In Part 4, delete the requirement to use the format of Official Form 410A, Part 5. Mortgage groups commented that this format does not work for distinguishing between prepetition arrears and postpetition defaults.

- In the third bullet point of Part 4, change "assessed to the mortgage" to "that the claim holder asserts are recoverable against the debtor or the debtor's principal residence." This language tracks the language of Rule 3002.1(c) and is clearer.

Professor Struve suggests making the same change in Part 3 as made in the response to notice forms by moving the substance of the language in the second sentence in the third box to create a new (b)(viii). This suggestion was accepted. The new clause viii would read "Total

amount of fees, charges, expenses, negative escrow amounts, or costs remaining unpaid: $_____."

Jenny Doling suggested there be someplace in the signature block to put the title of the person who is filing the response and the organization name like on the proof of claim form. The suggestion was also accepted.

Changes to the Committee Note reflect the changes to the Forms.

Judge Kahn noted that Nancy Whaley, Deb Miller and Tara Twomey provided a great deal of assistance on these forms.

The Advisory Committee gave final approval to the six forms as they appeared in the agenda book with the following changes:

- Forms 410C13-M1R and M2R -- add a new bracketed Part 5 to allow additional information
- Forms 410C13-M1R, M2R and NR – Remove 2nd sentence in 3d bullet point in Part 3(a) and move to Part 4 under new romanette (viii), with categorical language restated
- Form 410C13-N – delete "if any" in Part 3(a) and (c), change "paid" to "disbursed" in two places in Part 4, delete paragraph b in the 3d box of Part 4 and change designation of current c to b
- Form 410C13-NR -- in Part 5, add title of person executing response by using signature block used on proof of claim

(C) ***Consider Technical Amendments to Conform Certain Bankruptcy Forms to the Restyled Bankruptcy Rules***

Judge Kahn and Professor Bartell provided the report.

The amendments to the Federal Rules of Bankruptcy Procedure to reflect the restyling project are scheduled to become effective on Dec. 1, 2024. Because certain of the Official Forms and Director's Forms and their instructions explicitly quote or refer to Bankruptcy Rules that have been restyled, conforming changes need to be made to those forms and instructions. Mock-ups of the revised forms and instructions are attached. Amendments are proposed to Official Form 410 (Proof of Claim) and to the instructions to Official Forms 309A-I (Notice of Case), 312 (Order and Notice for Hearing on Disclosure Statement), 313 (Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan), 314 (Ballot for Accepting or Rejecting Plan), 315 (Order Confirming Plan), 318 (Discharge of Debtor in a Chapter 7 Case), and 420A (Notice of Motion or Objection), and to Director's Forms 1040 (Adversary Proceeding Cover Sheet) and 2630 (Bill of Costs) and to the instructions for Forms 2070 (Certificate of Retention of Debtor in Possession), 2100A/B (Transfer of Claim Other Than For Security and Notice of Transfer of Claim Other Than for Security), 2300A (Order Confirming Chapter 12 Plan) and 2500E (Summons to Debtor in Involuntary Case).

The Advisory Committee gave final approval to those amendments to the forms and instructions.

(D) ***Recommendation Concerning Proposed Amendment to Official Form 410 Regarding Uniform Claim Identifier***

Judge Kahn and Professor Bartell provided the report.

A proposed amendment to Official Form 410 based on a suggestion from Dana C. McWay, Chair of the Administrative Office of the U.S. Courts' Unclaimed Funds Expert Panel, was published in August 2023. The amendment would modify Part 1, Box 3 to eliminate the phrase "for electronic payments in chapter 13" when referring to the uniform claim identifier (UCI) so that it is can be used for paper checks as well as electronic payments without regard to chapter.

There were no comments on the published amendment, other than a general comment from the Minnesota State Bar Association supporting all proposed amendments published in 2023.

The Advisory Committee gave final approval to the amendments to Official Form 410.

7. **Report of the Technology, Privacy and Public Access Subcommittee**

(A) ***Continued Consideration of Suggestions 22-BK-I, 23-BK-D, and 23-BK-J Concerning SSN Redaction in Bankruptcy Filings and the Elimination of Truncated SSNs in Some Form Captions***

Judge Oetken and Professor Bartell provided the report.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be "scrubbed of personal information before they are publicly available." Portions of this letter, suggesting that the Rules Committees reconsider a proposal to redact the entire social security number ("SSN") from court filings, have been filed as a suggestion with each of the Rules Committees. The Bankruptcy Rules suggestion has been given the label of 22-BK-I.

A suggestion was made by the Clerk of Court for the Bankruptcy Court for the District of Minnesota, in which clerks of court for eight other bankruptcy courts in the eighth Circuit joined, suggesting that Rule 2002(n) (restyled Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the first one.

As reported at the last Advisory Committee meeting, the Subcommittee wishes to consider whether creditors actually need the last four numbers of the redacted SSN on all court filings where it is not statutorily required. On February 12, 2024, an ad hoc group consisting of

Judge Connelly, Judge Oetken, Jenny Doling, Nancy Whaley, Dave Hubbert, Ken Gardner, and Carly Giffin met with the reporters and Scott Myers to discuss how to survey the appropriate groups to address questions bearing on the suggestions.

Subsequently Ken Gardner worked with the ad hoc committee and the reporters to develop a survey to be sent to the Clerks' Advisory Group, and Nancy Whaley and Jenny Doling worked with the ad hoc committee and the reporters to prepare a survey to be sent to a group of debtor attorneys, chapter 12/13 trustees, creditor attorneys, chapter 7 trustees, various tax authorities and representatives of the National Association of Attorneys General.

As of April 10 the clerks' survey had received 23 responses. The clerks overwhelmingly support eliminating the requirement that the caption of all Rule 2002 notices comply with Rule 1005. Their views on the inclusion of truncated SSNs on the various forms were more divided.

As of April 10 there were 75 responses to the general survey. Opinions are divided on removing the truncated SSNs from the forms, with Chapter 7 trustees less inclined to support such a move and Chapter 13 trustees and debtors' attorneys more supportive.

The Subcommittee will consider all the responses at its next meeting and decide on next steps, if any.

(B) ***Consider suggestion 23-BK-C from the National Bankruptcy Conference dealing with remote testimony in contested matters***

Professor Bartell provided the report.

The National Bankruptcy Conference submitted proposals to amend Rules 9014 and 9017 and create a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases.

The suggestion proposes to eliminate the incorporation by reference in Rule 9017 of Fed. R. Civ. P. 43 (which generally requires witnesses' testimony to be taken in open court unless the court permits remote testimony "for good cause in compelling circumstances"), so it would no longer be applicable "in a bankruptcy case." Instead, new Rule 7043 would make Civil Rule 43 applicable in adversary proceedings. Rule 9014, dealing with contested matters, would be amended in two respects. First, it would make Civil Rule 43(d) (dealing with interpreters) applicable to contested matters and insert language identical to Civil Rule 43(c) (dealing with evidence on a motion). Second, it would delete the language requiring that testimony in a contested matter be taken in the same manner as testimony in an adversary proceeding and instead insert language that mirrors Civil Rule 43(a) with the exception that the standard for allowing remote testimony would be "cause" rather than "good cause in compelling circumstances."

The Advisory Committee supported the proposed amendments at its last meeting but agreed to the request of Judge Bates that formal approval for publication be deferred until the

Advisory Committee could coordinate with CACM which is looking at the issue of remote proceedings more broadly.

On January 17, 2024, CACM sent a letter to Judge Connelly stating it and the Bankruptcy Administration Committee have concluded that "the content of the proposed amendments do [sic] not appear to create any conflict with existing Conference policy regarding remote access or remote proceedings." CACM also stated that it "did not identify problems for its continued consideration of possible changes to remote access policy" in that CACM's "focus has been on whether to provide non-case participants, such as the public and the media, with additional remote access to court proceedings." The letter concluded, "given the careful, deliberative nature of the rules development process, the timing of the publication of the proposed amendments in 2024 is unlikely to hinder work on this issue."

The Subcommittee has reaffirmed its approval of the proposed amendments and recommends the proposed amendments to the Advisory Committee for submission to the Standing Committee for publication.

Judge Bates asked whether this change might be a precursor to further changes for adversary proceedings, or whether it is the end of what will be proposed for remote proceedings. Judge Oetken said it is not intended to lead to anything more. Judge Kahn agreed that there is no intent to move beyond this. Judge Harner said that there would be concern about moving beyond this in the bankruptcy community. Professor Bartell said that if the civil rules were modified, bankruptcy would follow suit. Judge Kahn noted that the presumption is still for live testimony. Judge McEwen said that there may be pressure to expand on this proposal, but it will not come from the Committee.

Judge Bates asked whether we will be seeing suggestions to change the rules to expand remote proceedings beyond these rules, and Judge Kahn said that this is likely, but the Committee will deal with that when they are made. Judge Harner reemphasized that we will follow the lead of the civil rules on adversary proceedings. Dave Hubbert said that the new rules will put a lot of emphasis on whether a particular action is an adversary proceeding or a contested matter, and might encourage litigants to propose a large number of witnesses in contested matters to make remote proceedings unlikely. Judge Harner noted that courts are doing remote testimony now under the current rule.

The Advisory Committee approved the amendments and new rule and agreed to send them to the Standing Committee for publication for public comment.

8. **Report of the Business Subcommittee**

(A) ***Recommendation Regarding Suggestion 23-BK-F from the National Bankruptcy Conference regarding the method of voting in Chapter 9 and 11 cases under Rule 3018(c)***

Judge McEwen and Professor Gibson provided the report.

The National Bankruptcy Conference (NBC) proposed an amendment to Rule 3018(c) to authorize courts to treat as an acceptance or rejection of a plan in chapter 9 and chapter 11 cases a statement of counsel or other representatives that is part of the record in the case, including an oral statement at a confirmation hearing. Conforming amendments were also proposed for Rule 3018(a).

At its fall meeting, the Advisory Committee approved the amendments for publication. At the January meeting of the Standing Committee, it approved the amendments, but some additional changes were subsequently suggested. Because publication would not occur until August, Judge Connelly decided that the Subcommittee and the Advisory Committee should have an opportunity to consider the additional changes before publication.

Because new subdivision (c)(1)(B) would allow an acceptance to be made by a written stipulation, as well as by an oral statement on the record, it was suggested that the heading for subdivision (c)(1)(A) (line 15) be changed from "*In Writing*" to "*By Ballot."* This title would more accurately indicate the difference between subparagraphs (A) and (B).

The proposed conforming amendment to subdivision (a) says that the court may also "do so" as provided in (c)(1)(B). The language that "do so" currently refers to includes changing or withdrawing both acceptances and rejections, whereas (c)(1)(B) just allows changing or withdrawing rejections. Therefore, it was suggested that the first sentence in (a)(3) should delete the words "or rejection" and the last sentence should be modified to read, "The court may permit the change or withdrawal of a rejection as provided in (c)(1)(B)."

The Subcommittee recommended the modified amendments to Rules 3018(c) and 3018(a) to the Advisory Committee for publication. The Advisory Committee approved the modified amendments for publication.

(B) ***Consideration of Suggestion 24-BK-A to Allow Masters in Bankruptcy Cases and Proceedings***

Judge McEwen and Professor Gibson provided the report.

Rule 9031 (as restyled) provides: "Fed. R. Civ. P. 53 does not apply in a bankruptcy case." As declared by its title, the effect of this rule is that "Using Masters [Is] Not Authorized" in bankruptcy cases. Since the rule's promulgation in 1983, the Advisory Committee has been asked on several occasions to propose an amendment to it to allow the appointment of masters in certain circumstances, but each time the Advisory Committee has decided not to do so. Now two new suggestions to amend Rule 9031 have been submitted to the Advisory Committee by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey (24-BK-A) and by the American Bar Association (ABA) (24-BK-C).

The Subcommittee discussed the suggestions at its meeting, and now asks the Advisory Committee for its input. She reviewed the history of the similar suggestions, the arguments

against permitting use of masters in bankruptcy cases and proceedings, and the competing arguments made by Judge Kaplan and the ABA in response.

The first issue the Advisory Committee might consider is whether it wishes to revisit the issue of allowing the use of masters in bankruptcy cases. Although the Advisory Committee has declined to amend Rule 9031 on at least 4 occasions, the last time such a suggestion was considered was in 2009, almost 15 years ago. Much has changed during that time, including a greater use of bankruptcy to resolve mass tort litigation and the filing of some especially complex reorganization cases. Moreover, the original reason for the rule—concerns about cronyism in bankruptcy judge appointments—have largely dissipated. A decision to revisit the issue and consider the merits of Chief Judge Kaplan's and the ABA's suggestions, of course, does not necessarily mean that the Advisory Committee will end up agreeing with the suggestions, but the Subcommittee would like the views of the Advisory Committee on whether to proceed in considering the suggestions. But if the Advisory Committee sees no reason to consider the issue again, there is nothing further to discuss.

If the Advisory Committee wishes the Subcommittee to consider the suggestions, the Subcommittee seeks input on whether it should gather empirical evidence to help inform its deliberations. With the FJC's assistance, bankruptcy judges could be surveyed about whether they have desired to use a master in any of their cases and, if so, what role the master might have played and how the court proceeded without a master. The Subcommittee may also want to seek information from district judges and attorneys.

There are legal issues to consider as well, such as whether the Code authorizes the payment of masters from a bankruptcy estate and the potential inefficiencies of adding another layer of judicial review. The Subcommittee solicits the Advisory Committee's views on what other issues that should be explored.

There was a general consensus that consideration of the suggestions should continue. Judge Kahn read the ABA suggestion as suggesting not only use of masters in bankruptcy, but an expanded role for what masters do. He wants to know what the civil committee is going to do with this suggestion.

Judge Hopkins noted that the committee was split in 2009, and Eugene Wedoff opposed allowing appointment of masters because he did not want lawyers lobbying him to be appointed as a master. There is likely to be a split among the judges on the suggestions.

Judge Harner thinks that the Bankruptcy Rules Committee may have different views than the Civil Rules committee, and may want to limit use of masters to business cases, or cases of a particular size or type.

The Committee members were invited to discuss their own experience with masters. Judge Lefkow said that she has used masters for discovery, but they are rarely appointed in her district. She thinks this is probably an issue limited to districts with large cases. Professor Gibson pointed out that bankruptcy judges do not have the help of magistrate judges as do

district court judges. Judge Oetken said that he had used masters only a few times, and only in connection with tricky discovery issues. He agreed that we should look at the suggestions. Judge Wu has had complicated patent cases where it might be appropriate to appoint a master. The question is how broad the authority would be.

Judge McEwen said that the consensus seems to be to gather more information and proceed to consider the suggestions. Tom Byron will coordinate with the FJC on a potential survey of judges. Ramona Elliott thinks the survey should include district court judges too. It might include questions about the expense of such appointments. Carly Giffin says the FJC is happy to help on this issue, but might want to start with interviews before drafting a survey to figure out what questions to ask.

9. **Appellate Rules Subcommittee**

(A) ***Recommendation for Final Approval Concerning Proposed Amendment to Rule 8006(g)***

Judge Bress and Professor Bartell provided the report.

On August 15, 2023, the Standing Committee published an amendment to Fed. R. Bankr. P. 8006(g) suggested by Judge A. Benjamin Goldgar to make explicit what the Advisory Committee believed was the existing meaning of the Rule--that any party to an appeal may submit a request to the court of appeals to accept a direct appeal under 28 U.S.C. § 158(d)(2). The form of the amendment was developed in consultation with the Advisory Committee on Appellate Rules which was concurrently preparing an amendment to Appellate Rule 6(c) (Appeal in a Bankruptcy Case – Direct Review by Permission Under 28 U.S.C. § 158(d)(2)) to make sure the rules worked well together. Both amended rules were published at the same time. The amended Rule 8006(g) is attached.

The only comment on the published amendment was a submission from the Minnesota State Bar Association's Assembly supporting all published proposed amendments.

The Subcommittee recommended the amended rule to the Advisory Committee for final approval. The Advisory Committee gave final approval to the amended rule.

10. **New Business**

Judge McEwen asks whether we should consider an amendment to Rule 7012(a) to reflect the new amendments to Civil Rule 12(a). Scott Myers said that if it is a simple conforming change, we can decide that this is a public suggestion today and assign it to a Subcommittee for the summer meetings. After the meeting it was decided that Judge McEwen should file a suggestion because the change is not a conforming change.

11. **Future Meetings**

The fall 2024 meeting has been scheduled for Sept. 12, 2024, in Washington, D.C.

12. **Adjournment**

The meeting was adjourned at 1:40 p.m.

# TAB 6

# TAB 6A

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

**JOHN D. BATES**
CHAIR

**H. THOMAS BYRON III**
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**JAY S. BYBEE**
APPELLATE RULES

**REBECCA B. CONNELLY**
BANKRUPTCY RULES

**ROBIN L. ROSENBERG**
CIVIL RULES

**JAMES C. DEVER III**
CRIMINAL RULES

**PATRICK J. SCHILTZ**
EVIDENCE RULES

# MEMORANDUM

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

**FROM:** Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

**RE:** Report of the Advisory Committee on Civil Rules

**DATE:** May 10, 2024

---

*Introduction*

The Civil Rules Advisory Committee met in Denver, Colorado, on April 9, 2024. Members of the public attended in person, and public on-line attendance was also provided. Draft Minutes of that meeting are included in this agenda book.

In August 2023 proposed amendments to Rule 16(b)(3)(B)(iv) and 26(f)(3)(D) dealing with privilege log issues, and a new proposed Rule 16.1 on MDL proceedings, were published for public comment. The first hearing on the proposed amendments and rule was held in Washington, D.C. on Oct. 16, 2023. 24 witnesses signed up to speak at that in-person hearing. Additional public hearings were held by remote means on Jan. 16 and Feb. 6, 2024, and presented the views of more than 60 additional witnesses. The public comment period ended on

Feb. 14, 2024. At its April 9 meeting, the Advisory Committee unanimously voted to forward the "privilege log" amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to the Standing Committee for adoption. It also unanimously voted to forward Rule 16.1, as revised after the public comment period, to the Standing Committee for adoption.

Part I of this report presents these two action items. It includes summaries of the testimony and comments received during the public comment period. It also includes notes regarding the post-public-hearing revisions to each proposal. The "privilege log" rule amendments remained exactly the same, but the Committee Note was shortened. The proposal of a new Rule 16.1 for MDL proceedings was revised by removal of the coordinating counsel provision and reorganized to focus on sequencing of management activities. As detailed in the notes of the MDL Subcommittee's two online meetings considering the public comment, careful thought was given to these changes. After that subcommittee effort was completed, further style revisions were adopted on recommendation of the Standing Committee's Style Consultants. Accordingly, the revised rule proposal included in this agenda book reflects the style consultants' contributions as well as the Subcommittee's revisions.

Part II of this report provides information regarding ongoing subcommittee projects:

(a) Rule 41(a)(1) Subcommittee: The Rule 41(a) Subcommittee, chaired by Judge Cathy Bissoon, is addressing concerns (raised by Judge Furman, a former member of this committee, among others) about possible revisions to that rule to resolve seemingly conflicting interpretations in the courts. The work is ongoing on this topic, and outreach to bar groups has occurred and is continuing. The reports received to date indicate that limiting Rule 41(a) to dismissals of an entire action can create difficulties that may present more frequent problems due to multiparty litigation in the 21st century compared to the 1930s norm, when the rule was originally adopted. It appears that an amendment should be seriously considered, but what exactly it should include remains uncertain. Though no proposed amendment was ready for consideration at the Advisory Committee's April meeting, it is hoped that there will be at least a rough draft for review at that committee's October meeting.

(b) Discovery Subcommittee ongoing projects: Besides producing the privilege log amendments mentioned above, the Discovery Subcommittee, chaired by Chief Judge David Godbey, is working on two ongoing projects and has discussed a third that will be taken up by a newly-appointed subcommittee addressing that project. The Subcommittee's ongoing projects are:

(i) Service of subpoena -- whether Rule 45(b)(1) should be amended to clarify what methods are required in "delivering a copy [of the subpoena] to the named person," as the rule directs. Courts have reached different conclusions on whether this rule requires in-person service. The Advisory Committee's current orientation is to amend Rule 45(b)(1) to permit service of a subpoena by means permitted under any of several provisions of Rule 4 for service of original process.

(ii) Filing under seal -- whether rule changes are warranted with regard to court authorization of filing under seal or the procedures used to obtain such authorization. Some

procedural specifics that have been proposed might be seen as intruding on local practice in some districts. Initial feedback has been obtained from representatives of the Federal Magistrate Judges Association, and it is expected that there will be a need to consult with clerks of court via the Advisory Committee's clerk liaison.

(c) Expanded disclosure requirements regarding interests in corporate parties: A Rule 7.1 Subcommittee, chaired by Justice Jane Bland (Texas Supreme Court), has begun gathering information about this topic, including a review of various local rules. This review has identified a variety of possible alternative descriptions of what must be disclosed, but to date the Subcommittee has not settled on what would be the best approach to a possible amendment. It has also received and considered the February 2024 update of Advisory Opinion No. 57 from the Judicial Conference Codes of Conduct Committee.

(d) Cross-border discovery issues: Judge Michael Baylson (E.D. Pa.) and Prof. Steven Gensler (U. Okla.) proposed study of possible rule amendments to address issues raised by cross-border discovery and explored in their *Judicature* article. A Cross-Border Discovery Subcommittee was appointed, chaired by Judge Manish Shah (N.D. Ill.), and it has begun work. For the present, it is focused on discovery for use in American proceedings rather than American discovery for use in proceedings in foreign tribunals. It has obtained initial feedback from the Federal Magistrate Judges Association and the Department of Justice, and is expecting to participate in a number of additional events with bar groups and other associations interested in the area. It is not presently clear whether there is a productive role for rule amendments.

Part III of this report provides information about other ongoing topics:

(a) Random assignment of cases: This new topic was introduced during the Standing Committee's January meeting, and it has continued to attract attention on several fronts. In March 2024, the Judicial Conference approved a new policy on this subject, and in late 2023 the Department of Justice provided a submission urging consideration of a rule amendment to address these issues. The topic remains under study by the Advisory Committee, in part to gauge the effect of the Judicial Conference's new policy. It remains unclear whether Civil Rule amendments are the most appropriate response to these concerns; the existence of single-judge divisions of district courts may largely be a matter of statute, and presently case assignment practices are handled locally as might be contemplated by 28 U.S.C. § 137(a). Circumstances may differ considerably in different districts, particularly in large states that are somewhat sparsely populated.

(b) Use of the word "master" in the rules: The American Bar Association has urged that the word "master" be replaced in Rule 53 and other places where it appears in the Civil Rules with the term "court-appointed neutral." The proposal asserts that the word "master" is not accurate, that "court-appointed neutral" is becoming the standard term, and that "master" is freighted with unfortunate historical connotations. The word has been used in Anglo-American jurisprudence for a long time, a use that does not seem intrinsically linked to slavery or other historical issues. It also is used by the Supreme Court, and appears in at least one provision in 28 U.S.C. Further work is needed to determine whether it appears elsewhere in the United States

Code. Initial views of Standing Committee members on this issue would be helpful to the Advisory Committee.

(c) Remote testimony: Particularly due to the pandemic, but also to technological change more generally, the possibility of remote testimony during trials and court hearings has become more prominent. It has been proposed that both Rule 43(a) (dealing with criteria for permitting remote testimony) and Rule 45 (authorizing a subpoena to compel an unwilling witness to report to a remote location to give such remote testimony be amended to make such arrangements easier. At the same time, there is concern about whether relying on remote testimony could undercut the value of in-person testimony in court and, sometimes, invite something akin to witness tampering. A new subcommittee, headed by Judge Hannah Lauck (E.D. Va.) was appointed after the April Advisory Committee meeting to study this issue. It is expected to begin work before the October meeting of the Advisory Committee. Somewhat parallel issues are pending before the Bankruptcy Rules Committee.

(d) Demands for jury trial in removed cases: A style change to Rule 81(c)(3)(A) in 2007 changed verb tense in a way that might confuse some about whether a jury trial must be demanded within 14 days of removal. The reported problem with the 2007 style change is that the rule might now be read to say that no demand need be made after removal unless the federal court so orders in the case if the time to make a demand in state court had not yet arrived. But it seems that the rule was intended to exempt cases from Rule 38's demand requirement only when the state court rules never required a jury demand, which might mean that practitioners in such states would be unfamiliar with the need to demand a jury. If a demand was required at any point in the state courts, one could expect careful practitioners to focus on when it is due in federal court upon removal, even if that is earlier in the litigation than would be required in state court.

One response might be to undo the 2007 change in verb tense: "If the state law does ~~did~~ not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." But there might nevertheless be uncertainty about whether a given state is among those exempted from Rule 38's demand requirement. An alternative proposal would require a demand under Rule 38 in every removed case without regard to state-court practice unless a jury demand was made before removal, resolving the possible ambiguity. Research by the Rules Law Clerk shows that there may be no requirement to demand a jury trial in as many as nine states, so a competing concern would be the risk of unsettling practices for lawyers from those states. At its April meeting, the Advisory Committee decided to continue studying the alternative of a blanket demand requirement after removal without regard to state practice.

# I. ACTION ITEMS

## A. Privilege log amendments proposed for adoption

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv) were published for public comment. There was much comment, from both "producer" and "requester" viewpoints. Summaries of the testimony and written comments on these proposed amendments are included in this agenda book.

After the public comment period, the Discovery Subcommittee met to discuss the comments. Notes of that Feb. 7, 2024, meeting are in this agenda book. There was no consideration of changing the rule amendments themselves, but considerable attention was given to the Committee Note to the Rule 26(f) amendment. The Standing Committee recommended during its January 2023 meeting that this Note be shortened, and the Subcommittee decided after the public comment period to shorten it further.

Though various proposals were made during the public comment period for Note language or rule language to prescribe what should be in a log, the Subcommittee's view was that "no one size fits all." Largely for this reason, it seemed that observations in the Note about burdens and methods of ameliorating those burdens are not likely to be particularly useful in individual cases. Nevertheless, there was extensive commentary about the Note. Some urged that it overly favored producing parties. Others urged that it be strengthened to support positions often adopted by producing parties.

The Subcommittee's consensus was to avoid Note language that seems to favor one "side" or the other. Thus, although the burdens on the producing party of preparing a detailed log can be large, the burdens on the requesting party to make use (perhaps even make sense) of a privilege log are often very heavy as well. Much depends on the circumstances of a given case.

Another challenging aspect going forward is the potential role of technology. Whether or not the term "metadata log" has meaning, it seems clear that many say the term means different things to different people. And though some witnesses contended that pretty soon technological advances will supplant existing methods of dealing with logging and simplify (and speed up) the process, it is not possible to be confident about what technology will bring, or when.

Altogether, these thoughts pointed toward pruning controversial statements from the Note. Accordingly, the revised Note below sets the scene for early consideration of privilege log issues while avoiding taking positions on many of the issues raised by participants in the public comment process.

Rule 26(b)(5)(A) cross-reference amendment: There have been proposals that a cross-reference be added to Rule 26(b)(5)(A) itself. But the Subcommittee did not favor taking this additional step. Because it was proposed by several who testified at hearings or submitted written comments, some explanation may be helpful.

In the first place, though adding this change to the existing amendment package should not require republication, it really seems not to add anything. The published amendment directs the parties to address compliance with this rule in their 26(f) meeting. That being the case, it seems odd to add something to this rule to remind people that Rule 26(f) applies. Anyone interested in what must be done at a 26(f) meeting presumably should begin by consulting 26(f); checking 26(b)(5)(A) as well seems an odd effort.

It somewhat seems that proponents of an amendment to 26(b)(5)(A) (from the "producer" perspective) were hoping that the revision there would either disapprove judicial decisions calling for a document-by-document log and/or promote categorical logs. The Subcommittee does not favor taking these steps; the "chaste" draft discussed on Feb. 7 avoided taking such positions.

And there is a more general rulemaking point here: Making cross-references might well be avoided unless necessary. To take a tendentious example, one might think that a cross-reference to Rule 11 might be included in Rule 8(a)(2). Surely Rule 11(b) bears on what attorneys should do as they devise their allegations to satisfy Rule 8(a)(2). The cross-reference idea might lead to a slippery slope toward multiple additions to rules that do not do more than call attention to other rules.

In sum, the Subcommittee recommended adoption of the published rule amendments with a shortened Note, but no change to Rule 26(b)(5)(A) itself.

Rule 45 amendment possibility: During the public comment period, some urged that Rule 45 also be amended to address compliance with Rule 26(b)(5)(A) by nonparties subject to subpoenas. The Subcommittee discussed this possibility during its Feb. 7 meeting and decided it did not warrant action.

Putting aside the possibility that this change could call for republication, a major concern was that the current amendment package is keyed to the Rule 26(f) meeting, which does not involve nonparties who receive subpoenas. Moreover, though there have been many reports about the burdens on parties caused by privilege log requirements, there has not been a comparable level of comment about such problems resulting from subpoenas. In addition, Rule 45(d) already specifically commands those serving subpoenas to "take reasonable steps to avoid imposing undue burden or expense" on the person served with the subpoena, and also says that the court "must enforce this duty and impose an appropriate sanction * * * on a party or attorney who fails to comply."

Post-Public-Comment revisions

Below in underscore/overstrike format are the post-public-comment changes the Subcommittee recommended to the full Advisory Committee. Following that version is a "clean" version of the proposed amended rule and Committee Note.

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

* * * * *

**(f) Conference of the Parties; Planning for Discovery.**

* * * * *

**(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

**(D)** any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

**Committee Note**

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties. ~~costs, often including a document-by-document "privilege log."~~

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. ~~Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens.~~ This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

~~Requiring this discussion at the outset of litigation is important to avoid problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period.~~

This amendment also seeks to provide ~~grant~~ the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials. Depending on the

nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

~~In some cases, it may be suitable to have the producing party deliver a document-by-document listing with explanations of the grounds for withholding the listed materials.~~

~~In some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. For example, it may be that communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. These or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.~~

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment, and should minimize problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

~~Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency of claims that producing parties have over-designated responsive materials. Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case. It can be difficult to determine whether certain materials are subject to privilege protection, and candid early communication about the difficulties to be encountered in making and evaluating such determinations can avoid later disputes.~~

"Clean" version of Revised Rule and Note

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

* * * * *

**(f) Conference of the Parties; Planning for Discovery.**

* * * * *

**(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

**(D)** any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

**Committee Note**

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties.

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

This amendment also seeks to provide the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment, and should minimize problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the

nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

---

**Changes Made After Publication and Comment**

There were no changes to the rule amendment after the public comment period. The Committee Note was shortened.

Post-Public-Comment revisions

**Rule 16. Pretrial Conferences; Scheduling; Management**

* * * * *

**(b) Scheduling and Management.**

* * * * *

**(3)** ***Contents of the Order.***

* * * * *

**(B)** *Permitted Contents.*

* * * * *

**(iv)** include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

**Committee Note**

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words – "and management" – are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid

problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes, ~~between themselves,~~ it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case there is no overarching standard for all cases. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

"Clean" Version of Rule and Committee Note

**Rule 16. Pretrial Conferences; Scheduling; Management**

* * * * *

**(b) Scheduling and Management.**

* * * * *

**(3)** ***Contents of the Order.***

* * * * *

**(B)** *Permitted Contents.*

* * * * *

**(iv)** include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

**Committee Note**

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words – "and management" – are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes, it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case there is no overarching standard for all cases. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

---

**Changes Made After Publication and Comment**

There were no changes to the rule amendment after the public comment period. Two small modifications were made to the Committee Note.

Notes of Discovery Subcommittee Meeting

Feb. 7, 2024

On Feb. 7, 2024, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Those participating included Judge David Godbey (Chair) and subcommittee members Judge Jennifer Boal, Ariana Tadler, Helen Witt, Joseph Sellers, David Burman, Carmelita Shinn. Additional participants included Emery Lee of the FJC, Allison Bruff and Zachary Hawari of the Rules Support Office, and Professors Richard Marcus, Andrew Bradt, and Edward Cooper.

Before the meeting, Prof. Marcus had circulated a sketch of some possible revisions to the Committee Note, and Helen Witt had circulated some further possible revisions. There were no suggestions for changing the proposed amendment to the rule.

Rule 26(f) Amendment

A starting point was that there seemed to be consensus on the objectives of the amendment. The goal is to move up serious consideration of the logging method for the case and thereby avoid problems of the sort that have emerged too often inappropriately late in the discovery process.

At the same time, the three public hearings make clear that there is a significant divide in the bar between what one could call the "requesting" parties and the "producing" parties. At the first hearing, most of those who addressed privilege log issues were producing parties, and at the third hearing they were mainly requesting parties.

So the participants focused on the Note, including both the revisions circulated by Prof. Marcus and the further revisions circulated by Ms. Witt.

One recurrent topic was the extent or manner in which the Note should address the costs of various forms of privilege logging. On the one hand, preparing a detailed document-by-document log can be extremely expensive. The Committee Note that accompanied the addition of 26(b)(5)(A) in 1993 recognized that possibility and suggested that other methods might (including describing the withheld documents "by categories") might be preferred when "voluminous documents are claimed to be privileged." Several on the producing party side urged that the courts had not attended to the guidance provided by this note and instead had gravitated toward document-by-document logging.

But one point emerging from the hearings is that evaluating a privilege log can be very burdensome also when there are many documents involved, and that opaque logging methods can make that burden even greater.

There was considerable discussion of the risk that the Note might be seen to put a "thumb on the scale" in evaluating what would work in a given case. And it was noted that a overarching preference for one method or another might not be suitable to some cases. Instead, for some

types of materials one method might make most sense, while a case might also involve other sorts of materials for which a different method might make more sense. It would be unwise to take the position that a single method would be necessary for all production in a given case.

Since the only changes under consideration were to the Note, it was asked whether the content of the Note really made that much difference. Justice Scalia, for example, said more than once that what matters is what the rule says, and that the Note has little importance. And the objection we have repeatedly heard is that the cautions in the 1993 Note to 26(b)(5)(A) when it was added to the rules were overlooked by the courts, hardly suggesting the relatively minor wording changes to the Note will make major differences in practice. But a different view was offered, stressing that more recently attention to the Note has considerably increased; what we say in the Note will be taken into account.

Another topic was the concern by requesting parties about over-designation, or what might be called inappropriate designation of certain materials as privileged. Though that concern was cited by several witnesses during the public comment period, it is not clear that the rule should take a position on whether it is rare or endemic.

Another point to keep in mind is that there are other privileges that implicate additional specifics not important with regard to the attorney-client and work product privileges. For example, one witness on Feb. 6 reported on the privileges that arise in civil rights litigation against police officers and prisons. There are many such cases in the federal courts and it could easily be that a privilege log for such cases would need different specifics than a commercial or product liability case.

A theme emerged: Given the contentious nature of the debate about costs and the variability of cases, perhaps the most prudent course would be for the Note to be relatively "agnostic" about costs and over-designation. Another idea would be to sidestep taking a position on whether document-by-document designation should be the norm.

Agreement on this point stressed that there are really three things to emphasize: (1) early attention to the method to be used is key; (2) both judges and parties need to be reminded that the rule is flexible and that it does not adopt a preference for any particular method or even a single method for everything to be produced in a given case; and (3) whatever method is adopted for a given case, the basic goal is to enable the other side to assess the privilege claim.

Caution was expressed about "drafting on the fly," even as to Note language. Instead, it seemed preferable to permit Prof. Marcus to try to incorporate the themes discussed during the meeting into a revised Note, building in part on the redraft from Ms. Witt and suggestions by other Subcommittee members.

Another theme emerged: Insisting that the parties deal with these issues up front and leaving it to judges to regulate privilege log issues when the parties cannot agree on the method of logging seems preferable to trying to prescribe in the Note, or to endorse certain methods. The goal is not so much to tell judges "this is what to do," but to tell parties "you can persuade the other side or the judge to do things in the way you think they should be done." Prescribing

solutions in advance and across the board is unwise. And we have been told that technology may soon play an outsized role in managing some of the burdens of privilege logging.

A reminder was offered: The first time this proposed amendment came before the Standing Committee, there was no problem with the small rule changes, but resistance to the length of the Note. The discussion suggests that things included in the Note as published could appropriately be removed in the expectation that the rule will bring the matter to the judge's attention, and that a judge may flexibly design a suitable method for the case in question. So shortening the Note might actually please the Standing Committee.

The resolution was for Prof. Marcus to circulate a new revision of the published Note based on the circulations before this meeting and the discussion during the meeting. Ideally, that could be evaluated by an exchange of email among members of the Subcommittee rather than necessitating another meeting.

Rule 26(b)(5)(A)

The amendment package did not include any change to Rule 26(b)(5)(A) itself. There was support (from the "producer" side) for including a cross-reference in that rule to call attention to the change to Rule 26(f) about method of logging.

Some who urged a change to this rule also urged that it should say that document-by-document logging is not required or preferred, and perhaps even offer the alternative of categorical logging.

The memo from Prof. Marcus circulated before the meeting offered a "chaste" cross reference to the amendment to Rule 26(f), to say that a party withholding privileged material must make the claim of privilege "after complying with Rule 26(f)(3)(D)."

The draft Note for this possible amendment to 26(b)(5)(A) included a bracketed quotation from the 1993 amendment to the rule that some on the "producer" side said had not been taken seriously enough under the rule. It was agreed that including this quotation of something already in the record (in the 1993 Note) would not be consistent with the Subcommittee's consensus on avoiding taking positions on what method or methods to use to satisfy the rule.

A concern was raised about making any change to this rule. When this additional change was proposed after the Standing Committee remanded the proposed amendment to permit the Advisory Committee to shorten the Note, the reaction was that it would be odd for somebody who is complying with Rule 26(f) to be looking at Rule 26(b)(5)(A) to find out how to do so. Unless lawyers are simply overlooking Rule 26(f), it might be odd to put a reminder in 26(b)(5)(A) that they should comply with 26(f).

Moreover, the Rule 26(b)(5)(A) issue would arise only after a Rule 34 request had gone out. Even though it is now permissible to make "early" Rule 34 requests before the 26(f) discovery-planning meeting occurs, compliance with those "early" requests is to occur only after the 26(f) conference. As a consequence, it would not be usual that 26(b)(5)(A) issues would

emerge at the time of the 26(f) conference independent of the proposed amendment to that Rule 26(f). So amending this rule also might not be important unless the Subcommittee wishes to take a position on whether document-by-document, categorical, or some other method is preferred.

And another caution was raised -- the rules do not usually include cross-references unless needed. For example, one could say that Rule 11(b) has a bearing on issues pertinent to motions to dismiss under Rule 12(b)(6), but Rule 12(b)(6) does not include a cross-reference to Rule 11.

The question whether to propose an amendment to Rule 26(b)(5)(A) in addition to the published amendment proposals will remain open. Adding that to the amendment package likely would not mean that republication should be required.

Rule 45 Amendment?

Some witnesses in the hearings have urged that Rule 45 be amended as well. That rule does use the same method for logging of withheld materials as does Rule 26(b)(5)(A). The sketch circulated by Prof. Marcus included a possible amendment to Rule 45.

A significant problem with amending Rule 45, however, would be that the pending amendment proposals are keyed to the Rule 26(f) discovery-planning meeting and designed to make the parties (and the judge) attend to the method of privilege logging up front. There is no similar meeting requirement with regard to subpoenas, and they almost always occur after the 26(f) meeting has occurred, since formal discovery may not occur until the parties have devised a discovery plan.

Moreover, though there have been many complaints about the burdens of privilege logging on parties, there has been scant suggestion that subpoena practice has presented similar problems. Rule 45 already directs that the party serving the subpoena avoid unduly burdening the nonparty subject to the subpoena.

The consensus was not to pursue a Rule 45 amendment further.

## Summary of Testimony and Comments

This memo summarizes the testimony and written comments about the privilege log proposals during the public comment period. When possible, it gathers together comments from the same source, including both testimony and separate written submissions. On occasion, the summary of testimony includes the written testimony submitted by witnesses.

The written submissions are identified with only their last four digits. The full description of each of them is USC-Rules-CV-2023-0001, etc. This summary will use only the 0001 designation for that comment.

The summaries attempt to identify matters of interest by topics. For some of the initial topics there may not have been comments or testimony. If none are received on those topics they will be removed from the final summary. The topics are as follows:

## Privilege Log Amendments

General

Timing of Meet and Confer

Categorical Logging

"Rolling" Logging and Timing

Use of Technology

Amending Rule 26(b)(5)(A) As Well

Amending Rule 45 As Well

## Washington Hearing (Oct. 16)

### General

Robert Keeling & 0003: He regularly serves as "discovery counsel" in major matters. Sometimes that includes millions of documents to review, and turns up tens of thousands for which privilege can be claimed. There is a broad consensus that reform is necessary due to the very large costs of preparing privilege logs, sometimes exceeding $1 million. Despite that, privilege logs themselves often do not include important information. But these proposed amendments will not alleviate the problems that exist, in part because they do not directly amend Rule 26(b)(5)(A). The rule should embrace Sedona Principle 6, giving the responding party to the right to select the appropriate method of preparing a privilege log. It should also provide some general guidelines on privilege log practices. He tends to be called in on asymmetric litigations, and in those the principle of proportionality tends to get lost. There is good reason for caution in screening for privilege, particularly given the risk of inadvertent waiver.

Doug McNamara: I support the proposed amendments because they will aid the courts and the parties to address privilege claims by focusing on the timing and production of logs, and the method for doing so. This can avoid unnecessary delays. It would be useful to consider providing examples of what should be in a proper log. For example, the Committee Note (at line 51-54) might be revised as follows:

> In some cases, it may be suitable to have the producing party deliver a document-by-document ~~listing with explanations of the grounds for withholding the listed materials~~ privilege log. Courts have found as adequate privilege logs that provide a brief description or summary of the contents of the document; the number of pages and type of document; the date the document was prepared; who prepared and received the document; the purpose in preparing the document; and the specific basis for withholding the document.

Regarding the risk of privilege waiver, Rule 502(b) provides protection, along with the 26(b)(5)(B) clawback right. And a rule 502(d) order should provide almost ironclad protection.

Alex Dahl (LCJ) & 0003: This proposal is flawed because it does not focus on the real source of the problems -- Rule 26(b)(5)(A) itself. There are thirteen references to 26(b)(5)(A) in the proposal, demonstrating that it is the real source of the problems being addressed. There is no question that rule changes are needed. For one thing, even though the Committee Note to the 1993 rule adoption cautioned that document-by-document logs are not required, many courts and lawyers misconstrue the rule to require that sort of log in every case. And since 1993 the explosion of digital data has resulted in ever-increasing burdens of the privilege process. But "[o]nly an amendment to Rule 26(b)(5)(A) can sufficiently clarify that the rule does not require document-by-document privilege logs but rather allows producing parties to create categorical privilege logs or to agree on other alternatives." At the very least, 26(b)(5)(A) should be amended to reference the changes to 26(f). These changes would benefit requesting parties as well as producing parties, for as things now stand requesting parties often must review thousands of entries, irrespective of importance. Often challenges to privilege logs are used as a tool by overly aggressive counsel to impose extra expenses on producing parties. But privilege log disputes rarely result in the production of documents or data that are dispositive of a case or claim. Furthermore, the lack of uniformity among courts (including in local rules) undermines uniformity in the federal court system.

Jonathan Redgrave: There is a significant level of nuance in modern privilege log practice. This proposal is useful, but not sufficient.

Amy Keller (& no. 0055): This rule does the job that needs to be done. I have reviewed millions of privilege log entries, and recognize that all parties to civil litigation have had complaints about privilege logs. But many of those issues could be resolved with early discussion about the how, when, and in what format the logs should be produced, and *if* categorical logging is suitable for their particular case. No "one size fits all" solution is appropriate. That is why courts and parties should strive to resolve these problems collaboratively. I enthusiastically support the proposed amendments to Rules 16 and 26 because they move in this direction. "Resolving those issues at the outset of litigation will reduce the

number of disputes the parties have during the discovery process." In a major MDL proceeding recently, we found that leaving the details of logging until a later date ultimately led to significant disputes and *months* of meet and conferring, in part because the defendants insisted on categorical logging. Document-by-document logging is often essential, because only that ensures that producing parties do a secondary review after initial designation of materials as privileged. Even so, requesting parties' challenges to designations (based on detailed logs) regularly produce the concession that many withheld documents are not actually privileged.

Lana Olson (Defense Research Institute) & 0006: DRI supports that proposed amendments to Rule 16 and 26. They will encourage parties to devise proportional and workable privilege log protocols, while facilitating timely judicial management where necessary to avoid later disputes. This is a way to avoid the continual frustration with document-by-document logging. Those logs seldom enable the parties or the court to assess the privilege claims. This problem has escalated due to the exponential proliferation of ESI since Rule 26(b)(5)(A) was adopted in 1993. But despite the 1993 Committee Note recognizing flexibility with regard to logging methods, too many parties and courts adhere to the notion that every document must be separately logged. Doing that is very labor-intensive, and regularly constitutes the largest category of pretrial spending in document-intensive litigation. "Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, and make and then validate initial privilege calls, and then construct a privilege log describing each withheld document."

Amy Bice Larson: The LCJ comments generally align with my views and experience. She has found that the plaintiff side treats document-by-document logging as the default rule.

John Rosenthal: Modern litigation is excessively burdensome and expensive, and privilege review and logging are usually the largest component of that wasteful reality. The current proposals go a long way toward righting the ship. But something must be changed in 26(b)(5)(A) itself for this to work. Unfortunately the courts did not take the sensible comments in the 1993 Note to heart. The result has been a "default" of document-by-document logging that some plaintiff-side lawyers use as a club.

Jan. 16 Online Hearing

Jeanine Kenney: The Committee's thoughtful approach reflects current practice and will reduce privilege log disputes. Requiring early meet-and-confer sessions will encourage early resolution of the required format, content, and timing of privilege logs, and will minimize or eliminate later time-consuming disputes and reduce the need for "do-overs." We always try to talk with the other side early in litigation. But the Note does not do an adequate job in addressing the widespread problem of over-withholding and undervalued document-by-document logs. And the Note seems somewhat slanted. "The Committee's emphasis on *burdens* of compliance without addressing the benefit of the rule in *assuring* compliance tips the scale by implicitly suggesting the amendments are designed to address only one side of that equation." "Purported burdens of compliance should not be a justification for non-compliance with Rule 26(b)(5)(A). There is too much discussion in the Committee Note of the burdens on the producing party.

Lori Andrus: I support the proposed rule changes. But I urge the Committee to make changes to the Note: I have never found that the failure of the parties to communicate about the nature of the privileges and materials involved to be a concern. There is too much emphasis on costs for producing parties in the Note. I recommend striking the sentence in the last paragraph of the Note referring to that possibility. In addition, I would strike the sentence about large costs that appears in the first paragraph of the Committee Note. I also support the proposal of Doug McNamara that specific language be added to the Note explaining what should be in a privilege log.

Emily Acosta (testimony & 0020): Many privilege logs are too long because documents have been improperly designated. Over-designation, or "fake privilege," is increasingly pervasive, as illustrated by the recent Google litigation. And increased costs are a result of recent law firm rate hikes and salary increases for associates. If a change is made, "reform rewards bad behavior."

David Cohen: For big cases, waste is upon us. It can cost as much as $4 million to prepare a privilege log. The courts disregarded what the Committee Note said in 1993 about the new Rule 26(b)(5)(A) requirement. Having a requirement to discuss this set of issues up front is an excellent start. We need to do something like the 2015 amendment to Rule 26(b)(1) regarding proportionality.

Chad Roberts (eDiscovery CoCounsel, PLLC): Rapidly emerging technologies are highly likely to fundamentally change historical assumptions concerning the costs and burdens of document-by-document privilege logs. The language of the rule proposal prudently emphasizes flexibility. The comments of some others urging that the amendments go further would likely result in a rule that would be obsolete by the time it went into effect. The preparation of a document-by-document privilege log requires two tasks: (1) identifying the responsive items that contain privileged content; and (2) summarizing those items in a way that complies with the rule and avoids disclosing privileged material. The second task is the one that generates the preponderance of costs associated with document-by-document privilege logging.

Feb. 6 Online Hearing

Seth Carroll: As a plaintiff civil rights lawyer, I believe the proposed amendments will ensure flexibility to adjust to privilege concerns based on the circumstances of each case, and avoid unnecessarily specific or rigid application that may not meet the varying needs of discovery. Party agreement due to Rule 26(f) consultations will likely reduce discovery disputes and promote efficiency. In a straightforward excessive force case against a single officer, the burden of identifying the specific documents withheld is relatively low. On the other end of the spectrum is a correctional heat-stroke case with hundreds of thousands of pages of documents and a variety of privilege claims, including self-evaluation privilege, joint-defense privilege, and claims about proprietary information. In a case like that, the cost and burden on both sides is significantly greater, but so also is the risk that privilege logs can be used to obstruct discovery of relevant evidence. Efforts to insert "proportionality" into this rule topic should be resisted. Some municipal or corporate actors will attempt to hide probative documents by using unilateral "proportionality" concerns.

William Rossbach: From 40 years' experience litigating plaintiff-side cases involving medical, scientific, and engineering issues, I strongly support the proposed amendments to mandate early development of privilege claim principles. It is critical to have this set of issues addressed at the outset. There are almost always delays. In some cases there is major problem with delayed disclosure of privilege logs, over-designation of allegedly privileged materials, and inadequate descriptions of what has been withheld. I agree with others on the plaintiff side who have already testified, including Mr. McNamara, Ms. Keller, and Ms. Andrus. I think that the Note is somewhat slanted in its emphasis on the burdens of logging on the producing party without also recognizing the burdens on the requesting party of inadequate logs that do not afford a basis for a confident assessment of privilege claims. I think that the Note should be revised along the following lines:

> Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-document "privilege log." However, such privilege logs may well be required to provide the information the party seeking discovery needs to assess the validity of the privilege claims, as the rule requires.

I also think (along with others) that it would be desirable for the Note to provide a description of what a log should include, as proposed by Mr. McNamara. I also note that some of the burden on corporate parties "has been the previously unimaginable corporate expansion of internal communication with large 'cc' lists which likely reduce the validity of a privilege claim." For example, recently the FTC and DOJ have been warning companies under investigation not to delete their Slack or Signal chat histories.

Brian Clark: I support the proposed rule amendments, but have concerns about the Note. In the District of Minnesota, such planning has long been encouraged as a part of case preparation. The stress on "burden" looks only to producing party efforts, and the Note seems to suggest that a categorical or metadata log is sufficient. But big corporations regularly overclaim privilege, and a categorical log would insulate that behavior. And there is a wide variety of views about what a metadata log is or should contain. I think the sentence at the beginning of the Note about the costs of document-by-document logging should be stricken.

Amy Zeman: Overall, this proposal is very well done. The Committee's efforts to amend the rules regarding privilege logs have resulted in a fair and effective proposal that will benefit parties and the courts. The proposed changes provide needed flexibility while ensuring that parties address the need for case-specific solutions early in the litigation. But I find that the Note places too great an emphasis on the cost of preparing a privilege log and not enough on the harm inherent in over-designation. This imbalance inappropriately suggests that a party may withhold material but fail to provide sufficient information to back up the claim. And it overlooks the ever-developing role that technology plays in producing privilege logs. I think that the following should be added at the end of the first paragraph of the Note:

> And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery.

Adam Polk: From years of experience representing plaintiffs, I support the amendments that align with best practices -- (1) engage early; (2) produce privilege logs on a rolling basis, and (3) exercise flexibility when it comes to logging over the life of a case. I have some concerns about the Committee Notes, however.

Kate Baxter-Kauf: Based on my experience in data breach, privacy, and cyber security litigation, I believe the proposed amendments are helpful and likely to aid the parties, in part by frontloading resolution of disputes. In my practice, the substantive privileges are often based on state law, while Rule 26(b)(3) applies to work product protections. Resolving these privilege issues often involves multiple layers of factual inquiry. "Evaluating and litigating a privilege log dispute in this arena is often a multistage process that is time intensive, expensive, and laborious for the parties and especially courts." But the Note unduly emphasizes the burdens of preparing for production and fails properly to address the burdens on the requesting party that result from flaws or insufficiency in the privilege log. For a variety of reasons, "document-by-document privilege logs exist and are the default mechanism for compliance with Rule 26(b)(5)(A), at least in the complex litigation in which I am involved." I think the Note material on when a document-by-document log is appropriate and inviting consideration of a "categorical" log should be removed.

Anthony Mosquera (Johnson & Johnson): The amendment should prompt adoption of modern approaches regarding the format of a privilege log. Presently the presumption is a document-by-document log. That should be replaced with a presumption in favor of a modern metadata log or a categorical log.

Robert Levy (Exxon): The proposal requires early engagement on privilege log issues, which is potentially helpful, but it does not address the underlying issue, which is the presumption applied by many courts that document-by-document logging is requires in all cases.

Aaron Marks (Committee to Support Antitrust Laws): We support the proposed rule, but have concerns about the Committee Note. The rule strikes an appropriately modest balance that will benefit litigants and courts. But the Note makes needlessly strong statements about a variety of topics:

(1) The Note stresses "burdens" on producing parties without also focusing on the substantial burdens imposed on requesting parties and courts and does not adequately recognize that Rule 26(b)(5)(A) imposes on the party asserting a privilege the burden to show that it applies;

(2) The first paragraph of the Note says document-by-document logs are "often" associated with large costs, which is likely to be interpreted by courts as expressing a preference against document-by-document logs. This paragraph should be removed. Moreover, our experience has been that document-by-document logs entail minimal burden in most cases that are not complex, which make up most of the federal docket. When larger numbers of documents are involved, the vast majority of the log consists of metadata.

Pearl Robertson: It is desirable to encourage early cooperation, but the parties must not be handcuffed by early agreements that prove unhelpful. The second sentence of the Note, referencing the costs of creating a privilege log, should be removed. For one thing, technology can reduce such costs. There should be no suggestion in the notes that categorical logging be considered. The better option is a metadata log.

Maria Salacuse (EEOC): The EEOC supports the proposed amendments to require parties to discuss privilege logs and report to the court about that subject. Unfortunately, those logs are often an afterthought and only supplied in response to a threat of a motion to compel. In some cases, producing parties do not provide logs until after depositions, thereby preventing the requesting party from asking witnesses about documents that should have been produced. Even then, the logs ultimately produced do not sufficiently describe the withheld documents to permit us to assess the privilege claim. The proposed amendment appropriately focuses on discussion up front. At the 26(f) stage, the parties are poised for such a discussion because document review has not yet commenced. At the same time, the amendments provide the parties and the court with discretion to tailor the logging method the specific case. We propose addition of the following at the end of the first paragraph of the Note (line 27 in the amendment proposal):

> Application of the Rule in a manner that does not allow the receiving parties to assess adequately the claim of privilege likewise imposes burdens on such parties and the court and may prevent parties from identifying improperly withheld documents.

In addition, we propose that the following be added to the Note at line 50:

> Whatever approach is agreed upon, the privilege log must provide sufficient information for the parties and the court to assess the privilege claim for each document withheld consistent with Rule 26(b)(5)(A).

And at line 65 we would add the following underlined language:

> But the use of categories calls for careful drafting and application keyed to the specifics of the action to ensure that the use of any categories or other approach provides sufficient information to assess the privilege consistent with Rule 26(b)(5)(A).

We disagree with assertions made by some that the rule should adopt a presumption that non-traditional logs, such as metadata or categorical logs, are preferred.

Brian Clark: As a plaintiff-side antitrust lawyer, I support the proposed amendments. But I have concerns with the Note and intend to focus on that. Early discovery planning, including privilege logs, is critical. But the Note over-emphasizes the burden and cost of logging. I find this inappropriate for several reasons: (1) large corporations are advised by counsel to label everything "privileged" even when no colorable claim of privilege exists. A categorical log would obscure this practice. (2) Though "metadata log" may have some appeal, there is a wide range of views on exactly what that is. Trying to decipher such a log can be extremely burdensome. (3) Privilege is an area in which there are perverse incentives to withhold non-privileged relevant information. Even under the current regime, I see vast over-designation. (4)

To the extent the producing party has legitimate burden concerns, the obvious solution is Fed. R. Evid. 502(d). I think the second sentence of the Committee Note should be stricken; the Note should not be dismissive of document-by-document logs.

Written comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): The proposed changes will force communication about these issues. But the changes do not go far enough. The reality is that the undue burdens that motivated the amendment proposal do not exist in all cases, but instead are concentrated in "document-heavy" cases. At least in those cases, the parties are probably not going to be prepared to address these concerns in a meaningful way at the 26(f), conference, with occurs before any document discovery has actually occurred.

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I think the proposed amendments properly recognize that early discussions are a productive way to eliminate disputes and expedite the resolution of disputes over privilege. But I think the Committee Note inappropriately suggests that in "large documents" cases document-by-document logging may not be warranted. "The more documents that are withheld the more important it is that the responding party be able to assess the claims of privilege."

Federal Magistrate Judges Association (0018): "FMJA Rules Committee members are in full agreement with the proposed changes, including the flexibility it allows for parties and the Court to determine the best process for addressing privilege n a case-by-case basis to determine how best to minimize the burden and expense of privilege logging."

Minnesota State Bar Association (0034): The MSBA has voted to support these rule changes. It believes they will foster increased transparency and possibly efficiency between parties and the court.

American Ass'n for Justice (0038): "Some defense-side commenters have focused on a minority of cases involving huge document productions. Of course, there is an objection to document-by-document logs in these cases, but it would be a mistake to draft a rule based on mega-document productions." The appropriate method of logging needs to reflect the number of documents involved in the case, and the proposed amendments strike the right balance as presently written. In particular, AAJ favors retaining Note language emphasizing flexibility in designing logging methods. But the Note should be fortified by clearer emphasis on the problems created by over-designation. At least, emphasis in the Note on the cost of logging should be removed. In addition, as suggested by Douglas McNamara, a definition of an appropriate log could be added to the Note.

John Rosenthal (0039): Discovery of ESI has greatly magnified the cost of discovery, and the review of ESI for production is the largest cost in discovery. Review and logging of documents withheld on the basis of privilege is the largest cost component of discovery. This large cost is compounded by the reality that many courts and parties continue to construe Rule

26(b)(5)(A) as requiring document-by-document logging. The proposed amendments do not directly address the fundamental problem resulting from the routine insistence of many judges on document-by-document logs.

Jory Ruggiero (0040): The Rule 26(b)(5)(A) requirement is critical to fair litigation. In a state court case raising the same issues as a federal MDL, the defendant withheld over 3,700 documents as privileged. But when the court eventually screened them, it turned out that 99% were not privileged. I support the proposed rule amendments, but think the Note should be modified to remove emphasis on the burdens of preparing logs. The logs are essential.

Christine Spagnoli (0044): As a plaintiff's lawyer, I have often had to obtain court orders to probe the specifics of privilege claims, and have often obtained court orders to produce based on those specifics. I generally agree that the proposed changes are helpful, I urge the Committee to take account of the fact that not all cases involve large productions such as those in mass tort cases, and that the rule needs to be flexible to address individual cases.

Hon. John Facciola & Jonathan Redgrave (0045): We strongly urge that flexibility and a focus on the needs of the case be retained in the rule and Note. Some proposals to amend the Note would undermine this objective. If the Note suggests that deviation from the document-by-document method must be justified by a showing of burden by the producing party, that would undermine the amendments' purpose. The 1993 Committee Note got it right -- document-by-document logs are sometimes appropriate, sometimes not. And categorical logging should not be categorically rejected. It is also important to retain the current draft Note's emphasis on burden. Failure to act will worsen the already bad situation in which we operate.

Lawyers for Civil Justice (0053): "Privilege review is the largest single expense in civil litigation." This problem is getting worse due to changes in technology. There is a critical "rules problem" due to the incorrect tendency of many courts to interpret Rule 26(b)(5)(A) as regarding document-by-document logging as the default. The solution is clear -- amend Rule 26(b)(5)(A) to clarify the this is not the default requirement. In addition, the concept of proportionality should be prominently featured in the Note to this amendment.

In-house counsel at 33 corporations (0056): Many courts misconstrue 26(b)(5)(A) to require a document-by-document log in every case despite the 1993 Committee Note. This mistake results in "one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation." We believe that the solution must lie in amending 26(b)(5)(A) itself, not only the rules addressed in the published proposed amendments, including a presumption that the parties are not required to log trial preparation documents created after the commencement of litigation.

Mackenzie Wilson (0057): I support the proposed rule because it calls for early discussion and allows flexibility depending on each individual case. I believe that logs should be exchanged early in the case, updated regularly, and should thoroughly explain why each document was withheld. Even though the cases I handle usually do not involve large numbers of documents, I find that vital documents are often withheld without justification. Switching to a categorical log would be unfair to both parties.

Benjamin Barnett & David Buchanan (0058): We are both now at Seeger Weiss, but Barnett spend years on the defense side, with an emphasis on eDiscovery. We fully support the proposed amendment to Rule 26(f). Mandating an early discussion and that this topic be included in the report to the court will product benefits. But the draft Note could be a source of future problems -- particularly the emphasis on the cost of preparing a log -- belong in the Note. We have found that one of the real drivers of the costs associated with privilege challenges is that corporate defendants over-designate early in the litigation. We dispute the draft Note assertion that Rule 26(b)(5)(A) has not been applied flexibly.

Leah Snyder (0061): Privilege logs must be detailed and complete so parties trying to ascertain the accuracy and appropriateness of the privilege asserted can do so. Over-designation remains a serious problem and categorical logs can conceal bad actors. I believe this rule change will assist the parties in ensuring the logs are appropriate and tailored to provide needed information to the parties.

Briordy Meyers (0063): These amendments are well intentioned, but they don't go far enough. The interpretation of 26(b)(5)(A) "has created an entire sub-industry in the legal profession of attorneys, vendors and legal technology dedicated to addressing claims that go to the heart of the attorney-client relationship and legal ethics." It has forced courts and lawyers to spend weeks, months, and even years wrangling with a problem that is completely self-imposed and did not exist before 1993. "Rule 26(b)(5)(A) is, on its face, inconsistent with Rule 26(b)(1) and Rule 1." But the proposed amendments may lead to even worse outcomes by provoking disputes in cases in which they would not arise absent the rule change. The best solution would be to amend 26(b)(5)(A) to remove the description requirement. Short of that, presumptively valid methods should be included in an amended rule.

MaryBeth Gibson (0064): In an MDL before Judge Grimm, Special Master Facciola ordered that the parties not use categorical logs. Subsequently, defendant Marriott turned over thirteen thousand documents that were indispensable to plaintiffs' case. Had the Special Master permitted a categorical log, these documents would not have been produced. Though categorical logs may be appropriate, that should depend on negotiations between the parties. "Simply put, burden should not be an excuse to demonstrating privilege on a document-by-document basis pursuant to Rule 26(b)(5)."

Joseph Gugliemo (0065): Party agreements about methods for logging, including categorical methods, can be beneficial. But that's only possible once the parties have enough information, and I worry that these amendments would result in hasty and premature arrangements. An official presumption in favor of early resolution of these questions also raises risks of creating perverse incentives for gamesmanship. I therefore recommend rejecting these amendments as written. The problem is timing; often the party's relationship with counsel has not reached a suitable point to make such arrangements. So one party, and the court, will be flying blind at the outset. Often the dynamics are not clear until well into the litigation, after custodians, search terms, and structured data sources have been identified. "For one thing, a hasty agreement on privilege logging can yield large-scale withholding of non-privileged but responsive documents because one party does not fully understand the other's practice regarding, e.g., the inclusion of counsel on email."

Google LLC (0067): The proposed changes do not adequately address the massive challenges associated with privilege logs, and the Committee Note will unintentionally exacerbate the problems. Additional amendments to the rules and Notes are needed. One addition that is needed is a reference to proportionality. There is, at best, a vague reference to proportionality in the current Notes. Proportionality is particularly important with regard to asymmetrical litigation, where parties rarely can reach agreement about solving problems like these. Discovery disputes about logging can readily sidetrack the entire case. The Note should be strengthened with regard to alternative methods of logging, including categorical logging. Metadata or "metadata plus" logs are another possibility. And rolling logs ought not be endorsed for large document cases because they can be a major burden when production may be occurring on a monthly or even bi-weekly basis. This idea overlooks the reality that privilege review is a difficult and time-consuming undertaking. It would be better for the Note to endorse "phased" or "tiered" logging. And in large scale litigation it would usually be true that the log should be prepare only as the production process is nearing completion.

Patrick Oot (0070): I offer examples of privilege logs that cost nearly $500,000 to produce. Despite Fed. R. Evid. 502, the costs of privilege review and logging have continued to escalate. The costs are intolerable, and a change is essential.

Timing of Meet-and-Confer

Robert Keeling & 0003: At the time of the Rule 26(f) conference, the parties are unlikely to be in a position to negotiate a workable privilege logging method. Any privilege protocol developed at this early stage is likely to be too generic to be helpful and to be upset by unanticipated factors or problems. Involving the court at this early point is not an attractive prospect because key information will not be available. It is "far more efficient * * * to compile the privilege log after the majority of documents have been reviewed." It would be more meaningful to change 26(b)(5)(A) itself.

Doug McNamara: "The sooner the better." It is too common that producing parties don't deliver a log until "substantial completion" of document discovery, which may be just before the end of fact discovery. Too often, junior lawyers or contract attorneys making the first cut over-designate, and more senior counsel focus on the review only later. By that time, depositions may have been taken, and only after that do "deprivileged" documents get produced, which may create a need for redeposition. But there is no reason to defer depositions until after the review of the documents and submission of the log is completed. I want the documents ASAP. So I'm more than willing to sign onto a 502(d) order.

Jonathan Redgrave: The early conference is important, and not just in really big cases. Early judicial involvement is very helpful.

Lana Olson (Defense Research Institute) & 0006: Too often, early discussion prompts the other side to demand document-by-document logging. But there is a need to discuss these matters early, though that is productive only if both sides are reasonable. If needed, it is possible to postpone arrangements for logging.

Amy Bice Larson: At the beginning of the case, you don't know enough about the client's information to make precise arrangements. At that point, it is often (despite "early" requests allowed under Rule 34) to know what the other side will be asking for.

Jan. 16 Online hearing

Jeanine Kenney: It is important that the conference between counsel about the manner of logging withheld materials occur prior to document review because the format and means of compliance may implicate how that review proceeds. In some multi-defendant litigation, for example, parties negotiate the precise fields that should be provided. To address concerns that any party may not have sufficient information at the time of the 26(f) conference, some protocols build in an escape hatch permitting modification of the protocol by agreement or by court order for good cause shown, or include placeholders for later negotiations over certain questions.

Jennifer Scullion: It is good to insist that the lawyers "talk more." But we must be careful to add breathing room in the process.

Feb. 6 Online Hearing

William Rossbach: The most important change is to make early development of a method for dealing with privilege claims mandatory and at the outset of litigation. As the Committee Note says, this should go a long way toward alleviating many of the problems with privilege claims by forcing early attention by the parties and the court on these issues. I stress that Rule 26(b)(5)(A) says the description should "enable other parties to assess the claim" of privilege.

Amy Zeman: I disagree with those who arguing that discussions about privilege logs are premature at the Rule 26(f) stage. This discussion is a natural component of a discovery plan, and it is disingenuous to argue that parties would at this point have sufficient information to design a discovery plan but not to address privilege log issues.

Adam Polk: My practice has borne out the effectiveness of addressing privilege issues early, and involving the judge early in the case has proved valuable. In one case, for example, the judge ordered that the privilege log be produced no more than fourteen days after disclosures or discovery responses were due. The judge's order also specified what a log had to contain: (a) the subject and general nature of the document; (b) the identity and position of its author; (c) the date it was communicated; (d) the identity and position of all addressees and recipients; (e) the document's present location; and (f) the specific privilege and a brief summary of any supporting facts. This directive "served as a starting point for discussions concerning compliance with Rule 26(b)(5) and streamlined those discussions in the case." Failure to develop "rules of the road" in other cases has resulted more protracted disputes about privilege assertions.

Kate Baxter-Kauf: Early discussions of logging documents and communications to be withheld on the basis of privilege is exceptionally helpful as a way to encourage discussion of types of documents for which a dispute may already be ripe. A meet and confer to narrow any dispute should commence immediately.

Pearl Robertson: Though early discussion of the format for privilege logs is useful, it is also important to recognize that experience during the litigation informs the actual process. Parties ought not be handcuffed by early agreements that eventually prove unhelpful. It seems that the proposed amendment is in line with what parties have been doing. But the stress on cost considerations is misguided; "the cost of compliance with Rule 26(b)(5)(A) is not the appropriate test for balancing the receiving party's right to the disclosure of discoverable information."

Written Comments

Lea Malani Bays (016): Speaking from the plaintiff perspective, I feel that "the comments arguing that the timing of privilege log discussions and productions should be delayed until later in the document review process will lead to a significant disadvantage for receiving parties and will likely disrupt court schedules with disputes over privilege emerging closer to the end of discovery. * * * Discussions regarding privilege logs may last longer than one initial meeting, as the parties more thoroughly explore issues related to discovery."

Federal Magistrate Judges Association (0018): "[A] court can often provide guidance and resolve privilege disputes early in the case. Importantly, a court's order for complying with Rule 25(b)(5)(A) does not rely on party agreement, though great weight will be given the parties' preferences. This approach is consistent with active case management and the court's obligations under Rule 1."

Categorical Logging

Robert Keeling & 0003: The rule should endorse standards that focus on whether the party claiming privilege protection has engaged in a reasonable process for logging privileged documents, rather than whether every withheld document was perfectly logged. "As with document production, the withholding party is in the best position to determine how to establish its claim of privilege and should have the flexibility to decide what type of log is best suited to meet the needs of the case."

Doug McNamara: "My experience with categorical logging is categorically bad." In one large MDL, a categorical approach led to a situation in which over 13,000 documents were "de-privileged" late in the discovery process. In part, the problem resulted from the use of "broad categories" for logging withheld documents. In a case before Judge Chhabria (N.D. Cal.), after the initial logging was challenged the producing party de-privileged 63% of the documents originally withheld. "With categorical logging, who sent it, who received it, what was it and when is often reduced to generic buckets like 'communications between client and outside counsel.'"

Alex Dahl (LCJ) & 0007: There should be a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation.

Amy Keller: Categorical privilege logs can be prone to gamesmanship and over-designation. In a recent MDL proceeding, for example, defense counsel refused to (1) agree what categories would be used; (2) include an attestation by an attorney to provide reasonable context as to the role of the person making the privilege assertion; (3) include specific data points for categorical logs; and (4) provide distinct data points for document-by-document logs. Instead, defendants insisted on category descriptions that were facially overbroad while producing millions of documents and indicating that they had withheld substantial numbers of other documents. Only after we involved the Special Master (retired Magistrate Judge Facciola) did defendant finally provide a document-by-document privilege log. That process resulted in one defendant producing 13,000 additional relevant documents that had been previously marked privilege. Had the parties used only categorical logs, we would never have gotten these documents. Many of them spoke directly to defendants' liability, and plaintiffs had been seeking their production for years. Had a document-by-document log been required from the outset, that would have avoided significant expense and avoided duplication of effort made necessary by the initial use of a categorical approach to logging. Proportionality considerations can be given weight as well.

Lana Olson (Defense Research Institute) & 0006: Some categories of documents and ESI are facially privileged or protected and can be agreed by the parties to be excluded from logging. For example, communications between counsel and client regarding the litigation after the complaint is served are clearly protected. The proposed amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example those exclusively between in-house counsel and outside counsel of an organization might be so clearly privileged that they need not be logged. Designing express exclusions, as allowed by the proposed amendments both reduces the burdens of reviews and logging and avoids possible disputes regarding the scope of logging needed in the case.

Jan. 16 Online hearing

Jeanine Kenney: The Note inappropriately suggests that document-by-document listing is appropriate only in "some" cases. This comment could suggest that this method is not generally necessary even though it is the standard approach in most cases and in most courts. In my experience, that method is generally the only meaningful method. "[N]o commenter before this Committee to date has explained how a receiving party is able to assess the propriety of a claim without disclosure of document-by-document information." Using alternative forms generally results in more, not fewer, disputes. In particular, the note inappropriately suggests that such logs are in appropriate in larger cases. "But is large-withholding cases * * * in which document-by-document information is most essential." Categorical methods have been widely criticized. In some cases and for some narrow categories, they may have a use. But there is a risk they might become a mechanism for failing to conduct a proper review in the first place. Some favor "tiered logs," but do not explain how one decides what belongs in which tier.

Lori Andrus: I have agreed to certain categorical exclusions from logging in specific cases. For example, often we will agree that communications with litigation counsel after the filing of the complaint need not be logged. But as a general matter so-called "categorical" logs fail to provide courts sufficient information to support privilege assertions. I have never seen a

case where categories of documents could be grouped together while still providing sufficient detail to permit the privilege claim to be determine whether the document is at least potentially protected from disclosure.

Feb. 6 Online Hearing

Adam Polk: Some mix of logging conventions, whether document-by-document or categorical, within a single case may make sense under certain circumstances. In the N.D. Cal., for example, the model order provides that "[c]ommunication involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log." Sometimes parties also include communications involving in-house counsel.

Kate Baxter-Kauf: "In my experience, categorical logs merely increase the burden and cost of evaluating privilege disputes for the parties, and lengthen and overly complicate privilege disputes, making it harder for the parties to narrow or eliminate disputes and requiring court intervention in more instances."

Robert Levy (Exxon): The rule should say that logs are not required absent a showing of need with regard to the following categories: (1) all communications with outside counsel; and (2) communications after suit is filed.

Aaron Marks (Committee to Support Antitrust Laws): Categorical logs burden receiving parties and litigants. An opaque categorical log inevitably spawns disputes between the parties. "Unlike document-by-document logs, there is no historical baseline expectation of what constitutes an appropriate 'categorical log.'" Such a method by its nature requires determining an appropriate level of abstraction for the categories. Due to the stakes, the parties dispute even basic structural components of categorical logs. And in any event, use of this technique increases the number of disputes about whether the privilege assertions are justified. Parties frequently force hundreds of documents into a single "category" because the description of the category is likely to be at a high level of abstraction. But the proposed Note would encourage expansion of their use without discussing how to relieve their shortcomings. And categorical logs prevent cases from being resolved on their merits because the lead to improper withholding of non-privileged materials. Rather than fostering use of categorical logs, the Note should move toward promoting "the primacy of traditional, document-by-document logs." They actually entail the least overall burden and avoid the need for case-specific log format disputes that will result without the presumption that document-by-document logs are what the rules mandate. The current Note does not even maintain "maximum flexibility" because it takes a substantive position that document-by-document logs are "often" associated with "very large costs." The burdens on the requesting party deserve equal time. And document-by-document logs focus the range of disputes and save court time.

Pearl Robertson: The Note should not refer to use of categorical logs because they do not provide the amount of information Rule 26(b)(5)(A) requires. Instead, they produce disputes.

Written comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): At the time the 26(f) conference occurs, counsel are not usually in a position to discuss these issues in a meaningful manner in "significant document cases." "It is invariably too early in the process to address privilege log issues with any specificity, as counsel are still typically getting their arms around the types, sources, and volume of documents and ESI that is responsive to identified or expected requests for production." In addition, in "asymmetric document cases," the document-light party will often demand a document-by-document log. We worry that if the parties are not really ready to discuss such issues at this early point, when the issues arise later "the court may give them short shrift, believing that they should have been raised at the Rule 16 conference." "If this Rule change is to work as intended, there is not substitute for an available judge who is ready to engage with counsel." We think that "the most appropriate time to address privilege -log issues is at the time of initial production." Too often, when only one side has the major burden of producing documents "the party seeking discovery may seek the most expensive method of logging. * * * [T]he court must be prepared to address the demand at the initial Rule 16 conference."

Federal Magistrate Judges Association (0018): "Many cases do not involve complex privilege issues and are candidates for categorical logs or short document-by-document logs. Other cases may call for a hybrid approach, using a combination of categorical logging and document-by-document logging for specific subject areas, custodian or time periods. Still other cases may benefit from a categorical log with a metadata log. This comment is not meant to endorse any particular methodology for privilege logging but rather to applaud the proposed Rule's flexibility as to approach and call for privilege issues to be discussed at the outset of the case."

"Rolling" Logging & Timing

Robert Keeling & 0003: The references to "rolling privilege logs" are inconsistent with modernizing privilege logging practice and ineffective and inefficient. Parties may over-withhold because they are not familiar enough with the documents to make informed decisions about which to withhold. Instead, it is better to defer preparation of a privilege log until the majority of documents involved have been reviewed by the lawyers most familiar with the issues. It would be better to call for "tiered" or "staged" logging. This approach would prioritize production and logging of key documents and resolving potential disputes early in the discovery process. "Even if the parties are able to reach agreement on a privilege protocol at the outset, it may be so generic as to be unhelpful in establishing key aspects of the privilege review." You really only know about the characteristics of the data collection after completing the initial review, which is unlikely to be completed at the time of the 26(f) conference.

Alex Dahl (LCJ) & 0007: The amendments should suggest tiered logging rather than rolling production. The main change would be to substitute "tiered" for "rolling." The idea is to focus first on the materials most likely to be critical to the resolution of the case, rather than trying to review and log all potentially discoverable materials. Rather than involving huge

expenditures of money and substantial delays, this approach can focus attention on the key issues, just as with a tiered approach to document production.

Jonathan Redgrave: The difference between "rolling" and "tiered" logging is significant.

Lana Olson (Defense Research Institute) & 0006: Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important, so it is that all documents withheld on privilege grounds have the same value in the litigation. Sampling and other procedures can be used to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, and the same sort of approach could be effectively employed to focus the logging effort. Some critics of the proposed amendments assert that categorical and iterative logging may provide an incentive to cheat the system. But that assumes that lawyers will violate their oaths and the rules of ethics. "If a lawyer is going to cheat, he or she will do so under a document-by-document log or a categorical log."

Jan. 16 Online hearing

Jeanine Kenney: It is valuable that the Committee Note highlights the importance of rolling privilege logs. This practice may prevent or at least restrict over-withholding by giving producing parties early guidance that can be used to inform later privilege reviews. Fed. R. Evid. 502(d) orders offer a significant solution to the concern that prompt production of some material may inadvertently include items that should have been withheld.

Andrew Myers (Bayer): The rolling and iterative approach to privilege review is a good idea.

Feb. 6 Online Hearing

Seth Carroll: Permitting "tiered" logs is undesirable. Defendants in the civil rights cases I handle sometimes try to hide probative documents behind unilateral "proportionality" concerns. Endorsing "tiered" logging or discovery would tend in that direction.

Amy Zeman: The Note's nod to rolling productions is well placed and references a common and effective discovery tool I regularly use in my cases. I disagree with the argument by another commenter that a party cannot simultaneously focus on document review and privilege log production. "Replacing 'rolling' production with 'tiered' production would compound the problem of over-designation rather than solving it, while adding opacity to the process." The comments favoring the use of "tiered" describe it on the basis of materiality and importance of the materials to be produced, but offer no explanation on who would make that determination. If that is left up to the producing party, there is an obvious path to discovery abuse.

Adam Polk: The Committee Note is right that delaying production of the privilege log until the close of discovery can create serious problems. When that happens, the party seeking

discovery is delayed in identifying documents that may have been improperly withheld. In order to resolve privilege disputes, sampling or preliminary rulings from the court can prove valuable. Only periodic production of logs over the course of discovery allows the parties to timely raise those disputes, often on an iterative basis.

Kate Baxter-Kauf: Describing "rolling" log production in the Note is exceptionally helpful to the parties. But a "tiered" approach would produce problems. The idea is that the logging should first be done with regard to the "important" documents. Though that sounds sensible, the problem is that only the producing party can make the "importance" determination. "This has the potential to lengthen disputes about privilege and logging as the parties *also* dispute which documents and requests for production are most material to the litigation and *then* discuss both format and content of privilege logs."

Robert Levy (Exxon): The Note should be altered to remove the reference to "rolling" logs. It would be better to use the term "tiered" logs. Rolling logs do not always work well because document productions are methodical and proceed by custodian.

Pearl Robertson: Rolling privilege logs are desirable. They are not more burdensome than "final" logs, and may actually produce less burden. They can also potentially cure the problem of over-designation.

Use of Technology

Robert Keeling & 0003: Sometimes objective metadata logs (to-from, date, etc.) may be useful without the effort of individual characterization of documents and pertinent privileges. Sometimes that approach permits opposing counsel to focus on certain items and perhaps demand a document-by-document log only of those items.

Doug McNamara: "Technology assisted review can easily capture the metadata of authors, recipients, and dates of communications to help with log creation. This data can then be converted from CSV files into spreadsheets and exported." Use of metadata logs can cut down significantly on the effort, but eventually "you have to have the last column" (specifying the privilege claimed). But the to/from listing can point up instances in which the company has adopted a policy of having counsel added as a cc on almost every message.

Alex Dahl (LCJ) & 0007: "While artificial intelligence and other technological advancements have increased the capability and efficiency of finding potentially privileged documents, litigants cannot use these tools alone to assert their privilege claims under the current rules. Instead, creating privilege logs remains a manual, burdensome, and exceptionally expensive process in litigation."

Lana Olson (Defense Research Institute) & 0006: "Providing initial logs with limited information, for example logs abased on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information is needed to assess the privilege claims."

Amy Bice Larson: Technology can't tell you what privilege applies. Only a trained professional can do that.

Jan. 16 Online hearing

Jeanine Kenney: If a metadata-type log is agreed to, it will be important up front to address documents for which metadata provides little or no information or inaccurate information, and any manual information that must be supplemented, how hard copy versus electronic documents will be logged, the physical format of logs (e.g., sortable spreadsheets), etc. Document-by-document logs are usually generated through automated processes, imposing limited burden. "True" metadata logs "are a type [of] low-burden document-by-document log that remain[s] an option for every type of case."

Lori Andrus: "Technological advances have made privilege logs much cheaper to generate in the last few years, and those costs will continue to plummet."

Jennifer Scullion: I do not think a typical metadata log suffices. Sometimes a "metadata plus" log will be helpful. Another technique that can be used is a "quick peek" (with Evidence Rule 502(d) protections) that persuade opposing counsel that materials on a certain topic are not worth the trouble to examine in the current litigation.

Chad Roberts (eDiscovery CoCounsel, PLLC): The draft rule is "pitch perfect." It is important to avoid getting too far in front of the technology, though the technology is improving by leaps and bounds. Pretty soon, generative AI will be able to summarize documents, so the privilege log can be produced quickly and inexpensively. "There is a healthy and robust commercial marketplace for litigation support technologies that address both the growing diversity of digital evidence and the increasing volumes in which it occurs. * * * Some electronic discovery problems that seemed insurmountable in the recent past are no longer so." Powerful analytics software has greatly economized the task of identifying responsive content within a collected data set. "Thus, using the evidence management platforms to generate a list of the privileged content, the creation of the privilege log itself tends to be a manageable task." But providing a summary of the content of these items has remained a repetitive manual task. Most every major developer of evidence management platforms is doing research seeking to use large language models for electronic discovery tasks. "These technologies have the potential to reliably generate non-privileged summaries of textual content based upon established criteria, and are likely to automate the repetitive and more expensive lawyer-intensive process of privilege log creation in ways not previously available."

Feb. 6 Online hearing

Robert Levy (Exxon): Privilege logs involve significant costs and due to the large increase in documents and records the cots continue to rise even with the advent of technology.

Written Comments

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I have found that metadata logs do reduce the burden of privilege logging because they do not require any human input, but that too often they do not provide sufficient insight into the basis for the privilege claims. Metadata field can help supplement a privilege log, sometimes by filling in gaps that otherwise would exist, but the are usually not sufficient on their own.

Amending Rule 26(b)(5)(A) As Well

Robert Keeling & 0003: Although the 1993 Committee Note properly foresaw that document-by-document logging would not be appropriate in every cases, many courts have treated the amended rule as requiring that in every case. Producing parties will not know their full custodian list, the prevalence of privilege documents or the complexity of the issues that may arise one document review begins. Trying to tame the privilege log beast without amending 26(b)(5)(A) is unlikely to work.

Alex Dahl (LCJ) & 0007: The best way to improve privilege log practice would be to adopt the proposal of Judge Facciola and Jonathan Redgrave and add a sentence to Rule 26(b)(5)(A):

> The manner of compliance with subdivisions (A)(i) and (ii) must be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

Adding this sentence will help ensure that courts and parties turning to 26(b)(5)(A) will learn that the rules require them to take the initiative in addressing the appropriate method of logging withheld items. The Committee Note should say that "there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation.."

Jonathan Redgrave: Rule 26(b)(5)(A) is the source of the current difficulties. Unless something is done to change that rule, the reform effort will not succeed.

John Rosenthal: Because the document-by-document expectation has become ingrained (even though the 1993 Note actually pointed in a different direction), this rule must be changed, if only to call attention to the new regime of a sensible negotiated method of satisfying the disclosure requirement. There are many less onerous methods, including categorical logging, metadata logs, and what I call "categorical plus" -- using either a metadata log or other categorical approach, and following up with possible targeted document-by-document logging.

Jan. 16 Online hearing

Jeanine Kenney: Amending this rule could impose greater, not lesser, burdens and parties and prevent judges from establishing their own standing policies and procedures on privilege logs. It must be remembered that compliance with this rule is not optional, so invoking proportionality is not justified.

David Cohen: Amending this rule also would be a good idea. The goal should be to put teeth in the 1993 Committee Note that recognized that document-by-document logging is not essential in many cases.

Andrew Myers (Bayer): Amending this rule also would be a good idea. Better yet, find a way to give real teeth to the 1993 Committee Note recognizing that document-by-document logging is not necessary in every case.

Feb. 6 Online Hearing

Robert Levy (Exxon): It is important to amend 26(b)(5)(A) as well because this is the rule that govern privilege withholding.

Written Comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): We believe it would be helpful to add a conforming sentence to Rule 26(b)(5)(A)(ii) to emphasize the importance of the court's role in preventing privilege log disputes. We suggest the following additional sentence:

> Where necessary to prevent undue burden, the method of compliance with subdivisions (A)(i) and (ii) shall be determined by the court after consultation with the parties.

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I oppose amending Rule 25(b)(5)(A). "Although some members of the defense bar are still encouraging drastic changes to Rule 26(b)(5), I believe the Committee's more measured approach is the right one." Many, perhaps most, parties do in fact carefully review privilege logs and find them necessary for determining whether designations should be challenged. "Non-traditional logs such as metadata logs and categorical logs cannot be presumptively appropriate under this rule. Categorical logs do not reduce the burden of privilege logging; the major burden is making the privilege determination (when properly done), not listing the results on a log.

American Ass'n for Justice (0038): Defense bar suggestions that Rule 26(b)(5)(A) also be amended should be rejected. For one thing, the published amendment proposal did not include a proposed change to this rule, and as a consequence AAJ members and plaintiff-side practitioners were not focused on this possibility and did not comment on it. The proposal by Judge Facciola and Mr. Redgrave would invite controversy, by emphasizing "undue burden" and "proportional to the needs of the case" in the Note. Moreover, there are reasons to refrain from cross-

references. "While AAJ itself has on occasion proposed cross-referencing in other rulemaking, it believes that cross-referencing is most suitable when there is a *choice* between two rules to apply." That is not the case here, so the cross-reference is unnecessary, and the draft Note proposed by LCJ would be strongly opposed by AAJ and its members.

John Rosenthal (0039): This rule should also be amended to clarify (a) that document-by-document logging is not required, (b) that courts and parties should consider alternative means of satisfying this rule, (c) that there should be a rebuttable presumption that certain categories of documents need not be logged, (d) what is the exact information needed to establish a claim of privilege, and (e) that Rule 502(d) orders can include provisions that ensure that information contained in a log cannot form the basis for a claim of waiver. Unless these changes are made, requiring additional conferences among counsel under the proposed rule amendments will not address the fundamental burden problems. The 1993 Committee Note to this rule when adopted got it right, and changes are needed to set things right again.

Hon. John Facciola & Jonathan Redgrave (0045): In January, 2023, we formally proposed that a cross reference be added to Rule 26(b)(5)(A), but that was not included in the amendment packet sent out for public comment. We believe that the public comment period confirms the need for a neutral addition to Rule 26(b)(5)(A). Continued, misplaced adherence in cases to document-by-document logs imposes unwarranted burdens on parties and courts. Adding a cross-reference should support and enhance the proposed amendments. Submissions urging that the rule require document-by-document logging show that an amendment to counter this trend in decisions is needed. We propose that the following be added:

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

This addition explicitly clarifies that there is no required or default manner of compliance, and that the parties and the court should address compliance in each case with reference to the specifics of that case. This addition would also show that the concept of proportionality should be considered. Because many courts and parties presume, erroneously, that this rule requires document-by-document logging, the absence of a reference in 26(b)(5)(A) to the new Rule 26(f) provision will in practice undermine the amendment. Adding the reference here will also ensure that parties are fully aware that they must address privilege logs early in the case. This amendment will trigger attorneys to consult the amendments to Rule 26(f) and 16(b).

Google LLC (0067): Rule 26(b)(5)(A)(i) and (ii) should be amended as follows:

> (i) expressly make the claim; ~~and~~
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed -- and do so in a manner using any reasonable method or format proportional to the needs of the case that, without revealing information itself privileged or protected, will enable other parties to assess the claim;~~.~~ and

(iii) a party receiving a description of information withheld on the basis of privilege or trial-preparation materials may not object solely on the basis of the method or format utilized by the party making the claim.

Amending Rule 45 As Well

Oct. 16 hearing

Alex Dahl (LCJ) & 0007: Although Rule 45 makes clear that nonparties should be entitled to greater protection against undue burdens, it fails to provide that expressly with respect to privilege logging. Yet nonparties are unlikely to be involved in Rule 26(f) negotiations. If the Committee does not want to address Rule 45 presently, it should take up the topic in the future to provide protection for nonparties.

Jonathan Redgrave: We need an amendment to Rule 45 connecting to Rule 26(b)(5) as well.

Feb. 6 Online hearing

Robert Levy (Exxon): Rule 45 should be amended as well to address the fundamental fairness of burden on third parties to litigation. But it is not clear how the Rule 45 setting provides something like the Rule 26(f) discovery-planning conference required of the parties

## B. New Rule 16.1 for adoption

The Rule 16.1 proposal received a great deal of commentary during the public comment period. A summary of the commentary is included in this agenda book. The MDL Subcommittee met twice after the public comment period to consider changes to the rule proposal and to the Committee Note. The first meeting was on Feb. 23, 2024, and the second on March 5, 2024. Notes of both these meetings are included in this agenda book. To provide context, each set of notes includes, as an Appendix, the drafting ideas discussed by the Subcommittee during that meeting.

These notes should fully introduce the extensive discussions of the Subcommittee, which produced a revised amendment proposal that was included in the agenda book for the Advisory Committee's April 9 meeting and is included below as a "clean" version which was included in the Advisory Committee agenda book for that meeting. After the agenda book was prepared, the Standing Committee style consultants presented suggestions for style changes. There followed considerable discussion of those changes and many of them were adopted. The resulting restyled revision of the Rule 16.1 proposed amendment was then circulated to the Advisory Committee members during the April 9 meeting and the Advisory Committee unanimously voted to approve this amendment for adoption.

The rule proposal adopted on April 9 therefore appears first after this introduction, with its companion Committee Note. Though the markups that follow suggest substantial changes from preliminary drafts, there really is only one significant change -- the removal of the "coordinating counsel" provision in Rule 16.1(b) of the preliminary draft. Except for that, the changes mainly resulted from reorganization of the matters listed in proposed Rule 16.1(c) in the preliminary draft.

Here is a quick roadmap of the revised rule proposal and the detailed material that follows:

(1) Eliminating the "coordinating counsel" position: Proposed Rule 16.1(b) invited the court to consider appointing an attorney to act as "coordinating counsel." After the public comment period was completed, on Feb. 23 the Subcommittee considered whether this position might be retained as "liaison counsel," with invocation of the Manual for Complex Litigation (4th) use of the term in § 10.221 (referring to "liaison counsel" who would deal with "essentially administrative matters"). But discussion led the Subcommittee to conclude that the strong reaction against creation of this new position provided a reason for removing it from the rule entirely. It no longer appears in the rule.

(2) Providing that unless the court orders otherwise, the parties must address all the topics listed in the rule: The published draft made the parties' obligation to address certain matters depend on the court taking the initiative to order them to address those specific matters. But requiring affirmative action by the court to get a report on the listed matters seems unnecessary, particularly since the parties can tell the court that it's premature to address certain items. That is implicit in the breakout of certain matters listed in Rule 16.1(b)(3), on which the parties are directed only to provide their "initial views." And the rule continues to say the parties

may raise whatever matters they wish to raise whether or not the court ordered them to do so. This shift in no way limits the court's discretion, but it may sometimes reduce the burden on the court and also perhaps suggest to the parties that they might suggest that the court excuse a report on certain topics. The goal is to prepare the court to make the most effective use of the initial management conference.

(3) Subdividing the topics listed in published Rule 16.1(c) into two categories, one directing the parties to provide their views on certain topics and the other calling for the parties' "initial views": These two categories of reporting responsibilities would be divided between Rule 16.1(b)(2) and Rule 16.1(b)(3). These groupings are:

Group 1, in Rule 16.1(b)(2) provides that the parties must provide their views on the following:

(A) Whether leadership counsel should be appointed, and if so address a number of matters bearing on the appointment of leadership counsel.

(B) Previously entered scheduling or other orders that should be vacated or modified;

(C) A schedule for additional management conferences;

(D) How to manage the filing of new actions in the MDL proceedings;

(E) Whether related actions have been filed or are expected to be filed, and whether to consider possible methods of coordinating with those actions.

Group 2 in Rule 16.1(b)(3) provides that the parties must provide the court with their "initial views" on the following unless the court orders otherwise:

(A) Whether consolidated pleadings should be prepared to account for the multiple actions in the MDL proceedings.

(B) Principal legal and factual issues likely to be presented;

(C) How and when the parties will exchange information about the facial bases for their claims and defenses. The revised Note makes clear that this is not discovery, and mentions that the court may employ expedited procedures to resolve some claims or defenses based on this information exchange. It also provides that the court should take care to ensure that the parties have adequate access to needed information.

(D) Anticipated discovery;

(E) Likely pretrial motions;

(F) Whether the court should consider measures to facilitate resolution; and

(G) Whether matters should be referred to a magistrate judge or a master.

(4) Initial management order: The court should enter an initial management order regarding how leadership counsel would be appointed if that is to occur and adopting an initial management plan that controls the MDL proceedings until the court modifies it.

Below is a detailed explanation of the evolution of the revised amendment proposal approved by the Advisory Committee at its April 2024 meeting. It seems useful to provide a list of the items that follow as a roadmap to what's in this agenda book:

- Clean version of revised rule and Note (approved at April 2024 Advisory Committee meeting) (after revision in response to suggestions of Style Consultants), and the GAP report noting those changes as approved
- Clean version of rule and Note as included in agenda book for the April 2024 meeting (before further revisions in response to suggestions of Style Consultants)
- Preliminary draft of proposed Rule 16.1 and Committee Note (published for public comment in August 2023)
- Overstrike/underline version showing changes between published preliminary draft and proposed rule in agenda book for April 2024 Advisory committee meeting (second item above)
- Notes from March 5, 2024, meeting of MDL Subcommittee (including appendix showing interim redrafts discussed during that meeting)
- Notes from MDL Subcommittee meeting of Feb. 23, 2024 (including appendix showing interim redrafts discussed during that meeting)
- Summary of testimony and comments received during public comment period

**Revised Proposed New Rule 16.1 and Note**
**(Approved by Advisory Committee)**

**Rule 16.1. Multidistrict Litigation**

**(a) Initial Management Conference.** After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

**(b) Report for the Conference.**

**(1)** ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

**(2)** ***Required Content: the Parties' Views on Leadership Counsel and Other Matters.*** The report must address any matter the court designates — which may include any matter in Rule 16 — and, unless the court orders otherwise, the parties' views on:

**(A)** whether leadership counsel should be appointed and, if so:

**(i)** the timing of the appointments;

**(ii)** the structure of leadership counsel;

**(iii)** the procedure for selecting leadership and whether the appointments should be reviewed periodically;

**(iv)** their responsibilities and authority in conducting pretrial activities and any role in resolution of the MDL proceedings;

**(v)** the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;

**(vi)** any limits on activity by nonleadership counsel; and

**(vii)** whether and when to establish a means for compensating leadership counsel;

**(B)** any previously entered scheduling or other orders that should be vacated or modified;

**(C)** a schedule for additional management conferences with the court;

**(D)** how to manage the direct filing of new actions in the MDL proceedings; and

**(E)** whether related actions have been — or are expected to be — filed in other courts, and whether to adopt methods for coordinating with them.

**(3)** ***Additional Required Content: the Parties' Initial Views on Various Matters.*** Unless the court orders otherwise, the report also must address the parties' initial views on:

**(A)** whether consolidated pleadings should be prepared;

**(B)** how and when the parties will exchange information about the factual bases for their claims and defenses;

**(C)** discovery, including any difficult issues that may arise;

**(D)** any likely pretrial motions;

**(E)** whether the court should consider any measures to facilitate resolving some or all actions before the court;

**(F)** whether any matters should be referred to a magistrate judge or a master; and

**(G)** the principal factual and legal issues likely to be presented.

**(4)** ***Permitted Content***: The report may include any other matter that the parties wish to bring to the court's attention.

**(c) Initial Management Order.** After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

**Committee Note**

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased since the statute was enacted but has leveled off in recent years. These actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation (MDL proceedings) in the Civil Rules. The addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. Of course, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies in handling those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

**Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop an initial management plan for the MDL proceedings and, thus, this initial conference may only address some of the matters referenced in Rule 16.1(b)(2)-(3). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b)(2)-(3) should be of great value to the transferee judge and the parties.

**Rule 16.1(b)(1).** The court ordinarily should order the parties to meet to submit a report to the court about the matters designated in Rule 16.1(b)(2)-(3) prior to the initial management

conference. This should be a single report, but it may reflect the parties' divergent views on these matters.

**Rule 16.1(b)(2).** Unless the court orders otherwise, the report must address all of the matters identified in Rule 16.1(b)(2) (as well as all those in 16.1(b)(3)). The court also may direct the parties to address any other matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

The rule distinguishes between the matters identified in Rule 16.1(b)(2)(B)-(E) and in Rule 16.1(b)(3) because court action on some of the matters identified in Rule 16.1(b)(3) may be premature before leadership counsel is appointed, if that is to occur. For this reason, 16.1(b)(2) calls for the parties' views on the matters designated in (b)(2) whereas 16.1(b)(3) requires only the parties' initial views on those matters listed in (b)(3).

Rule 16.1(b)(2)(C) directs the parties to suggest a schedule for additional management conferences during which the same or other matters may be addressed, and the Rule 16.1(c) initial management order controls only until it is modified. The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceeding. Experience has shown, however, that the matters identified in Rule 16.1(b)(2)(B)-(E) and Rule 16.1(b)(3) are often important to the management of MDL proceedings.

**Rule 16.1(b)(2)(A).** Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointments may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel and many times this will be one of the early orders the transferee judge enters. Rule 16.1(b)(2)(A) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first topic is the timing of appointment of leadership. Ordinarily, transferee judges enter orders appointing leadership counsel separately from orders addressing the matters in Rule 16.1(b)(2)(B)-(E) and 16.1(b)(3).

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Rule 16.1(b)(2)(A)(ii) therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

The procedure for selecting leadership counsel is addressed in item (iii). There is no single method that is best for all MDL proceedings. The transferee judge is responsible to ensure that the lawyers appointed to leadership positions are able to do the work and will responsibly and fairly discharge their leadership obligations. In undertaking this process, a transferee judge should consider the benefits of geographical distribution as well as differing experiences, skills, knowledge, and backgrounds. Courts have considered the nature of the actions and parties, the

needs of the litigation, and each lawyer's qualifications, expertise, and access to resources. They have also taken into account how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries and also claims by third-party payors who paid for medical treatment. The court may need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

Item (iv) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

An additional task of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Item (v) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As item (vi) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, item (vii) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for the management of case staffing, timekeeping, cost reimbursement, and related common benefit issues. But it may be best to defer entering a specific order relating to a common benefit fee and expenses until well into the

proceedings, when the court is more familiar with the effects of such an order and the activities of leadership counsel.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify one or more classes, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

**Rule 16.1(b)(2)(B)-(E) and (3).** Rule 16.1(b)(2) and (3) identify a number of matters that often are important in the management of MDL proceedings. The matters identified in Rule 16.1(b)(2)(B)-(E) frequently call for early action by the court. The matters identified by Rule 16.1(b)(3) are in a separate paragraph of the rule because, in the absence of appointment of leadership counsel should appointment be warranted, the parties may be able to provide only their initial views on these matters at the conference.

**Rule 16.1(b)(2)(B).** When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which they were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

**Rule 16.1(b)(2)(C).** The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceeding to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

**Rule 16.1(b)(2)(D).** When large numbers of tagalong actions (actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceeding) are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for remand at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related litigation (e.g., state courts and bankruptcy courts) at the case management conferences.

**Rule 16.1(b)(2)(E).** On occasion there are actions in other courts that are related to the MDL proceeding. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may happen that a party to an MDL

proceeding is a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceeding. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such actions in other courts have been filed or are anticipated.

**Rule 16.1(b)(3).** As compared to the matters listed in Rule 16.1(b)(2)(B)-(E), Rule 16.1(b)(3) identifies matters that may be more fully addressed once leadership is appointed, should leadership be recommended, and thus, in their report the parties may only be able to provide their initial views on these matters.

**Rule 16.1(b)(3)(A).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers, in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in all MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceeding. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

**Rule 16.1(b)(3)(B).** In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that in many cases an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are issues that should be addressed early in the proceeding (e.g., jurisdiction, general causation, or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information may be ordered independently from the discovery rules, which are addressed in Rule 16.1(b)(3)(C). Alternatively, in some cases, transferee

judges have ordered that such exchanges of information be made under Rule 33 or 34. Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

**Rule 16.1(b)(3)(C).** A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceeding may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

**Rule 16.1(b)(3)(D).** Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

**Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution.

**Rule 16.1(b)(3)(F).** MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

**Rule 16.1(b)(3)(G).** Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

**Rule 16.1(b)(4).** In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

**Rule 16.1(c).** Effective and efficient management of MDL proceedings benefits from a comprehensive management order. An initial management order need not address all matters designated under Rule 16.1(b) if the court determines the matters are not significant to the MDL proceeding or would better be addressed in a subsequent order. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be

flexible, the court should be open to modifying its initial management order in light of developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

---

**Changes Made After Publication and Comment**

Three changes were made to the rule amendment after the public comment period: (1) The "coordinating counsel" provision in preliminary draft Rule 16.1(b) was removed; (2) The various reporting matters in preliminary draft Rule 16.1(c) were subdivided into Rule 16.1(b)(2) and (b)(3); and (3) the rule was revised to mandate reports on all those matters unless the court orders otherwise. The Committee Note was revised to reflect these changes.

**Revised Proposed New Rule 16.1 and Note[1]**
**(Clean)**

**Rule 16.1. Multidistrict Litigation**

**(a) Initial Management Conference.** After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial management plan for orderly pretrial activity in the MDL proceedings.

**(b) Preparing a Report for the Initial Management Conference.** The transferee court should order the parties to meet, prepare and submit a report to the court before the conference. Unless otherwise ordered by the court, the report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter in Rule 16. The report also may address any other matter the parties wish to bring to the court's attention.

**(1)** The report must address whether leadership counsel should be appointed and, if so, it should also address the timing of the appointment and:

**(A)** the procedure for selecting leadership counsel and whether the appointment should be reviewed periodically during the MDL proceedings;

**(B)** the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

**(C)** the role of leadership counsel in any resolution of the MDL proceedings;

**(D)** the proposed methods for leadership counsel to regularly communicate with and report to the court and nonleadership counsel;

[1] This version of the revised rule appeared in the agenda book for the Advisory Committee's April 9 meeting, and was further revised in response to suggestions from the Standing Committee's Style Consultants to produce the version beginning on p. 43 of this report. This version reflects changes made after the public comment period but before the style review.

**(E)** any limits on activity by nonleadership counsel; and

**(F)** whether and, if so, when to establish a means for compensating leadership counsel.

**(2)** The report also must address:

**(A)** any previously entered scheduling or other orders that should be vacated or modified;

**(B)** a schedule for additional management conferences with the court;

**(C)** how to manage the filing of new actions in the MDL proceedings;

**(D)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

**(E)** whether consolidated pleadings should be prepared.

**(3)** The report also must address the parties' initial views on:

**(A)** the principal factual and legal issues likely to be presented in the MDL proceedings;

**(B)** how and when the parties will exchange information about the factual bases for their claims and defenses;

**(C)** anticipated discovery in the MDL proceedings, including any difficult issues that may be presented;

**(D)** any likely pretrial motions;

**(E)** whether the court should consider measures to facilitate resolution of some or all actions before the court; and

**(F)** whether matters should be referred to a magistrate judge or a master.

**(c) Initial Management Order.** After the initial management conference, the court should enter an initial management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(b) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

**Committee Note**

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

**Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop a management plan for the MDL proceedings and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b) should be of great value to the transferee judge and the parties.

**Rule 16.1(b).** The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in Rule 16.1(b) prior to the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters, as they may affect parties differently. Unless otherwise ordered by the court, the report must address all the matters identified in Rule 16.1(b)(1)-(3). The court also may include any other

matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) directs the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(b)(1)-(3) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

Counsel often are able to coordinate in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

**Rule 16.1(b)(1).** Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly discharge their leadership obligations, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceedings. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

Subparagraph (C) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the

common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

**Rule 16.1(b)(2) and (3).** Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) often call for early action by the court. The matters identified by Rule 16(b)(3) are in a separate section of the rule because, in the absence of appointment of leadership counsel should appointment be recommended, the parties may be able to provide only their initial views on these matters.

**Rule 16.1(b)(2)(A).** When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

**Rule 16.1(b)(2)(B).** The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

**Rule 16.1(b)(2)(C).** Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be

appointed specifically to report on developments in related state court litigation at the case management conferences.

**Rule 16.1(b)(2)(D).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

**Rule 16.1(b)(2)(E).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

**Rule 16.1(b)(3).** Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

**Rule 16.1(b)(3)(A).** Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

**Rule 16.1(b)(3)(B).** In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceedings.

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

**Rule 16.1(b)(3)(C).** A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

**Rule 16.1(b)(3)(D).** Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

**Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution.

**Rule 16.1(b)(3)(F).** MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

**Rule 16.1(c).** Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent

developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

**Proposed New Rule 16.1 and Note[2]**
**(As Published in August 2023)**

**Rule 16.1. Multidistrict Litigation**

**(a) Initial MDL Management Conference.** After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings.

**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:

**(1)** assist the court with the conference; and

**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).

**(c) Preparing a Report for the Conference.** The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address any matter designated by the court, which may include any matter listed below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

**(1)** whether leadership counsel should be appointed, and if so:

**(A)** the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;

**(B)** the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

[2] New material is underlined in red.

**(C)** their role in settlement activities;

**(D)** proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;

**(E)** any limits on activity by nonleadership counsel; and

**(F)** whether and, if so, when to establish a means for compensating leadership counsel;

**(2)** identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

**(3)** identifying the principal factual and legal issues likely to be presented in the MDL proceedings;

**(4)** how and when the parties will exchange information about the factual bases for their claims and defenses;

**(5)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

**(6)** a proposed plan for discovery, including methods to handle it efficiently;

**(7)** any likely pretrial motions and a plan for addressing them;

**(8)** a schedule for additional management conferences with the court;

**(9)** whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);

**(10)** how to manage the filing of new actions in the MDL proceedings;

**(11)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

**(12)** whether matters should be referred to a magistrate judge or a master.

**(d) Initial MDL Management Order.** After the conference, the court should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

**Committee Note**

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There previously was no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the type of management challenges this rule addresses. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

**Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs to develop a management plan for the MDL proceedings. That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(c) may be of great value to the transferee judge and the parties.

**Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel -- perhaps more often on the plaintiff than the defendant side -- to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.

While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings,

counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.

**Rule 16.1(c).** The court ordinarily should order the parties to meet to provide a report to the court about the matters designated in the court's Rule 16.1(c) order prior to the initial MDL management conference. This should be a single report, but it may reflect the parties' divergent views on these matters. The court may select which matters listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may also include any other matter, whether or not listed in those rules. Rules 16.1(c) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow. Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-(12) are often important to the management of MDL proceedings. In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

**Rule 16.1(c)(1).** Appointment of leadership counsel is not universally needed in MDL proceedings. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. This provision calls attention to a number of topics the court might consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries, and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16.1(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).

The rule also calls for a report to the court on whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that -- a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(d). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities non-leadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

**Rule 16.1(c)(2).** When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may

warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

**Rule 16.1(c)(3).** Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

**Rule 16.1(c)(4).** Experience has shown that in MDL proceedings an exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings.

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

**Rule 16.1(c)(5).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

**Rule 16.1(c)(6).** A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

**Rule 16.1(c)(7).** Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

**Rule 16.1(c)(8).** The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively

manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

**Rule 16.1(c)(9).** Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the settlement of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that -- a decision to be made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate settlement.

**Rule 16.1(c)(10).** Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.

**Rule 16.1(c)(11).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

**Rule 16.1(c)(12).** MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

**Rule 16.1(d).** Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings

or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel were appointed after the initial management conference under Rule 16.1(a).

**Revised Proposed Rule 16.1 and Note[3]**
**(Redline)**

**Rule 16.1. Multidistrict Litigation**

**(a) Initial ~~MDL~~ Management Conference.** After the Judicial Panel on Multidistrict Litigation ~~orders the transfer of~~transfers actions, the transferee court should schedule an initial management conference to develop ~~a~~an initial management plan for orderly pretrial activity in the MDL proceedings.

**(b) ~~Designating Coordinating Counsel for the Conference~~.** ~~The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

~~**(c)**~~ **Preparing a Report for the Initial Management Conference.** The transferee court should order the parties to meet ~~and~~, prepare and submit a report ~~to be submitted~~ to the court before the conference ~~begins. The~~. Unless otherwise ordered by the court, the report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter ~~listed below or~~ in Rule 16. The report ~~may~~ also may address any other matter the parties wish to bring to the court's attention.

**(1)** The report must address whether leadership counsel should be appointed~~,~~ and, if so, it should also address the timing of the appointment and:

[3] This version reflects changes made to produce the revised rule that was in the April 9 agenda book and also appears beginning on pg. 52 above. This version was further revised in response to suggestions from the Standing Committee's Style Consultants to produce the final version approved by the Advisory Committee on April 9, which begins on p. 43 above.

**(A)** the procedure for selecting ~~them~~ leadership counsel and whether the appointment should be reviewed periodically during the MDL proceedings;

**(B)** the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

**(C)** ~~their~~the role of leadership counsel in ~~settlement activities~~any resolution of the MDL proceedings;

**(D)** the proposed methods for ~~them~~leadership counsel to regularly communicate with and report to the court and nonleadership counsel;

**(E)** any limits on activity by nonleadership counsel; and

**(F)** whether and, if so, when to establish a means for compensating leadership counsel~~;~~.

**(2)** ~~identifying~~ The report also must address:

**(A)** any previously entered scheduling or other orders ~~and stating whether they~~that should be vacated or modified;

~~**(3)** identifying the principal factual and legal issues likely to be presented in the MDL proceedings;~~

~~**(4)** how and when the parties will exchange information about the factual bases for their claims and defenses;~~

~~**(5)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;~~

~~**(6)** a proposed plan for discovery, including methods to handle it efficiently;~~

~~**(7)** any likely pretrial motions and a plan for addressing them;~~

~~**(8)**~~ **(B)** a schedule for additional management conferences with the court;

~~(9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);~~

~~(10~~ **(C)** how to manage the filing of new actions in the MDL proceedings;

~~(11~~ **(D)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

~~(12~~ **(E)** whether consolidated pleadings should be prepared.

**(3)** The report also must address the parties' initial views on:

**(A)** the principal factual and legal issues likely to be presented in the MDL proceedings;

**(B)** how and when the parties will exchange information about the factual bases for their claims and defenses;

**(C)** anticipated discovery in the MDL proceedings, including any difficult issues that may be presented;

**(D)** any likely pretrial motions;

**(E)** whether the court should consider measures to facilitate resolution of some or all actions before the court; and

**(F)** whether matters should be referred to a magistrate judge or a master.

~~(d~~**(c) Initial ~~MDL~~ Management Order.** After the initial management conference, the court should enter an initial ~~MDL~~ management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(~~e~~b) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

**Committee Note**

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There ~~previously was~~has been no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the ~~type of~~ management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

**Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial ~~MDL~~ management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop a management plan for the MDL proceedings~~.~~ and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial ~~MDL~~ management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(~~c) may~~b) should be of great value to the transferee judge and the parties.

**Rule 16.1(b).** ~~Rule 16.1(b) recognizes the court may designate coordinating counsel -- perhaps more often on the plaintiff than the defendant side -- to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.~~

~~While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~

~~**Rule 16.1(c).**~~ The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in ~~the court's~~ Rule 16.1(~~c) order~~b) prior to

the initial ~~MDL~~ management conference. This should be a single report, but it may reflect the parties' divergent views on these matters~~. The court~~, as they may ~~select which~~affect parties differently. Unless otherwise ordered by the court, the report must address all the matters ~~listed~~identified in Rule 16.1(~~c) or Rule 16 should be included in the report submitted to the court, and may also~~b)(1)-(3). The court also may include any other matter, whether or not listed in ~~those rules.~~Rule 16.1(b) or in Rule 16. Rules 16.1(~~c~~b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) directs the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(~~c~~b)(1)-(~~12~~3) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial ~~MDL~~ management conference.

Counsel often are able to coordinate in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(~~c~~b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

**Rule 16.1(b)(1).** Appointment of leadership counsel is not universally needed in MDL proceedings~~.~~, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. ~~This provision~~The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) calls attention to ~~a number of~~several topics the court ~~might~~should consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly ~~represent plaintiffs~~discharge

their leadership obligations, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries~~,~~ and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. ~~If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16.1(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).~~

The rule also calls for ~~a report to~~advising the court ~~on~~ whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL ~~proceeding.~~proceedings. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with ~~specifics~~specific suggestions on the leadership structure that should be employed.

Subparagraph (C) recognizes that~~, in addition to managing pretrial proceedings,~~ another important role for leadership counsel in some MDL proceedings is to facilitate ~~possible settlement. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that -- a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about~~ resolution~~. It is often important that the court be regularly apprised~~ of ~~developments regarding potential settlement~~claims. Resolution may be achieved by such means as early exchange of ~~some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.~~information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in ~~accord~~accordance with the court's initial management order under Rule 16.1(~~d~~c). In some ~~MDLs~~MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities ~~non-leadership~~nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

~~**Rule 16.1(c)(2).**~~

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

**Rule 16.1(b)(2) and (3).** Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) often call for early action by the court. The matters identified by Rule 16(b)(3) are in a separate section of the rule because, in the absence of appointment of leadership counsel should appointment be recommended, the parties may be able to provide only their initial views on these matters.

**Rule 16.1(b)(2)(A).** When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ~~("transferor district courts").~~. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district

courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

~~Rule 16.1(c)(3).~~

**Rule 16.1(b)(2)(B).** The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

**Rule 16.1(b)(2)(C).** Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.

**Rule 16.1(b)(2)(D).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

**Rule 16.1(b)(2)(E).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in MDL

proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

**Rule 16.1(b)(3).** Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

**Rule 16.1(b)(3)(A).** Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

**Rule 16.1(~~c)(4).~~b)(3)(B).** In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that ~~in MDL proceedings~~ an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. ~~Whether early~~Early exchanges ~~should occur~~ may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as ~~whether~~ motions to dismiss or other early matters ~~might render~~and their impact on the ~~effort needed to~~early exchange of information ~~unwarranted~~. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL ~~proceeding~~proceedings.

~~**Rule 16.1(c)(5).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).~~

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances, – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

**Rule 16.1(~~c)(6~~b)(3)(C).** A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

**Rule 16.1(~~c)(7~~b)(3)(D).** Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

~~**Rule 16.1(c)(8).** The Rule 16.1(a) conference is the initial MDL management conference.~~

**Rule 16.1(b)(3)(E).** ~~Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.~~

~~**Rule 16.1(c)(9).**~~ Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the ~~settlement~~resolution of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that ~~—~~ a decision to be made by the parties. But ~~as recognized in Rule 16(a)(5) and 16(c)(2)(I),~~ the court may assist the parties in ~~settlement~~ efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate ~~settlement~~resolution.

~~**Rule 16.1(c)(10).**~~

**Rule 16.1(b)(3)(F).** ~~Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.~~

~~When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.~~

~~**Rule 16.1(c)(11).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.~~

~~The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.~~

~~**Rule 16.1(c)(12).**~~ MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

**Rule 16.1(~~d~~c).** Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel ~~were~~is appointed after the initial management conference under Rule 16.1(a).

Notes of MDL Subcommittee Meeting
March 5, 2024

The MDL Subcommittee of the Advisory Committee on Civil Rules met via Teams on March 5, 2024, to complete its post-public-comment revisions to proposed Rule 16.1. It had earlier met on Feb. 23, 2024, to begin the task of considering and reacting to the public comments.

Participants included Judge David Proctor (Chair of the Subcommittee); Judge Robin Rosenberg (Chair of the Advisory Committee), Judge Hannah Lauck, Ariana Tadler, Joseph Sellers, David Burman, Prof. Richard Marcus (Reporter to the Advisory Committee), Prof. Andrew Bradt (Associate Reporter to the Advisory Committee), Prof. Edward Cooper (Consultant to the Advisory Committee). Also participating were Emery Lee (FJC) and Allison Bruff and Zachary Hawari of the Administrative Office.

Before the meeting, Prof. Marcus had circulated the latest version of the post-hearings revisions to proposed Rule 16.1. That draft is an appendix to these notes. Members of the Subcommittee had circulated reactions to this draft by email before the meeting, indicating considerable agreement on word choices in the draft. The meeting was introduced as an opportunity for the members of the Subcommittee to proceed through the draft, noting where there was unanimity on revisions and also where items called for more discussion. For simplicity, these notes will proceed in the order of the lines on the draft as circulated to the Subcommittee. Unfortunately, the line numbering in the Appendix may not correspond exactly with the draft the Subcommittee discussed.

Line 4 [Rule 16.1(a)]: "MDL" would be removed from the title to (a).

Line 5 [Rule 16.1(a): It was agreed to remove the word "of," so the rule would read "After the Judicial Panel on Multidistrict Litigation transfers actions, . . . "

Line 7 [Rule 16.1(a): It was agreed that the bracketed "begin to" need not be included in the rule text, though those words should be retained in the Note.

Line 19: The words "Initial Management" would be added to the title of (b) before "Conference."

Lines 20-21 [Rule 16.1(b): It was agreed that the lines should be revised to read ". . . should order the parties to meet, and prepare and submit a report to the court before the conference."

Lines 25-26 [Rule 16.1(b)]: After discussion, the consensus was to leave the revised language of the last sentence as published, except that "may" would be moved after "also."

Line 64 [Rule 16.1(b)(3)]: The word "initial" would be used before "views."

Lines 95-96 [Rule 16.1(c)]: "MDL" would be removed from the title of this subdivision and from the first sentence.

Line 135 [Note to 16.1(a)]: The words "begin to" would be retained in the Note.

Line 182 [16.1(b) Note]: The words "begin to" would be retained in the Note.

Line 193 [16.1(b) Note]: The word "coordinate" would be substituted for the word "organize" that was in the draft.

Lines 213-14 [Rule 16.1(b)(1) Note]: The language would be changed to read " . . . appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of . . . ."

Line 217 [Rule 16.1(b)(1) Note]: The word "should" would be substituted for the word "might."

Lines 225-26 [Rule 16.1(b)(1) Note]: The phrase "discharge their leadership obligations" would be used.

Line 260 [Rule 16.1(b)(1) Note]: The bracketed sentence at the end of the paragraph would be retained, but the phrase "– sometimes one year –" would not be included.

Line 272 [Rule 16.1(b)(1) Note]: "cross-cutting motions" would be changed to "pretrial motions."

Line 298 [Rule 16.1(b)(1) Note]: As a Reporter's call, "accord" would be changed to "accordance" – "in accordance with the court's management order."

Lines 318-26 [Rule 16.1(b)(1) Note]: There was much discussion of whether this added paragraph about the relationship between Rule 16.1 and Rule 23(g) sent the correct message when addressing the management of MDL proceedings including class actions. There has been considerable concern about these issues in the class action bar. One suggestion was to replace the last sentence of the paragraph with something like: "Rule 16.1 does not displace Rule 23(g), which continues to apply to class actions."

The concern is that MDLs may include class actions and other actions. Among other things, there may be individual actions brought by those who opted out of the class action after certification. And in some MDLs there may be multiple class actions, maybe so many that the court has to appoint some form of leadership counsel to manage the multiple class actions. And there may be derivative actions as well. Moreover, sometimes the class action is used as the vehicle for settling an MDL, i.e., to conclude that was previously a more "ordinary" MDL that did not originally include class actions.

One perspective is that in some sorts of class actions – perhaps antitrust and securities provide good examples – there are established practices that we do not desire to disrupt. Indeed, the PSLRA has its own provisions about selection of the lead plaintiff and that party's authority to pick the lawyer for the class. But somewhat similar class-action issues can arise in other sorts of MDLs, such as consumer protection and data breach MDLs. Some may be entirely made up of class actions, while in others there might be a mix of sorts of cases.

And there is no assurance that class certification (and therefore appointment of class counsel under Rule 23(g)) will be an early decision. In one major MDL, for example, though there were a number of class-action complaints the question of class certification was deferred while other matters were addressed. In that MDL, a *Daubert* ruling eventually ended the proceeding, so the question of certification never had to be reached.

The Rule 23(g) authorization for interim class counsel means that a 23(g) appointment can occur well in advance of class certification in some instances, including MDL proceedings. But MDL leadership counsel are different from class counsel. Even interim class counsel can, for example, propose a classwide settlement to the court that can include an agreement by defendant to certification for purposes of settlement and be binding on all class members who do not opt out. MDL leadership counsel cannot do that.

One basic point that was emphasized was a familiar one – MDLs come in many different sizes and shapes. The public comment period demonstrated that the class action bar is worried about the interaction of 16.1 and 23(g), but the reality may well be that there is no blanket solution to the potential difficulties presented by class actions – perhaps with appointed class counsel – alongside other actions with appointed leadership counsel – in some MDL proceedings.

After much discussion, the resolution was **the Subcommittee members should circulate proposed Note language to improve the presentation of what is currently in lines 318-26**.

Lines 331-38 [Rule 16.1(b)(2) and (3) Note]: Concern was raised about the use of the words "administrative" and "substantive" to characterize the difference between the topics in (b)(2) and (b)(3). Some of the matters in (b)(2), such as whether to use consolidated pleadings, might seem fairly "substantive." But they would ordinarily be topics that ought be considered seriously up front. Saying "administrative" might, however, suggest that under *Gelboim* such combined pleadings might be viewed as superseding individual complaints, which is not what is meant. One potential solution would be to remove the language at lines 332-33 – "are generally of an administrative nature, and" leaving "The matters identified in Rule 16.1(b)(2) often call for early action by the court." But the next sentence says that more "substantive" matters in 16.1(b)(3) stand in "contrast," which doesn't seem quite right.

Perhaps the focus should be on what is ripe for potential court action at the initial management conference or shortly thereafter, in contrast to others that more often are wisely deferred until after leadership counsel are appointed if such an appointment is contemplated. Another suggestion was that the distinction is "categorical," and perhaps the (b)(2) is more about "procedural" matters and (b)(3) more about "substantive" matters.

After considerable discussion, as with lines 318-26, the resolution was that **the Subcommittee members should circulate proposed Note language to improve the presentation at lines 328-38.** It seemed that the Subcommittee was in essential agreement about what the Note should say but uncertain about how to express that agreement.

Lines 372-73 [Rule 16.1(b)(2)(C) Note]: The consensus was to revise the language to read: " . . . it is important to address other matters that can arise, such as properly handling . . . ."

Line 392 [Rule 16.1(b)(2)(D) Note]: It was agreed to replace "coordinating" with "the coordination of" so the line would read: "For example, the coordination of overlapping discovery is often important."

Lines 404-16 [Rule 16.1(b)(2)(E) Note]: The draft language would be shortened considerably:

> The Rules of Civil Procedure apply in MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings. Decisions whether to use master pleadings . . . .

The discussion of pleading rules and the question whether to include defenses here would be removed as unnecessary in this portion of the Note, which is basically about consolidated pleadings rather than the "vetting" topic.

Line 436 [Rule 16.1(b)(3)(B) Note]: "and defenses" would be retained.

Line 454 [Rule 16.1(b)(3)(B) Note]: The discussion agreed on revising the sentence at lines 454-55 as follows: "Other factors such as pending motions to dismiss, might include whether there are legal issues that should be addressed . . ." But the previous sentence might make this addition redundant: "And the timing of these exchanges may depend on other factors, such as motions to dismiss or other matters and their impact on the early exchange of information." **The addition of this language might be reconsidered in light of the presence of similar language in the prior sentence.**

Lines 458-68 [Rule 16.1(b)(3)(B) Note]: The Note would be shortened and simplified to read as follows:

> This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

This change removed the unnecessary invocation of certain (but not other) Civil Rules.

Lines 488-49 [Rule 16.1(b)(3)(C) Note]: The underscored sentence at the end of the paragraph would be deleted. The question of evidence preservation was not raised in the published preliminary draft, and might be a provocative thing to add at this point.

Line 510 [Rule 16.1(b)(3)(E) Note]: The bracketed phrase about Rules 16(a)(5) and 16(c)(2)(I) would be removed, as the Subcommittee has decided to use "resolution" rather than "settlement" in the rule.

Appendix
Draft before Subcommittee
on March 5, 2024

Feb. 29 Meeting Revisions (with Cooper suggestions)

**Rule 16.1. Multidistrict Litigation**

**(a) Initial MDL Management Conference.** After the Judicial Panel on Multidistrict Litigation ~~orders the~~ transfers of actions, the transferee court should schedule an initial management conference to [begin to] develop an initial management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

**(be) Preparing a Report for the Conference.** The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. Unless otherwise ordered by the court, t~~T~~he report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter in Rule 16. The report ~~may~~ also may address any other matter the parties wish to bring to the court's attention.

**(1)** The report must address whether leadership counsel should be appointed~~,~~ and, if so, it should also address the timing of the appointment and:

**(A)** the procedure for selecting leadership counsel ~~them~~ and whether the appointment should be reviewed periodically during the MDL proceedings;

**(B)** the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

**(C)** the~~ir~~ role of leadership counsel in any resolution of the MDL proceedings ~~settlement activities~~;

**(D)** the proposed methods for leadership counsel ~~them~~ to regularly communicate with and report to the court and nonleadership counsel;

**(E)** any limits on activity by nonleadership counsel; and

**(F)** whether and, if so, when to establish a means for compensating leadership counsel.~~;~~

**(2)** The report also must address:

**(A)**~~(2) identifying~~ any previously entered scheduling or other orders that ~~and stating whether they~~ should be vacated or modified;

**(B)** a schedule for additional management conferences with the court;

**(C)** how to manage the filing of new actions in the MDL proceedings;

**(D)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

**(E)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings.

**(3)** The report also must address the parties' [preliminary] {initial} [early] views on:

**(A)**~~**(3)** identifying~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

**(B)**~~**(4)**~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

~~**(5)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;~~

**(C)** ~~**(6)** a proposed~~ anticipated ~~plan for~~ discovery in the MDL proceedings, including any unique issues that may be presented ~~methods to handle it efficiently~~;

**(D)**~~**(7)**~~ any likely pretrial motions ~~and a plan for addressing them~~;

~~**(8)** a schedule for additional management conferences with the court;~~

**(E)**~~**(9)**~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

~~**(10)** how to manage the filing of new actions in the MDL proceedings;~~

~~**(11)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and~~

**(F)~~(12)~~** whether matters should be referred to a magistrate judge or a master.

**(c~~d~~) Initial MDL Management Order.** After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(b~~e~~) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

**Committee Note**

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There has been ~~previously was~~ no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the type of management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

**Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to [begin to] develop a management plan for the MDL proceedings and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b~~e~~) should ~~may~~ be of great value to the transferee judge and the parties.

~~**Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel perhaps more often on the plaintiff than the defendant side – to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference. While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL~~

~~proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~

**Rule 16.1(be).** The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in ~~the court's~~ Rule 16.1(be) ~~order~~ prior to the initial MDL management conference. This should be a single report, but it may reflect the parties' divergent views on these matters, as they may affect different parties differently. Unless otherwise ordered by the court, the report must address all the matters identified in Rule 16.1(b)(1)-(3). The court also may ~~select which matters listed in Rule 16.1(bc) or Rule 16 should be included in the report submitted to the court, and also may~~ include any other matter, whether or not listed in Rule 16.1(b) or in Rule 16~~those rules~~. Rules 16.1(be) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to [begin to] develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(be)(1)-(3~~1~~2) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

Oftentimes, counsel are able to organize in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

**Rule 16.1(be)(1).** Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel is often an early action, and court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) ~~This provision~~ calls attention to several ~~a number of~~ topics the court might [should] consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly [represent their clients~~plaintiffs~~,] {discharge their leadership obligations} keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries~~,~~ and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. ~~If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16.1(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).~~

The rule also calls for advising ~~a report to~~ the court ~~on~~ whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding. [Transferee courts have found that appointment for a term – sometimes one year – is useful as a management tool for the court to monitor progress in the MDL proceedings.]

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

Subparagraph (C) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, cross-cutting motions, bellwether trials, and settlement negotiations. ~~, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that – a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions~~

~~about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or~~

~~all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.~~

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(c~~d~~). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDLs, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Particularly before class certification is resolved, there is no across-the-board rule on handling such issues.

**Rule 16.1(b~~e~~)(2) and (3).** Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) are generally of an administrative nature, and often call for early action by the court. The matters identified by Rule 16(b)(3), by contrast, are generally of a more substantive nature and, thus, in the absence of appointment of leadership counsel should appointment be recommended, the parties only may be able to provide their [preliminary] {initial} [early] views on these matters.

**Rule 16.1(be)(2)(A).** When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts

from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

**Rule 16.1(b)(2)(B).** The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

**Rule 16.1(b)(2)(C).** Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate ~~transferor~~ district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.

**Rule 16.1(b)(2)(D).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems [(e.g., California and New Jersey)] have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding ~~may~~ becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, coordinating ~~avoiding~~ overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

**Rule 16.1(b)(2)(E).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule

56. ~~As noted above,~~ [The Rules of Civil Procedure] {Rules 8, 9, and 12} continue to apply in MDL proceedings. Not only must each claim or defense satisfy Rule 11(b), each claim [or defense] must also satisfy Rule 8(a)(2) [or Rule 8(b)] even though presented by a short form complaint [or answer] that relies in part on the allegations of the master complaint [or answer]. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

**Rule 16.1(b)(3).** Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

**Rule 16.1(be)(3)(A)~~(3)~~.** Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

**Rule 16.1(be)(3)(B)~~(4)~~.** In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims [and defenses] have been asserted without the inquiry called for by Rule 11(b). Experience has shown that ~~in MDL proceedings~~ an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. The methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. ~~Whether~~ Eearly exchanges ~~should occur~~ may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as ~~whether~~ motions to dismiss or other early matters and their impact on the early ~~might render the effort needed to~~ exchange of information ~~unwarranted~~. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). As noted above, there should be no doubt that – as in all actions – [the Rules of Civil Procedure] {Rules 8,9, 11 and 12} apply in MDL proceedings. An important part of the court's management of the MDL proceeding may include implementing the requirements of those rules. [Under some circumstances, {– after taking account of whether the party whose claim or defense is involved has reasonable access to needed information –} the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.]

~~**Rule 16.1(be)(2)(D)(5).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).~~

**Rule 16.1(be)(3)(C)~~(6)~~.** A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication. Some issues relating to discovery the court may want to address include the suitability of early preservation and service-of-process orders.

**Rule 16.1(be)(3)(D)~~(7)~~.** Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

~~**Rule 16.1(be)(2)(G)(8).** The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.~~

**Rule 16.1(be)(3)(E)~~(9)~~.** Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution ~~settlement~~ of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be made by the parties. But [as recognized in Rule 16(a)(5) and 16(c)(2)(I),][1] the court may assist the parties in ~~settlement~~ efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution ~~settlement~~.

[1] If we are avoiding use of the word "settlement," the bracketed references might better be removed. Rule 16(a)(5) refers to "facilitating settlement." Rule 16(c)(2)(I) is more general: "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." The latter does use "resolution" as well as "settlement," but is limited to procedures "authorized by statute or local rule," which might introduce some perplexities.

~~**Rule 16.1(bc)(2)((I)(10).** Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.~~

~~When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.~~

~~**Rule 16.1(bc)(2)(J)(11).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.~~

~~The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.~~

**Rule 16.1(bc)(3)(F)~~(12)~~.** MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

**Rule 16.1(cd).** Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is ~~were~~ appointed after the initial management conference under Rule 16.1(a).

Notes of MDL Subcommittee Meeting
Feb. 23, 2024

On Feb. 23, 2024, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Those participating included Judge David Proctor (Chair), Judge Robin Rosenberg (Advisory Committee Chair); Judge Hannah Lauck, Ariana Tadler, Helen Witt, Joseph Sellers, and David Burman. Additional participants included Emery Lee of the FJC, Allison Bruff and Zachary Hawari of the Rules Committee Staff, and Professors Richard Marcus and Andrew Bradt, as Reporters.

Before the meeting, Prof. Marcus had circulated two sketches of post-public-comment revisions of the published proposal to adopt a Rule 16.1. These sketches, which were referred to as Version 1 (dated Feb. 19) and Version 2 (dated Feb. 22 and circulated the evening before this meeting), appear as appendices to these notes of the meeting.

The meeting began with an overview of the main differences between Version 1 and Version 2. Both versions eliminate the position of "coordinating counsel," to which there had been many objections during the public comment period. In addition, as written Version 1 required the parties to include in their reports to the court only those matters the court had directed them to include, while Version 2 directed them to address every matter identified in Rule 16.1(b) unless the court ordered otherwise.

Both versions separate appointment of leadership counsel from other matters. The public comment period emphasized the importance of addressing appointment of leadership up front. But on other topics preliminary views may be all the court needs.

The two versions also different in how they treated issues other than leadership counsel. Both versions directed the parties to address appointment of leadership counsel. In Version 2, however, the other topics identified in Rule 16.1(b) were divided into two "tiers." The first [Rule 16.1(b)(2)] consisted of matters that were largely administrative and often needed prompt action by the court. The second [Rule 16.1(b)(3)] addressed other matters that were more "substantive" and might often be addressed most effectively after appointment of leadership counsel and, sometimes, after more experience with the evolution of the MDL proceedings.

So a basic question was whether to follow the Version 1 or Version 2 approach to topics other than leadership counsel. As the discussion developed, the consensus was to use Version 2.

One member began the discussion by explaining that Version 2 represents an effort to accommodate two sets of concerns. For one thing, many witnesses who appeared in the public hearings stressed that – at least from the plaintiff side – it would often be true that many of the matters included on the list in the rule would depend on familiarity with the cases that counsel did not yet fully possess. And this problem would be magnified if leadership counsel were to be appointed but had not yet been appointed.

At the same time, there were several matters that called for fairly immediate attention. A good example of that would be the possibility that scheduling or other orders entered before the cases were transferred by the Panel calling for actions that would not fit the overall management

of the MDL proceedings. These concerns prompted a desire to postpone action on these topics until later.

Balanced against this uncertainty, particularly among some on the plaintiff side, there was also an understandable desire among judges to get some basic information about the various topics listed in Rule 16.1(b) in addition to appointment of leadership counsel.

The division between 16.1(b)(2) and (3) sought to address these topics by "frontloading" the ones on which immediate action might be important [16.1(b)(2)] and calling only for "preliminary views" on the other topics.

A judge suggested that this approach could enable lawyers not ultimately selected for leadership to provide their views, and also present the court with a variety of views rather than (perhaps) only the views of the self-selected "leadership" emerging from "private ordering" within the plaintiff bar. Put differently, the concern was that "non-repeat players" be heard.

Another judge observed that the idea of "coordinating counsel" was conceived as assisting the court in part by enabling divergent views to come to the court's attention. That was not meant to give greater weight to the views of coordinating counsel. Instead, as was emphasized during the public comment period, the plaintiff lawyers self-organize pretty frequently.

A lawyer expressed concern about addressing several of the matters on the rule's list before appointment of leadership counsel. "We walk into court, and somebody goes up the podium and starts telling the judge things." It can be dangerous to have people talking to the transferee judge about factual and legal issues. "It's like a hand has been shown before it should be shown." Too often important decisions – even about the basic issues raised in the case – ought not be addressed until leadership counsel are appointed. This is a serious concern. People who presume they will be in leadership may prove to be mistaken about that, and it should be up to leadership to make the strategic decisions about which issues to push, and how.

At the same time, several of the matters included in 16.1(b)(2) in Version 2 could be helpfully addressed in the initial management conference.

But premature action on several of the matters in 16.1(b)(3) could have dangerous consequences. For example, requiring the plaintiff side to discuss the "principal factual and legal issues" or a "plan for discovery" could produce unfavorable consequences. "The problem is with the 'musts' in these redrafts." The transferee judge is hearing what might be regarded as unvetted views of only one or only a few lawyers on that side.

These comments drew the reaction that the command "must" had been in the published rule proposal, so long as the court directed the parties to discuss a given matter.

A judge noted that it could be desirable for lawyers not in leadership to be able to present their views to the court. That drew the response that it was important sort out potential positions before statements are made on the record before the court. Moreover, it is rare that individual attorneys appear at management hearings.

Another attorney shared these concerns. True, the judge benefits from having information about the views of the parties on a range of issues. And it's also true that in appointing leadership counsel courts should and have stressed getting a variety of views represented. This focus is carefully explained in the Committee Note.

A judge commented that it seemed odd that it might be too early to get "preliminary views" from counsel. For one thing, those preliminary views might properly affect the judge's selection of leadership counsel. For another, it stands to reason to expect defense counsel to address several of those matters, so it seems to make sense to prompt plaintiffs to address them also. Another judge noted that courts often require position statements.

An attorney reacted to the "preliminary views" terminology. If this had gone out for public comment with that term in it, there likely would have been comment that it was not defined. A response was to ask whether it would be more palatable without the word "preliminary" – "the parties views on" the various matters. Adding "preliminary" seems to stress that these are not binding views.

A different point was raised. Version 2 shows consolidated pleadings as a topic on which only preliminary views need be presented. That might sensibly be moved into 16.1(b)(2) rather than (3). But other things in (3) – for example the factual and legal issues likely to be presented, or a plan for discovery – ought not be the topic of a binding management order at this early point. Particularly as to leadership counsel appointed later, there is a risk they would be "handcuffed" by such an order.

A judge responded that judges need to hear about these issues early on, and that judges can be judicious about what provision for them ought to be included in the initial management order.

Discussion turned to the directive in Version 2 that all listed topics in 16.1(b) must be addressed unless excluded from the court's order. Proposed 16.1(b)(3) is watered down, and only seeks "preliminary views." What reason would a judge have for leaving things on that list out, particularly since the parties can tell the judge that it is premature to take action on them.

Another judge suggested that the Committee Note might make the point that the positions taken on these matters are "non-binding." And it was noted that the draft Committee Note seems already to say that in new language added after public comment:

> Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(8) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it."

A judge recognized that there could be a risk that premature comments by some counsel might mislead the judge, but noted also that the rule could serve as an "information-forcing" device that prompted counsel to provide the judge with insights and an array of views that would improve management of the MDL proceedings. Having only one voice on the plaintiff side could cause

problems. Perhaps an example is the common benefit order entered by Judge Chhabria in the Roundup litigation. Had he heard, for example, from lawyers with cases pending in state courts who challenged his authority to "tax" their settlements to pay leadership counsel in the federal MDL, he might have been better equipped to address the issue.

Another judge noted that "This rule is not just for judges." Instead, it's designed to unify what's going to happen in the litigation. "There are *always* multiple discovery plans." The judges and lawyers can handle these things appropriately.

Discussion turned to the 16.1(b)(3) item regarding a possible discovery plan. The consensus was that the alternative language would be preferable: "an overview of anticipated discovery in the MDL [proceedings], including any unique issues that may be presented."

A lawyer proposed moving what Version 2 presented as 16.1(b)(3)(C) (on consolidated pleadings) into the "frontloaded" category of 16.1(b)(2). That prompted a question about whether direct filing should be addressed so soon. A response was that this is really about tagalongs. Dealing with those up front can be important. Another reaction was that direct filings should receive early scrutiny. It is important that direct filing orders take account of possible choice of law complications. It was noted, however, that the Committee Note already addressed this concern:

> When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and *how choice of law issues should be addressed* (emphasis added).

A different view of direct filings was presented. Including that in the rule could seem to create a presumption that this is a legitimate practice. From a defense viewpoint, that is far from a unanimous view. But another participant noted that the cases cited in a challenge to direct filing orders (usually by stipulation) showed that they do not exceed the transferee judge's powers.

As the meeting was ending, there was an effort to recap. The next step would be for Prof. Marcus to provide a new draft reflecting the discussion during this meeting. Version 2 would be the starting point, with the following changes:

> Line 7: the added phrase "consider appointment of leadership counsel and" would be removed.
>
> Line 23: "address" would be moved after "must."
>
> Lines 25-26: the reference to Rule 16 would be restored.
>
> Lines 31-32: The brackets would be removed around "the timing of such appointment."

Lines 62-63: The verb would be changed to "address" and alternatives to "preliminary" would be offered, probably "initial" or "early."

Lines 72-74: 16.1(b)(3)(C) (on consolidated pleadings) would be moved into 16.1(b)(2).

Lines 76-78: This would be changed to "an overview of anticipated discovery in the MDL [proceedings], including any unique issues that may be presented."

Professor Marcus would try to circulate a revised rule draft promptly. Ideally, the Subcommittee could try to meet again on March 1 or March 4. The latter date looked more workable to some Subcommittee members. The "official" due date for agenda book materials is March 15.

APPENDIX
Drafts before Subcommittee on
Feb. 23, 2024

Version 1
(draft of Feb. 19)

**Rule 16.1. Multidistrict Litigation**

**(a) Initial MDL Management Conference.** After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to consider {address} appointment of leadership counsel and develop an initial {interim} management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

**(be) Preparing a Report for the Conference.** The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address whether leadership counsel should be appointed and any other matter designated by the court, which may include any matter identified in Rule 16.1(b)(1) and (2) ~~listed below~~ or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

**(1)** If the report recommends appointment of ~~whether~~ leadership counsel, it should address [the timing of such appointment and] ~~be appointed, and if so~~:

**(A)** the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;

**(B)** the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

**(C)** their role in [the] {any} resolution of the MDL proceedings ~~settlement activities~~;

**(D)** proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;

**(E)** any limits on activity by nonleadership counsel; and

**(F)** whether and, if so, when to establish a means for compensating leadership counsel;

**(2)** The [report] {agenda} must also provide {the parties'} views on:

**(A)**~~(2) identifying~~ any previously entered scheduling or other orders that ~~and stating whether they~~ should be vacated or modified;

**(B)**~~(3) identifying~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

**(C)**~~(4)~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

**(D)**~~(5)~~ whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

**(E)**~~(6)~~ a proposed [an overview of a] plan for discovery, including methods to handle it efficiently;

**(F)**~~(7)~~ any likely pretrial motions and a plan for addressing them;

**(G)**~~(8)~~ a schedule for additional management conferences with the court;

**(H)**~~(9)~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

**(I)**~~(10)~~ how to manage the filing of new actions in the MDL proceedings;

**(J)**~~(11)~~ whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

**(K) ~~(12)~~** whether matters should be referred to a magistrate judge or a master.

**(c~~d~~)** **Initial MDL Management Order.** After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel would be appointed, and an initial [a tentative] {an interim} management plan for the matters designated under Rule 16.1(b~~e~~) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Version 2
(Draft of Feb. 22)

**Rule 16.1. Multidistrict Litigation**

**(a)** **Initial MDL Management Conference.** After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to consider appointment of leadership counsel and develop an initial management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

**(be)** **Preparing a Report for the Conference.** The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must, unless otherwise directed by the court, address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court~~, which may include any matter in Rule 16~~. The report may also address any other matter the parties wish to bring to the court's attention.

**(1)** The report must address whether leadership counsel should be appointed. If the report recommends appointment of leadership counsel, it should address [the timing of such appointment and]:

**(A)** the procedure for selecting leadership counsel ~~them~~ and whether the appointment should be reviewed periodically during the MDL proceedings;

**(B)** the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

**(C)** the~~ir~~ role of leadership counsel in any resolution of the MDL proceedings ~~settlement activities~~;

**(D)** the proposed methods for leadership counsel ~~them~~ to regularly communicate with and report to the court and nonleadership counsel;

**(E)** any limits on activity by nonleadership counsel; and

**(F)** whether and, if so, when to establish a means for compensating leadership counsel;

**(2)** The report must also address:

**(A)**~~(2) identifying~~ any previously entered scheduling or other orders that ~~and stating whether they~~ should be vacated or modified;

**(B)** a schedule for additional management conferences with the court;

**(C)** how to manage the filing of new actions in the MDL proceedings; and

**(D)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them.

**(3)** The report must also include the parties' preliminary views on:

**(A)**~~**(3) identifying**~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

**(B)**~~**(4)**~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

**(C)**~~**(5)**~~ whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

**(D)**~~**(6)**~~ a proposed [an overview of a] plan for discovery, including methods to handle it efficiently;

**(E)**~~**(7)**~~ any likely pretrial motions and a plan for addressing them;

~~**(8)** a schedule for additional management conferences with the court;~~

**(F)**~~**(9)**~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

~~**(10)** how to manage the filing of new actions in the MDL proceedings;~~

~~**(11)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and~~

**(G)**~~**(12)**~~ whether matters should be referred to a magistrate judge or a master.

**(c**~~**d**~~**)** **Initial MDL Management Order.** After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel would be appointed, and an initial management plan for the matters designated under Rule 16.1(b~~e~~) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

## Summary of Public Comment Period Testimony and Written Comments

This memo summarizes the testimony and written comments about the Rule 16.1 proposal. When possible, it gathers together comments from the same source, including both testimony and separate written submissions. On occasion, the summary of testimony includes the written testimony submitted by witnesses.

The written submissions are identified with only their last four digits. The full description of each of them is USC-Rules-CV-2023-0001, etc. This summary will use only the 0001 designation for that comment.

The summaries attempt to identify matters of interest by topics. For some of the initial topics there may not have been comments or testimony. If none are received on those topics they will be removed from the final summary. The topics are as follows:

### Rule 16.1

General
Rule 16.1(b) – Coordinating Counsel
Rule 16.1(c)(1) – Leadership Counsel
Rule 16.1(c)(2) – Previously Entered Orders
Rule 16.1(c)(3) – Identifying Principal Issues
Rule 16.1(c)(4) – Exchange of Factual Basis of Claims
Rule 16.1(c)(5) – Consolidated Pleadings
Rule 16.1(c)(6) – Discovery Plan
Rule 16.1(c)(8) – Additional Management Conferences
Rule 16.1(c)(9) – Facilitate Settlement
Rule 16.1(c)(10) – Manage New Filings
Rule 16.1(c)(11) – Actions in Other Courts
Rule 16.1(c)(12) – Reference to Master/Magistrate Judge
Rule 16.1(d) – Initial Management Order

### Oct. 16, 2023, Washington, D.C. Hearing

#### General

Mary Massaron: The biggest problem is the presence of meritless claims. Early MDL practice was like the wild west. An overwhelming proportion of the claims submitted turned out to have no foundation. Winnowing those claims should be job 1. Timing should be imposed by rule. Ad hoc approaches to this vetting process will not work. For individual cases, we have bright line rules to weed out groundless claims up front. But in large MDL proceedings that is not happening. In large MDL proceedings, however, Rule 12(b)(6) does not work.

Alex Dahl (LCJ) & 0004: Proposed 16.1 contains no requirements; to call it a "rule" is aspirational. At the same time, the Committee Note merely offers advice. Moreover, those suggestions include topics that are not suitable for rulemaking because they are either unsettled

matters of law or disallowed by (or in serious tension with) existing rule provisions. Not every topic that comes up in court is appropriate for incorporation into the rules. The 16.1 proposal should be revised to provide rules guidance to ensure claim sufficiency and to remove the subsections that could do more harm than good by enshrining into the rules concepts that raise complicated or undecided questions about existing rule or statutory provisions. For example, it is far from clear that MDL courts have authority to appoint leadership counsel or to supplant an MDL plaintiff's own lawyer, so it would be imprudent to include this ill-defined concept in the rules.

Kaspar Stoffelmayr & 0008): Promulgating a rule for MDL proceedings is long overdue. The current reality in MDL proceedings is ad hoc rulemaking. "I can't tell the client what to expect." Although ensuring the MDL transferee judges have broad latitude in managing transferred cases is important, the current proposal falls short of what is needed because it includes no mandatory language. This current reality contributes to the proliferation of unsubstantiated claims and inadequately restricts the judge's discretion with respect to what are essentially non-reviewable orders. Altogether, these circumstances have contributed to the lack of confidence among both plaintiffs and defendants in MDLs as a means to fairly adjudicate disputes. I agree with the LCJ comments. "The unpredictability inherent in ad hoc rulemaking contributes to the unsubstantiated claims problem that has become the defining characteristic of modern MDLs," prompting "cut and paste complaints on behalf of hundreds or thousands of plaintiffs." Not every judge will be equally adept at MDL case management, so "there is much to be said for restricting a lone MDL judge's discretion in favor of considered rules of procedure." Only the insiders know how to play the game. The proposed rule should be amended as suggested by LCJ to remove the unnecessary invitation to engage in ad hoc rulemaking. In short, though there is a crying need for rules to solve these problems, this rule will not do so. There is great need to insist that claimants show that their claims have substance up front.

John Beisner: I generally agree with the LCJ comments.

Chris Campbell: We need a rule amendment providing firm positions on MDL management. But the current draft conflicts with existing rules, advisory notes, and existing law. The 1926 Senate Judiciary Committee Report on the Rules Enabling Act stated that the goals of the national rules were to make process "uniform," and also aimed at "simplicity." But the current reality is that, in the absence of rules accessible to the entire legal community, repeat players thrive while others face confusion and delay. Instead of solving this problem, the draft invites increased process ad hockery. This is not a real rule.

James Shepherd: We need MDL rules that are specific. Although 16.1 is a good start, it has flaws.

Fred Haston (Int'l Assoc. of Defense Counsel): Based on 20 years of involvement in major MDL proceedings, I endorse the LCJ comments. The reality of the practice has been ever expanding dockets of MDL cases. This is not a healthy situation. Rule changes should recognize the need for structure, predictability and uniformity. That permits litigants to know what's coming, and promises more efficient outcomes.

John Guttmann: My views are generally in line with the DRI comments on proposed 16.1. There has been an exponential growth in the number of actions transferred to MDL courts. But the 16.1(c)(4) provisions do not adequately address this upsurge in filings with meaningful methods to screen out unsupportable claims. The rule should require each plaintiff to provide support for the claim asserted, and the Note should outline the reason for the rule's adoption – the proliferation of unfounded claims in MDL proceedings. With such a requirement, "failure to supply the required information makes their dismissal almost a ministerial task rather than calling for the more resource-intensive motion practice required under the existing rules."

Harley Ratliff: Based on 20 years of experience with MDL proceedings, I can report that the current system is broken. It imposes on the courts the burden of dealing with thousands of largely un-vetted claims. The presence of those claims devalues the claims of real plaintiffs who have real claims. Rule 16.1 is a start toward dealing with the disfunction of MDL today, and much of what it proposes already takes place frequently in large MDLs. Although the draft rule therefore may be helpful to entirely uninitiated MDL judges, it does not address the underlying problems. "To fix the current situation, we must go beyond Rule 16.1 and begin to address the real problems with our MDL system."

Sherman Joyce (President, American Tort Reform Assoc.): The preliminary draft is insufficient. An industry has developed around MDL litigation. "Hundreds of millions of dollars are spent on generating claims for a single mass tort." The total amount spent on such ad campaigns is $7 billion. This spending supports advertising campaigns and the filing of speculative litigation. Because screening is minimal, clams are filed *en masse*. As a consequence, the MDL docket has surged; as of the end of the 2022 fiscal year it reached an astounding 73% of pending actions. But a significant proportion of these claims – as high as 40% or 50% – are not viable. What is needed is a rule that (1) responds to the extraordinary surge of mass tort litigation, (2) requires that cases be carefully screened and provides a mechanism for courts to dismiss speculative claims at an early stage, and (3) encourages courts to rule on dispositive legal issues, such as t novel theories of liability, general causation, preemption, or statutes of limitation, as soon as practicable.

Deirdre Kole (Johnson & Johnson): I applaud the Committee's efforts to bring much needed change to the governance of MDL proceedings. There is undoubtedly a great need for amending the rules to address these issues. The federal judiciary is struggling under the current rules to deal with ever-growing MDLs. Tens of thousands of claims are being submitted without basic factual or legal support, and the judiciary is besieged as a result. Some plaintiff attorneys engage in "stockpiling of claims" because FRCP safeguards that ordinarily prevent the initiation of baseless lawsuits are not utilized or do not function in the MDL context. These groundless claims disappear when real vetting begins. But they should never have been filed in the first place. In some litigations, as many as 45% have dropped out at that point. But the current draft does not solve this problem.

Leigh O'Dell: Based on extensive experience representing plaintiffs in MDL proceedings, I support efforts to improve the MDL process. 16.1 is valuable in encouraging the MDL court to schedule an initial management conference soon after the creation of an MDL proceeding. And it could be very helpful for the court then to address several of the matters specified in 16.1(c) – (1) appointment of leadership counsel; (2) identifying orders that might appropriately be vacated or

modified; (3) identifying the principal factual basis for the case and legal issues to be presented, to the degree known and without prejudice to leadership after appointment (language we think should be added to (c)(3), (10) managing the filing of new actions, and (11) whether related actions have been or will be filed in other courts. This shortened list of topics will enable the court to address preliminary matters needing attention at the outset. On the other hand, it would be premature for the court at this early stage (and before leadership counsel are appointed) to address the other items listed in 16.1(c): (4) exchange of information; (5) consolidated pleadings; (6) a plan for discovery; (7) likely pretrial motions; (8) schedule for further management conferences; (9) measures to facilitate settlement; and (12) whether matters should be referred to a magistrate judge or a master. Before decisions are made about these matters, leadership counsel should be in place and able to evaluate these issues. There is a risk that the process could become "an ill-informed box-checking exercise." We favor a more limited rule with an initial management conference limited to the matters suitable for consideration at that point.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: We always try to talk with opposing counsel early in the case, and also talk with other counsel on our side. But opposing counsel often does not want to have discussions. But this rule should not apply to all MDL proceedings. The Committee's entire focus has been on mass tort MDLs. But most MDLs are not mass torts. MDLs that are not mass torts implicate different case-management issues. For that reason, application in such MDLs could disrupt and delay other MDLs. For example, when there are class actions included ordinarily the first step is appointment of leadership counsel, and those class counsel are authorized by court order to act on behalf of the entire class. For example, there simply are not bellwether trials in class actions. This is not a distinction based on the nature of the substantive claims asserted (securities or antitrust v. mass torts), but the distinctive features of class actions.

Mark Chalos: Not two MDLs are exactly alike. The needs of each MDL are different, so the management plans need to be tailored to the given MDL. I think the last sentence of the first paragraph of the Note should be changed to insert the word "flexible" before "framework": "There previously was no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a flexible framework for the initial management . . ." In addition, at the beginning of the second paragraph of the Note I would add the following sentence: "Because MDLs vary significantly, some or all of the provisions of Rule 16.1 may not apply in a particular MDL." The amendment should also say somewhere whether the initial management conference supplants the Rule 26(f) requirement to develop a discovery plan.

Tobi Milrood: There is a risk that this rule would inject unintended ambiguity or uncertainty into complex litigation. For example, the LCJ recommended additions are purely focused on product liability MDLs and ignore the vast array of complex litigation before transferee judges. "For judges without experience in MDLs, the list of topics will often become a de facto checklist of matters that must be considered by the parties. * * * [E]xperience foretells that defendants in an MDL will urge the transferee judge to address all listed topics." This is the "initial management conference," but there is no provision for additional conferences. Using this conference to lock the plaintiff side into a schedule would be harmful. How about instead saying

it is an "early" management conference. "The rule cannot be a substitute for training new judges or for Manual on Complex Litigation, which is still a beacon for MDL courts."

Alyson Oliver: The coordinating counsel should be somebody who has a substantial stake in the litigation. If you get an outsider, considerable time (and expense) will be involved in getting that person up to speed. This concern is not about allowing the court to supervise the conduct of the litigation, but instead to foster efficiency.

James Bilsborrow: I am encouraged that proposed 16.1 embraces a flexible approach to the initial MDL management conference. "MDLs are not one-size-fits-all and many of the environmental and toxic tort cases I litigate involve diverse claims pursued by a range of people and entities." There are no parameters in the rule about qualifications to be coordinating counsel. By way of comparison, interim class counsel under Rule 23(g) must have a client. Without this interlocutor, there may be competing reports. If the court designates somebody as coordinating counsel, the parties will treat that person as de facto lead counsel because the court "has blessed this individual." This effect could stifle divergent views. In one toxics MDL, for example, the court received two competing reports and ended up establishing separate tracks for claims of different sorts. The worse case scenario haunts this proposal.

Diandra Debrosse: I am not part of the "old boys network," and that is the likely source for this early appointment. So including this provision will impede new entrants. Inevitably this person will hold great power even though the judge has not explicitly granted that power.

Dena Sharp: "The draft rule and note promote the flexibility and discretion that an MDL transferee court needs to effectively manage its docket in a manner that is tailored to the needs of the unique MDL before it." But Rule 16.1(c) has too many topics on its list. Instead of frontloading all those topics, the court should be urged to hold periodic status conferences. One approach would be to add this to the introductory text of Rule 16.1(c): "The transferee court may determine, or a party may suggest, that certain topics should be addressed on a preliminary basis at the initial conference, or deferred to a subsequent conference, as appropriate to the needs of the MDL, and consistent with Rule 16.1(d)."

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: This proposed rule is particularly gratifying to me because it fulfills my own decade-long crusade championing a rule amendment to address MDLs. "I urge the Committee to stay the course." I was the first to compare the statistics maintained by JPML staff with those of the A.O. and found then that MDLs included more than 40% of pending civil cases, and that percentage has recently jumped to more than 60%, largely due to the 3M Combat Earplug MDL. I offer 43 style and formatting suggestions. More generally, the Committee Note overreaches when suggesting that its recommendations might also be suitable for other multiparty litigations. The draft goes too far, and ventures into areas far afield. The Manual for Complex Litigation is a more suitable guide for such litigation. In addition, the Committee Note at lines 132-43 should be revised to add the following:

> The germaneness and urgency to address certain topics at the initial management conference will depend on the nature of the MDL, the judge's and parties' familiarity with MDL practices and procedures, and the importance and necessity of input from leadership

> counsel, who may not yet have been appointed. Subdivision (c) lists certain case-management topics that might be useful to discuss at the initial management conference, particularly in some large MDLs, but expressly provides discretion to the court and the parties to address other topics. Those other topics are described in the Manual for Complex Litigation, which contains more comprehensive lists of topics that may be useful.

There is actually little consensus on what topics should be addressed up front. Focusing on a select prescribed list of topics is not likely to be useful. "There is no reason to believe that the bench and bar will behave differently after the Rule takes effect. In fact, by enshrining these selected topics in the rule without meaningful clarification, the bench and bar likely will focus solely on them, disregarding many topics that might be more important under the specific circumstances of the case.

Frederick Longer (0019): I commend the Committee for its efforts to provide some structure for modern MDL practice, but many of the rule's fixes amount to solutions to problems that do not exist or are matters best left to practice guides. LCJ, for example, said that the rule is "aspirational," and not really a rule. The rule is not necessary. The problems cited in pharmaceutical product MDLs are not present in other types of MDLs. "Calls for a uniform MDL rule mandating receipts or medical records at jump street amounts to overkill for most other MDLs." I believe that benign neglect is the best course. If the Committee insists on proceeding, some Note mistakes should be fixed. A leading example is that the Note compares class actions (with commonality requirements) to MDLs. But in a data breach MDL consisting solely of consolidated class actions, that's too broad a brush and the Note could haunt class counsel. I think that sentence should be removed. In addition, it could be beneficial to remove the word "initial" from the description of the management conference called for by 16.1(a); this should be an iterative process.

Norman Siegel: There is a facial disconnect between proposed 16.1 and the MDL cases my firm typically handles, which are class actions. The disconnect is evident throughout the entire rule, which fails to take account of the reality that many MDLs are made up of class actions. The "coordinating counsel" position, for example, could be counterproductive in class actions. In MDLs consisting of multiple class actions, the first order of business should be a schedule of motions for appointment of interim class counsel. And Rule 23(g)(3) on interim class counsel already exists. I propose three solutions: (1) Exclude MDLs consisting solely of class actions from the rule; (2) As to "hybrid MDLs" (consisting of class actions and individual actions), the rule should be clear that nothing in 16.1 supersedes Rule 23(g); and (3) if "coordinating counsel" is retained, the rule should make it clear that this position is limited to purely ministerial duties pending the appointment of interim class counsel.

Jennifer Hoekstra: There is no urgency about adopting a rule. MDL counsel and transferee judges are not attempting to circumvent the FRCP. "The Committee must understand that there have been decades of MDL litigation where the FRCP, as they exist, have already been adequately applied. Codifying the types of clauses included in proposed Rule 16.1 will have an unintended consequence of changing the fabric of mass torts unless this committee considers [my] comments." There are already more than enough sources of guidance for handling MDLs, including the Manual for Complex Litigation and the Annotated Manual for Complex Litigation. If the rule goes

forward, 16.1(c) should be limited to (1) (leadership counsel); (2) (scheduling order identification); (3) (identifying factual and legal issues, though without prejudice to later revision); (10) (managing new filings); and (11) (whether related actions have been filed in other courts. As to the other matters, there is a significant disadvantage for plaintiff counsel and the rest should be stricken from the rule.

Patrick Luff: I share the concern of an Advisory Committee member about "mission creep." "A seemingly innocuous rule providing mere suggestions for early management could quickly become an unwieldy leviathan." On that, recall the length of the Manual for Complex Litigation. On the particular issue of "claim insufficiency," the Committee might wisely not try to devise a rule for MDL proceedings; "the matter would better be dealt with through an amendment of Fed. R. Civ. P. 23 that allows class certification of individuals injured by corporate misconduct." "The solution is simple. Amend Rule 23 to relax certification requirements and allow for class treatment of personal injury and consumer protection claims."

Emily Acosta (testimony & 0020): From a mass torts plaintiff-side background, I believe some of the proposed changes strike an appropriate balance, but others raise serious concerns. I generally support the idea of an MDL management conference. But I disagree with several specific proposals. Most of the items in 16.1(c) should be removed, or at least no "formal, written report" to the court should be required. Instead, 16.1(c) should only say that counsel should "be prepared to address" the enumerated topics.

A.J. de Bartolomeo: At the earliest stages of the cases, the plaintiffs (unlike the defendants, who have fewer organizational problems) are often not really in a position to deal with most of the issues listed in Rule 16.1(c). Only after formal leadership is appointed would it be timely to address those issues.

Lise Gorshe: As a plaintiff lawyer, I support the proposed rule as a method to provide guidance to courts and parties. But in the mass tort context, I find some provisions troubling. The coordinating counsel provision in 16.1(b) is not a good idea. "In fact, appointing first a coordinating counsel that is later replaced by leadership counsel may slow the process when continuity is lacking." And the list of topics in 16.11(c) includes many that should not be addressed until leadership has been appointed. This applies to topics (4), (5), (6), (7), (9), and (12). Scheduled status conferences will provide occasions for the judge to monitor and supervise these topics.

Rachel Hampton: From the perspective of a young lawyer, it still seems like much of this material deals with "inside baseball" issues. It would be useful to have a road map for MDLs, since currently they are not mentioned in the FRCP.

Jennifer Scullion: The best way to achieve efficient management of MDL proceedings is through early and continuing management. But the proposed rule tries to do too much, too soon. Combining both the selection of leadership counsel and many topics that leadership will have to address at the same time is not sensible. Often it will not be possible early on for plaintiffs to identify the principal factual and legal issues. And the draft seems to invite attention to "early discovery" based on that forecast. The potential for phasing, bifurcation, etc., is often one of the most hotly contested issues in litigation. Similarly, modification of existing scheduling orders, the

possibilities of consolidated pleadings, the timing and nature of motions to dismiss and for class certification and a proposed discovery plan are all matters the parties should have more time to consider. And settlement is among the most important issues in many cases. "While it certainly can be helpful to begin addressing settlement processes early, it makes better sense to settle on a leadership structure and map out some of the 'big picture' issues first, rather than having the parties submit premature proposals through an ad hoc drafting process." At least the rule should be softened to say that the initial conference is to allow the court to "consider and take appropriate action" on the leadership and imminent scheduling matters set forth in 16.1(c)((1) and (2). The coordinating counsel idea should be removed. And 16.1(c) should not call for a report, but only that counsel be prepared to discuss specified issues with the court at the initial management conference.

Feb. 6, 2024, Online Hearing

Mark Lanier: What problem is this rule trying to solve? It seems designed to provide guidance to judges because they will have a big job handling an MDL. The rule was not proposed because something is broken, but the rule goes further than mere guidance to judges. As drafted, it will add complexity to MDL proceedings and reduce both efficiency and justice. The fact that the number of actions subject to an MDL transfer order has increased is not a problem, and not due to the growth in unsubstantiated claims. Indeed, the number of MDLs has declined int he past decade, and only 10% of those MDLs involved more than 1,000 actions. The growing total number of actions in MDL proceedings is largely a function of the length of time it takes to resolve a complex MDL. And just now, the main reason the MDL actions are such a large portion of the federal civil docket is the 3M earplug MDL. The vast majority of those claims are valid and are being settled.

Jessica Glitz: MDLs are so varied that there is no "magic formula" for handling them. And though a small number of MDLs include the great variety of all individual actions within MDL proceedings, actually only a small proportion of MDLs approach this dimension. At present, nearly 60% of the MDLs have fewer than 100 cases.

Ellen Relkin: Based on decades of experience in MDLs, I can report that they have functioned well for decades. Relatively recently, there has been a concerted campaign by the defense bar to obtain legislation or, when that did not work, rule changes to erect barriers to product liability MDLs. The current proposal is not necessary, though it may be slightly helpful to some new MDL judges in the initial handling of a new MDL assignment.

Jennie Anderson: The proposed changes appear mainly directed toward mass tort MDLs, and not those comprised mainly or entirely of class actions. Rule 23 already exists to govern class actions, and Rule 23(g) provides criteria of interim class counsel. The rule should only apply to mass tort MDLs.

Seth Katz: Based on extensive experience in MDLs, I see some components of the proposed rule that will improve or "codify" what is being done by many transferee courts. But other components, though drafted with good intentions, are likely in practice to create less efficiency or result in confusion. Specifically, in terms of the items listed in 16.1(c) it is useful to

focus on (1) appointment of leadership counsel; (2) identifying scheduling orders that might be vacated or modified; (3) identifying the primary factual and legal issues to the extent known; and (4) managing the filing of new actions. This shortened list focuses on what should be addressed up front. But discussion of the remaining topics in 16.1(c) would be premature because they all require substantive decision-making about the case itself, which is not possible until leadership is appointed. There is a risk that this list will become an ill-informed box-checking exercise.

Roger Mandel: There should be a two-tiered approach to initial organization of an MDL, with most of the topics listed in 16.1(c) deferred until leadership counsel are in place. I attach a proposed rewrite of the proposed rule and Note to implement these suggestions. Among other things, the revision addresses the reality that leadership in class actions (if included in the MDL) must be appointed differently from plaintiff leadership counsel. I see nothing in the testimony on this proposal – from either side of the v. – arguing against deferring attention to most of the issues until after appointment of leadership counsel. Taking this approach will alleviate major stakeholder concerns.

Lauren Barnes: Most of my MDL experience is with class actions, and they are not really suited to this rule. I think the rule should exclude MDL proceedings made up primarily or exclusively of class actions. Alternatively, an explicit cross-reference to Rule 23(g) in Rule 16.1(b) and 16.1(c)(1)(B) should be added. The rule should also state that the role of coordinating counsel is purely ministerial pending appointment of class counsel. I addition, the reference to consolidated pleadings should acknowledge that under Rule 23 it may be that a consolidated class action complaint is all that is needed, and is usually provided now without the need for this new rule.

Kellie Lerner (President, Committee to Support the Antitrust Laws): Although mass tort MDLs represented hundreds of thousands of individual actions, most MDLs are not mass torts. So a rule for all MDLs must consider the diverse range of cases that are subject to transfer under § 1407 and whether a rule animated by just one kind of MDL should apply to others that do not implicate the same issues.

William Cash: It is essential that any rule ensure that MDL judges retain their traditional flexibility to handle the MDLs assigned to them. "I have never seen an MDL judge who did not approach MDL procedure as the unique animal that it can be." But the proponents of this rule seem to think there is too much variation from judge to judge, so that a uniform format should be prescribed. I do not understand this to be a problem worth solving. So the directive in 16.1(c) that the judge may select appropriate topics for the report, but 16.1(d) then says that the judge "should" enter an order afterwards. The implication is that every one of the factors set out in 16.1(c) must be the focus of the court's order, even if not particularly relevant to this MDL. The problem is that "suggestions" in rules "sometimes have a way of calcining by practice into mandatory inflexible 'musts' later." The Rule and Note should be modified to emphasize that the court retains flexibility. The Note or Rule should be amended to make clear that it may not apply to every MDL.

Max Heerman (Medtronic): MDL proceedings impose huge costs on defendants. "Every dollar that Medtronic and other Life Sciences companies unnecessarily spends on MDL litigation could be used far more productively to provide more jobs, return money to shareholders, and – most importantly – improve healthcare for patients." I focus my concerns on (c)(4).

Jessica Glitz: It is notable that nearly 60% of the currently active MDLs have fewer than 100 cases in them. For decades, these MDL proceedings have used the FRCP, and there is no urgent need for an additional rule in the average MDL. I agree that some features of it might be of use, such as initially addressing selection of leadership counsel, providing a schedule for additional management conferences, providing for management of newly-filed actions, and management of related actions, many other issues should not be addressed until leadership counsel are appointed.

Seth Katz: Don't "fix" what is not broken. Though some aspects of proposed 16.1 may improve MDL practice, others are problematical. The coordinating counsel proposal could cause confusion or even chaos. If this is to be a neutral, that seems to usurp the position of the magistrate judge. The proposal is unclear about where this person's powers start and end. Only a few of the topics in proposed 16.1(c) are suitable for discussion prior to appointment of leadership counsel. What would be better than this proposal is a much more limited rule that calls for a very early management conference addressing only a short list of subjects.

Dimitri Dube: Proposed 16.1(b) will automatically stifle diversity. The plaintiffs' bar can self-organize and give appropriate weight to diversity. The Note to 16.1(c)(1) does take a balanced approach to leadership counsel appointments. But the 16.1(b) appointment happens too soon.

Written Comments

Andrew Straw (0012 & 0013): We need a national standard for how to implement state court rules applied to an MDL. Whenever an MDL court decides an issue of state law, that court should be required to certify those question of state law to the relevant state supreme court, and to be bound by the answers. In MDL 2218, the MDL court said one thing about state law and the state supreme court adopted a different interpretation. In addition, it should be required that if the court of appeals having jurisdiction over the MDL court makes a decision interpreting state law, that interpretation should be binding after return of the case to the originating court. In addition, to avoid the problem of "alien circuits" deciding the meaning of state law for states outside their circuit, MDLs should be created in the same circuit where the injury actually occurred.

Prof. Charles Silver (0015): This comment attaches copies of the following articles: Charles Silver & Geoffrey Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 Vand. L. Rev. 107-77 (2010); and Robert Pushaw & Charles Silver, The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations, 48 BYU L. Rev. 1869-1959 (2023).

James Beck (0017): In this century, the MDL procedure has had an effect opposite to what Congress wanted in 1968. Instead of promoting judicial efficiency, it has had the opposite effect, at least in mass-tort MDLs. These developments have led to a wholesale abandonment of the Federal Rules. Against this background, proposed 16.1 falls far short of addressing the real problems. Nearly 80% of pending federal civil cases are in MDLs, but the rules do not address the unique adjudicatory and administrative problems these agglomerations cause. The rules were crafted decades before MDL proceedings arose, so it is not surprising that they do not address these problems. Without uniform rules, there is no predictability in MDL proceedings. The rules regularly neutered in MDL proceedings include the following:

Rule 3: This rule is circumvented in MDL proceedings that use filing alternatives like an "MDL census" or "census registry." These provisions do not require claimants to state a claim, but only to "register" their claims with a third party claims administrator. These claimants are relieved of the need to pay a filing fee, as are ordinary plaintiffs. And this has been used in at least three large MDLs – 3M Earplugs, Zantac, and Juul Labs. "MDL courts' refusal to follow Rule 3 effectively eliminates any barriers to asserting claims. * * * The lack of a Rule 3 complaint essentially freezes each MDL claimant's suit, since the filing of a complaint is what triggers the application of other FRCP."

Rule 7: Repeatedly, MDL courts have departed from Rule 7 by allowing "master" complaints. Some excuse their failure to follow the rules by characterizing these submissions as "administrative tools." The predictable result is that large numbers of unvetted plaintiffs remain in the MDLs for years. A rules change could fix this problem. Many MDLs feature pleadings that do not exist under Rule 7.

Rule 8: Under the Supreme Court's *Twombly* and *Iqbal* decisions, MDL courts preclude individualized motions that are routine in individual civil actions and critical to policing insufficiently pleaded claims. "Refusal to apply Rule 8 to MDLs is only getting worse." In one case, a master nullified Rule 8 altogether by treating fact sheets as a substitute.

Rule 12: "Despite Rule 12(b)'s critical gatekeeping role, MDL courts have postponed or even refused to consider defendants' Rule 12(b) motions, despite the Rule not providing for postponements or rejections, in either MDL proceedings or any other civil litigation."

Rule 16: The *Opiates* litigation pushed Rule 16 "right to the edge."

Rule 26: In MDLs, plaintiffs are often excused from making required initial disclosures. In addition, some courts reorient the "proportionality" requirement of Rule 26 to look not to the proportionality with regard to the individual claim, but instead with regard to the overall MDL proceeding.

Rule 56: In some MDL proceedings, courts permit a postponement under Rule 56(d) without requiring what the rule says must be supplied – an affidavit supporting postponement of the court's decision.

Proposed Rule 16.1 does nothing to prevent MDL transferee judges from failing to follow these rules. "Given the enormity of the problem * * * it is questionable whether proposed Rule 16.1 * * * is worth the effort."

Federal Magistrate Judges Association (0018): "The FMJA Rules Committee members fully endorse the new rule and its flexible approach."

Maria Diamond (0029): I question the purpose behind the rule proposal. What problem are we trying to solve? The rule goes much farther than providing mere guidance to judges, and would add unnecessary complexity of an already complex process. For example, the coordinating counsel idea will mainly add complexity. Defense representations that MDLs are "overwhelming" the courts are wrong.

Hon. Charles Breyer (N.D. Cal.) (0031): I have conducted more than a dozen MDL proceedings. I am a "recent convert to the rules process directed to Multidistrict Litigation." My case management decisions in MDL proceedings have always been guided by the Federal Rules of Civil Procedure. Proposed Rule 16.1 addresses the goal that litigation be "just and efficient" by providing the parties with a checklist of options that, in any given case, may achieve efficiency and a just result. I was an early skeptic about rulemaking in this area, but am now a convert in light of the "precatory, as distinct from mandatory" nature of this rule proposal. "I urge adoption of proposed Rule 16.1."

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. We believe "the Rule is a good idea and orients judges and counsel to the court case management principles that effective case management requires." In particular, early vetting, two-way discovery, and coordination with overlapping litigation in state court will help move along meritorious claims while eliminating meritless ones.

Laura Yaeger (0033): This rule reflects steps MDL transferee judges are already taking to address preliminary matters. But it broadens the scope of matters typically covered at the initial management conference. In particular, I think it would be premature then to address exchange of information about the basis for claims asserted, whether consolidated pleadings should be prepared, a plan for discovery, likely pretrial motions, measures to facilitate settlement, and whether to refer matters to a magistrate judge or a master. Each of those topics requires substantive knowledge of the case and would be better addressed after the judge appoints leadership counsel.

Minnesota State Bar Association (0034): The MSBA has voted to support these rule changes. It believes they will foster increased transparency and possibly efficiency between parties and the court.

John Rosenthal and Jeff Wilkerson (0035): Without changing the draft on the subject of early vetting, we think that LCJ is right that it would be better to have no rule than the current draft. Though it is true that early management is key, the "endless barrage of advertising for personal-injury claims on television, radio, and social media" calls for more vigorous vetting. The current draft functions largely as a checklist of things the courts *may* address in an early case management conference. This does not serve the ordinary function of a "rule," since it provides suggestions rather than instructions.

American Ass'n for Justice (0043): The proposed rule provides the flexibility that judges and parties require. MDLs come in many sizes, and too much rigidity is unnecessary for small MDLs, hampering and delaying the resolution of claims. AAJ appreciates the consideration the Advisory Committee has given to class action MDLs, mass action MDLs, and MDLs based on non-product liability claims. AAJ's major concerns are that the coordinating counsel position should be removed and that it would be premature to focus on many of the topics identified in Rule 16.1(c) at the initial management conference. "If the rule lists multiple topics, then discussion of those listed topics will become the default even if the parties need to focus on the basic structure

of the MDL early in the litigation. A judge who insists that the parties address each of these topics will often produce a waste of time and resources. The rule tries to do too much, too soon.

A. Layne Stackhouse (0046): Some of the provisions of Rule 16.1 make sense, but several of the topics listed in 16.1(c) will not be ripe of action at the initial management conference. These matters should be addressed only after leadership counsel are appointed.

Warren Burns, Daniel Charest & Korey Nelson (0048): One important matter was left off the 16.1(c) list – motions to remand cases transferred by the Panel. At least for cases originally filed in state court, the rule should state that the court ought to act promptly to resolve motions to remand the state courts from which they were removed when plaintiffs challenge that removal. Removal weakens state sovereignty. And the federal courts' have a duty to determine whether they actually have subject matter jurisdiction of removed cases. Of particular concern is the possibility that Rule 16.1 might encourage the development of early assessment of the merits of claims presented. MDL courts must not address the merits of cases in the MDL until they verify that they have jurisdiction over those cases. Therefore, 16.1(c) should add the following:

> (13) how and when the court will rule on any pending motions to remand matters to state court.

John Yanchunis (0049): This rule is not suitable for MDLs that consist solely or mainly of class actions. For one thing, interim class counsel under Rule 23(g) would make coordinating counsel under proposed Rule 16.1(b) unnecessary. And Rule 23(g) enumerates the factors to govern appointment of class counsel, but Rule 16.1(b) falls woefully short in that regard. Accordingly, if only class actions are centralized, they should be excluded from this rule. With hybrid MDL proceedings – including class actions and individual actions – it should be made clear that nothing in 16.1 supersedes Rule 23(g). Finally, if coordinating counsel is retained it should be made clear that such a person's role is limited to purely ministerial duties until class counsel are appointed.

Pamela Gilbert (COSAL) (0051): COSAL requests that the Note be amended to clarify that other rules and statutes apply when class actions are included in an MDL proceeding. It should be made clear that this rule does not supplant Rule 16.1 or the PLSRA.

Nardeen Billan (0052): As a law student, I offer a comment on the use of the word "should" in the draft rule. "The word 'should' is prickly. It is a modal verb, used as a recommendation or suggestion. Initial management of MDL cases allows for appreciation on both sides of the 'v.' Overall, its malleability allows for more of a reach than having a limiting effect."

Amy Keller (0053 and 0068): "It is important when considering a rule that would apply to *all* MDLs that the Committee not treat the rule as a 'one-size-fits-all' *requirement* (which may be the case, even if language like 'may consider' is used)." It is also important to take note of the PSLRA, which has a statutory direction how the lead plaintiff is to be selected in many securities fraud class actions.

Lawyers for Civil Justice (0053): There is only one "rules problem" identified in the comment on Rule 16.1 that can be addressed via the rules without creating harm. That is the problem of insufficient claims aggregated into an MDL. There are no "rules problems" regarding appointment of leadership counsel, facilitating settlement, managing direct filing, appointing special masters or preparing pleadings that are not allowed by Rule 7. Rulemaking on these topics would produce substantial negative consequences.

In-house counsel at 33 corporations (0056): Enforcement of the requirements of FRCP 3, 7, 8, 9, 10, 11 and 12 can ensure that the constitutional requirements of Article III standing are satisfied. But these rules are ineffective in mass tort MDLs.

Mary Beth Gibson (0059): My extensive experience with MDL practice persuades me that the procedure for appointment of leadership works in its current form. Only after that appointment occurs should the court's attention turn to the many matters identified in draft 16.1(c)(2)-(12). There is a risk that this rule could upend the natural and existing process. In particular, the idea of "coordinating counsel" under 16.1(b) is unwise.

Ilyas Sayeg (0062): The implication in the draft Note that the rise in number of cases in MDLs presents a problem is mis-directed. Defense side claims that rising numbers show there is a problem are simply not true. The draft's seemingly inflexible insistence on discussion of all items listed in 16.1(c) at the initial management conference could prompt a new MDL judge to force the litigants to spend needless time and energy on a premature discussion of issues that should be addressed later. I think that proposed 16.1(c)2), (3), (8), (10), and (11) are appropriately included in the list. But items (4)-(7), (9), and (12) should not be on the list for the initial conference.

16.1(b) – Coordinating Counsel

Oct. 16, 2023, Washington, D.C. Hearing

Leigh O'Dell: To expect "coordinating counsel" to provide adequate information on many of the topics listed in 16.1(c) is unworkable. The rule does not require that this person have any stake in the litigation. In some instances, there may be competing theories of the case and different slates of attorneys vying for leadership. In such instances, the court must make a leadership appointment before addressing substantive issues in the proceeding. The appointment of leadership is an issue that affects almost exclusively the plaintiffs' side. It is extremely important for plaintiff lawyers to have leadership appointed quickly. The use of coordinating counsel inserts a two step process into the selection of leadership without establishing any criteria for the vetting process for coordinating counsel. Under this setup, the court will have to undertake a second process of appointing more permanent leadership.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: In MDLs including class actions, this proposed rule is out of place. What is needed is appointment of interim counsel under Rule 23(g). "I am not aware of any class action MDL where interim class counsel has not been appointed." The bench and bar would be better

served by a rule limited to mass torts, or at least that specifies that the rule is not designed for "simple MDLs."

Mark Chalos: Including this provision carries unnecessary risks. The rule does not explicitly give the court space to implement a process to consider applicants for this position in advance of this designation. So this will worsen the "repeat player" problem. Without a prescribed selection process, the court potentially will be inclined to base this designation only or mostly on the court's experience with the lawyer, or other such things. Moreover, it seems likely that coordinating counsel will have the inside track on being appointed to leadership, exacerbating the "repeat player" concern. Moreover, this is unnecessary. Without such a designation, on the plaintiffs' side counsel will work their differences and arrive at a consensus, or present them to the court to sort out in due course. I favor eliminating 16.1(b), though something of the sort might be mentioned in the Note.

Tobi Milrood: AAJ (of which I was president a few years ago) has deep reservations about this provision. "Concerns about early organization can be addressed without a rules-mandated appointment that may lead to unintended consequences." For one thing, "a formal rule-based title could be seen as the logical stepping-stone to permanent leadership." If this provision is retained, it would be better to use the term "interim." Permanent leadership, not temporary leadership, should decide what discovery should be pursued, what pretrial motions to make, whether the court should consider measures to facilitate settlement and whether matters should be referred to a magistrate judge or master. Instead of this rule provision, a Note "could urge the MDL judge to use the preliminary conference as an opportunity to invite those counsel who have vested interest, resources and are engaged in the litigation to assist the Court with some of the preliminary matters."

Alyson Oliver: From a plaintiff perspective, my view is that if the coordinating counsel remains in the rule it should remain as flexible as possible. But I think adding such a step is not necessary and therefore that this provision should be eliminated in whole. Otherwise, it will substantially increase the costs of litigation. Without a vetting process to select coordinating counsel, the court will be left with no input from the lawyers who have a stake in the litigation. As a consequence, for a designated coordinating counsel it may involve a considerable amount of work to get up to speed. Surmounting that learning curve is not free. Moreover, to the extent the views of this court-appointed lawyer are given importance by the court, the effect will be to slow the proceedings down.

Dena Sharp: In recent MDL proceedings the term used for this sort of position has been "interim" counsel. That should be considered.

Jose Rojas: The rule does not provide explicit criteria on who should be selected or whether serving in this position would preclude later participation in leadership counsel. Absent extraordinary circumstances, transition from coordinating counsel to leadership should be discouraged absent evidence that the person selected as coordinating counsel satisfied my proposed changes to the leadership counsel provision (presented below). Perhaps prominent MDL practitioners who often are appointed to leadership would be sensible choices for the coordinating counsel position, but the rule should be amended to add the following: "Designation as

coordinating counsel does not presuppose a subsequent leadership role in the MDL proceedings." And the Committee Note language at lines 184-92 should be replaced with the following:

> While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference.

James Bilsborrow: The coordinating counsel idea could have negative effects. The rule provides no parameters for this appointment and, given the early stage in the litigation, the transferee court is likely to choose lawyers familiar to the court rather than those most familiar with and best positioned to successfully litigate the cases. In my experience, transferee judges encourage plaintiffs' counsel to informally coordinate in addressing a set of issues identified in an initial order. This approach allows for the various stakeholders to be heard. In the dicamba herbicides MDL, on which I worked, this sort of arrangement permitted two groups of plaintiffs' counsel to submit reports to the court, and the court ultimately appointed members of both groups to leadership and set a separate litigation track for certain sorts of claims. "Had the court appointed coordinating counsel, this minority proposal might not have made it into the Rule 16.1(c) report." There is little lost in permitting multiple reports to the court, but the rule will likely curtail presentation of diverse plaintiff viewpoints. The rule should ensure that coordinating counsel do not make substantive decisions that bind leadership counsel.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: In the Committee Note, lines 122-26 should be deleted because they restate what is already stated at lines 118-21. In addition, the Note uses the confusing phrase "facilitate the management of the action." What does that mean? Regarding lines 126-27, they should be rewritten: "After the initial management conference, the court ~~may designate~~ can consider retaining the coordinating counsel to assist ~~the court~~ it on administrative matters before leadership counsel is appointed." The draft is ambiguous. Does it refer only to appointing coordinating counsel before the initial conference and before appointing leadership, or is it intended to apply to an appointment that continues after the initial management conference?

Dena Sharp: The Committee should consider using the term "interim counsel" rather than "coordinating counsel." This nomenclature has already been adopted by some MDL transferee judges. Possibly the Note should refer to Rule 23(g), though leadership considerations in MDLs differ from class actions. On that score, the Note should be rewritten: "MDL proceedings in non-class cases may ~~do~~ not have the same commonality requirements as class actions, . . . "

Frederick Longer: So far as I know, this "coordinating counsel" position has never before existed. The newly minted designee is not well described in the proposed rule or the Note. Adding new layers of counsel could spur contest within the plaintiffs' bar for an interim, undefined position that is unnecessary if the court were instead to address appointment of leadership counsel.

Jennifer Hoekstra: This provision is redundant and duplicative; it might even curtail judicial discretion in selecting leadership. It is silent about the requirements or experience required of such persons. "Would someone who was involved in the Talc litigation be appointed to coordinating counsel in an antitrust litigation?" "Although criticism of 'repeat players' in mass

torts exists, the expertise gained from years of experience working on complex litigation cannot be substituted by an inexperienced third party." Moreover, this coordinating counsel position appears duplicative of the magistrate judge or master appointment. Why add another layer to an already complicated system?

Emily Acosta (testimony & 0020): There is little need for this kind of rule. And this rule proposal does not even contain a requirement that the attorney selected actually have a stake in the litigation, such as representing a claimant. This targets an issue that is almost exclusively about the plaintiff side. But this person can't really do much. "[B]oth sides cannot have productive conversations about how to organize and move a litigation forward unless and until both sides are vested with decision-making authority." The Committee should remove (b) because it would "disrupt the natural coordination that already occurs and, as written, is ambiguous and does not provide the court with appropriate guidance."

A.J. Bartolomeo: I request that the Committee provide more clarity as to the role and responsibility of Coordinating Counsel. As things presently stand, this addition may create more complications in MDL proceedings. Guidance can be found in § 10.221 of the Manual for Complex Litigation. Moreover, 16.1(c) "requires that the transferee court 'should order the parties to meet and prepare a report'" on twelve topics. But that should not happen until leadership counsel is appointed. If the Committee wishes to proceed, it should adopt a new 16.1(e):

> After the appointment of lead counsel through the process identified in subparagraph (c) above, the court shall direct plaintiffs' lead counsel to meet with defense counsel to consider and report to the Court on the following matters in connection with the Rule 26(f) conference, to the extent these matters are not already addressed by Rule 26(f):

This should be followed by what are now in 16.1(2)-(12). Otherwise, the rule could inadvertently put the plaintiffs and their counsel at a disadvantage when discussing the items now listed in 16.1(c).

Michael McGlamry: While defendants come to an MDL with their chosen counsel in place and prepared to move forward, that is not true on the plaintiff side. So the court has a responsibility to decide how best to structure the plaintiff leadership. Given the importance of that project, there seems no reason to hurry things as this provision appears to dictate. "[W]hy not take 30-60 days up front to appoint a complete, diverse, and appropriate Plaintiffs' leadership team?" The rule does not answer that question; to the contrary "there is no criterion, no process, no direction, and no structure" for the choice of coordinating counsel. But "until Plaintiff's Leadership is put in place, constant and intense pressure, manipulation, negotiations, and alliance building will occur behind the scenes." Moreover, it's not fair for coordinating counsel to make the decisions about many of the matters listed in proposed Rule 16.1(c). "[P]roposed Rule 16.1 empowers coordinating counsel, who are selected absent any criteria, process, direction, or structure, to bind all plaintiffs for all time."

Norman Siegel: It would be all right to have somebody like this to handle "ministerial" tasks, but most of the things listed in 16.1(c) go well beyond that. A discovery plan, for example, is extremely important to the entire litigation.

Jayne Conroy: From a mass tort context, I am opposed to this concept. It mainly adds another layer and is potentially harmful to both sides. In particular, it is a potential step backwards for diversity. MDL transferee judges have made a real effort to diversify leadership and they have succeeded. But adopting a coordinating counsel provision could blunt this worthy effort. The topics listed in 16.1(c) are too important to be handled by this person.

Feb. 6, 2024, Online Hearing

Kelly Hyman: As a solo plaintiff-side mass tort practitioner, this provision raises concerns for me. Neither the rule nor the note provides clear criteria for who should be selected. Courts are likely to appoint repeat players. This vagueness makes the coordinating counsel position an automatic leadership appointment. It will lead to unnecessary repetition of work and a secondary fight for leadership. The draft does not even require the court to appoint a lawyer with a stake in the litigation, suggesting that the court should consider the role like a special master, but a neutral appointee would be subject to a steep learning curve. I agree with Jose Rojas, who supported "broadening the leadership committee." This provision "limits diversification of practitioners with specialized interest and experience in the litigation. I think this provision should be eliminated unless language is added to specify the distinction between this position and leadership counsel. Often the plaintiff side can self-organize; this provision is not needed, and its vagueness is troubling. Using the term liaison counsel might be more familiar and less troubling.

Jonathan Orent: The coordinating counsel provision should be eliminated; it would probably become standard practice and it would create significant risks. Since the rule provides no criteria, the rule makes it likely that courts will base these designation on experience with particular lawyers. That would place familiarity over qualification and diversity of experience and background in selection of what would undoubtedly be a leadership position in the litigation. Moreover, this provision would result in duplication of judicial effort. There is no need for this layering or duplication of process. There very often is a local liaison counsel to facilitate dealing with the court in a manner that the court ordinarily uses, a sort of "administrative liaison."

Mark Lanier & Rebecca Phillips: Only plaintiff's counsel has the experience-based insight necessary to make leadership structures work and work well. This provision should be stricken, and 16.1(a) should be amended to state that the main goal of the initial management conference is to Appoint leadership counsel, with all other "prompts" in the rule made discretionary. Under the proposal, the court must – without guidance – make an important decision, and coordinating counsel "must take substantive positions on behalf of plaintiffs" with regard to the other matters listed in 16.1(c). How can the court know whether the selected lawyer is at odds with the other lawyers? How can the court know whether this lawyer is accurately representing the positions of other plaintiff lawyers? Permitting this lawyer to make important decisions for the plaintiff side risks prejudicing plaintiffs. "My firm has already had a negative experience with a protocol similar to that contained in Proposed Rule 16.1, requiring the submission of a joint report before leadership is appointed." There were significant differences among counsel about how to proceed. In terms of early presentation of evidence, it is important to keep in mind that defendants are the ones with proof of product use. That reality is central to the decision in the Federal Rules not to require plaintiffs to prove their cases at the outset.

Jessica Glitz: Since most MDLs have fewer than 100 plaintiffs, designating coordinating counsel would be obsolete. Ordinarily a small group of attorneys have organized themselves prior to the initial MDL management conference. In my experience, that's even true with MDLs with more than 1,000 claims. Appointing coordinating counsel would only lead to complications down the road. And sometimes coordinating counsel may be needed in the defense side. In the hair relaxer litigation, for example, there are more than 21 defendants. The right approach is to set up strict timelines for appointment of leadership counsel.

Ellen Relkin: There is no explanation how the judge would go about making the appropriate temporary appointment at the inception of the litigation. Providing for such an appointment may result in the submission of agenda items or discovery suggestions that are not appropriate because the individual selected in not as engaged in the issues as those who initiated the litigation. Certainly the discussion of the issues in 16.1(c)(3) or (4) should not be addressed by such a temporary appointee. Instead, my experience is that is always involving "an organize process whereby those lawyers who are most engaged are presumed or accepted by consensus to be the spokesperson." Creating this new position is a distraction. There has been one instance involving an immediate need for action in which the court appointed several interim counsel. But that is not the norm. "The plaintiffs' bar has its own mechanism to coordinate in advance of the first hearing held by the selected MDL court and generally reach a consensus."

Jennie Anderson: Creating this new position to be appointed before appointment of leadership would be inefficient and potentially damaging, particularly for plaintiffs. It could leave plaintiffs essentially unrepresented at a mandatory meet and confer at which coordinating counsel has been authorized to negotiate with defendants prior to appointment of plaintiffs' leadership counsel. "[T]he proposed amendment appears to hand that same counsel broad authority to meet and confer on far reaching topics." These difficulties are compounded by the Committee Note that says coordinating counsel may later seek a leadership position. That could enable an end run around the leadership application process and give the selected lawyer an undeserved advantage. The proposed rule provides no guidelines for selecting coordinating counsel, and an application process is required to assure that such lawyers are properly qualified. But providing that process will mean that no time savings are achieved by the appointment.

Ashleigh Raso: I believe the best way to organize an MDL is to appoint *qualified* liaison counsel. When I have had that role, sometimes my tasks go beyond basic communications with lawyers. The additional tasks have included putting together digestible case criteria to ensure that meritorious cases are filed, working with defense counsel on test practices of serving complaints and discovery, working with the court's clerk to create a "Case Filing Master Manual," publishing a plaintiffs-only website where all court orders are posted. "It is crucial to appoint a liaison counsel who is most qualified and actually wants a position that involves high levels of organization and communication. Premature appointment to this position could engender conflicts among attorneys on the plaintiff side, a rush to select leadership that could exclude good candidates, confusion regarding authority, and a lack of diverse candidates being appointed.

Seth Katz: This provision is unclear and unnecessary. For one thing, it's not clear whether this will be one of the counsel or a neutral, how the counsel will be selected, and where this person's powers will start and where they will end. There is a potential for newly appointed

transferee judges to consider this "suggestion" mandatory. There is also the unaddressed issue of how this person will be compensated.

Adam Evans: The main problem with this provision is the timing. Partly for that reason, this proposal is unmoored to diversity, capability, leadership potential and other things that are important. There's no context for making this appointment, and the proposal will "hamstring the judges." It will also have an unfortunate effect on the incentives for the plaintiffs' bar, who will pursue this early appointment as the route to permanent appointment to leadership. This early decision will necessarily be made by a judge who is to some extent myopic. It will also incentivize filing of many unvetted claims because having lots of claims on file will be the ticket to appointment as coordinating counsel.

Kellie Lerner (President, Committee to Support the Antitrust Laws): This provision would cause unnecessary delay in class actions. At present, the transferee court selects interim class counsel using a clear set of criteria set forth in Rule 23(g). Otherwise, the time required to appoint leadership counsel is usually not great. Data from the last ten antitrust MDL cases (on which I focus) shows that appointment happens within about 90 days of Panel transfer. Under these circumstances, adding an additional layer of leadership is not warranted. Moreover, the proposed rule does not provide specific criteria for coordinating counsel, which will create confusion in class actions. It is not even clear who appoints this person. Are the various class counsel designated under this rule chosen through private ordering or is the role filled by the court prior to appointment of interim class counsel? And the responsibilities of the role are undefined. Is it an "administrative" role or a "substantive" role? Given that only interim class counsel (or the court) can bind the class, what role is there for this person? In any event, this addition could produce much waste effort. In addition, this provision could impose additional costs and burdens on defendants, who prefer to discuss and negotiate case schedules only with interim class counsel who have the authority to make decisions about these matters.

Roger Mandell: There should be a two-tier approach, with selection of leadership counsel the first step. At the same time, the court should stay all the actions and suspend all scheduling orders, etc. Only "ministerial" considerations should be taken up at the outset. Until formal appointment of leadership counsel, the plaintiff lawyers can self-organize. The key is a deliberative process from the outset; the coordinating counsel provision just lets the judge appoint somebody she knows. Keep in mind the defense perspective; defense lawyers don't want to negotiate with somebody who may soon be out of the case, or at least not in leadership. This rule creates a risk that at least some judges will treat its proposals as "gospel." This position is not analogous to interim class counsel under Rule 23(g). Rule 23(g) was modeled on long judicial experience with appointment of class counsel before it was formally added to Rule 23, and judges used that experience to guide selection of interim counsel also.

William Cash: This provision is confusing and needs better elaboration, if not outright elimination. Among the problems:

(1) There is no mechanism to determine how coordinating counsel should be appointed, which is dangerous because every plaintiff's lawyer who applies for a leadership position will cite appointment as coordinating counsel as a reason for appointment to leadership.

> (2) The rule is not clear on whether coordinating counsel are even drawn from the ranks of the lawyers representing the parties. Saying that coordinating counsel may "work with plaintiffs or with defendants" suggests that the appointed person might come from neither side.
>
> (3) In MDLs where plaintiffs are not yet organized, no one person or team can speak for all. There is a risk that defendants would be in a position of choosing their opponents. Moreover, there is a risk that reports will come with "dissents" or competing arguments from different groups. How would that work?
>
> (4) The selection of plaintiff leadership and manner of organization of leadership are not issues on which defendants should have much input. Plaintiffs have no right to tell defendants what lawyers to hire, how they should be compensated, etc.
>
> (5) Many of the other topics in 16.1(c) should be addressed only after leadership counsel are appointed. True, some may say the court will appreciate that initial positions are "just preliminary." Plaintiffs should be allowed to get organized before consequential topics are resolved by the court. Defendants always start with an advantage because they know more. Though that is in some ways unavoidable, adding the coordinating counsel provision puts the cart before the horse.

Jessica Glitz: Because most MDLs have fewer than 100 plaintiffs, the designation of coordinating counsel seems obsolete. With only 100 plaintiffs, there are far fewer attorneys in the room. And in my experience, that is also true in MDLs with over 1,000 claims. "Plaintiffs have become organized, utiliz[ing] platforms and databases to share information when a new tort is on the horizon. Therefore, the designation of a separate counsel to help coordinate the initial conference would only lead to complications down the road. And the proposal raises more questions than it answers. How long is the appointment to last? Can such lawyers be considered for leadership appointments? Can another coordinating counsel be appointed later in the MDL? The better solution is to set strict timelines and guidelines as to how and when leadership counsel will be appointed. I propose that the rule be changed to say:

> The transferee court should order the parties to meet and be prepared to address, in particular, the appointment of leadership under subsection (1) and its scope. Additionally, the parties should be ready to address any matter designated by the Court, which may include any matter addressed in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

Ashleigh Raso (testimony & no. 0050): Early organization and coordination is critical, and the best way to do that is to appoint qualified liaison counsel. I have held that post, and sometimes my tasks went beyond basic communication with lawyers. The person selected for this role must be well organized. But this provision could prompt a premature fight to obtain this designation, and the rule proposal is confusing on the responsibilities and authorities of such persons. Though acting rapidly has desirable features, rushing to make this appointment may exclude good leadership candidates.

Amber Schubert: I believe 16.1(b) should be removed. This is an entirely new position. "Coordinating counsel" is not a term commonly used in MDLs or other complex litigation. It is not defined, and is not well understood by practicing attorneys. In class actions, in which I work, we already have the term "interim counsel." The two-step process of appointing coordinating counsel before the initial management conference and then leadership counsel after it would create inefficiencies and confusion. And it may be unnecessary, as the Note acknowledges. "In my experience, self-ordering among plaintiffs' counsel prior to an initial case management conference is *the rule* in class actions, not the exception." Retaining this provision would exacerbate the repeat player problem in MDL leadership. The Note discussion of leadership counsel provides guidance about that selection, but the Note to 16.1(b) does not do the same. "In my experience, without adequate guidance, transferee judges often select attorneys for these roles who they have previously appointed in prior cases and are most familiar with." This provision "would hinder diversity and encourage implicit bias in MDL leadership."

Christopher Seeger: Many of the topics identified in 16.1(c) are not suitable for resolution before appointment of formal leadership. In its current form, the rule risks either giving coordinating counsel an outsized role in making critical strategic decisions or producing a report that is not very useful to the court. I am skeptical there is a real need for this rule; there have not been significant problems with initial conferences under the current rules.

Lexi Hazam: Designating coordinating counsel prior to the initial case management conference may deprive courts of the chance to conduct more fulsome vetting of potential leadership, and also shorten the time for qualified candidates to come forward. It might also short circuit attempts by counsel to informally organize in ways that may prove helpful. In addition, an early designation may produce inefficiencies by requiring a transition from one form of leadership to another in the early period of the case. Avoiding this duplication of effort is especially important given that there are no defined criteria or process for selecting coordinating counsel. The solution should be to appoint permanent leadership prior to the initial management conference, and then calling for a report like the one called for by Rule 16.1(c) before the next management hearing.

Written Comments

Federal Magistrate Judges Association (0018): "[t]he explicit recognition that a court may appoint 'coordinating' counsel prior to appointment of any leadership counsel is a helpful management tool. Indeed, appointment of coordinating counsel will assist the court and parties to prepare for the initial conference and map out a preliminary plan, including preliminary issues such as extensions of time to answer and discovery stays. Appointment of coordinating counsel allows additional time to ensure the court has a full appreciation of any differences between and among plaintiffs and the different strengths and skill sets of potential leadership counsel."

Fred Thompson (0041): Creating this new position is not a wise move. "It smells of creating a special guild of professional coordinating counsel who doubtless will see themselves as somehow expert in MDL formation. * * * I can see special masters seeing this slot as a desirable appointment if it is lucrative." It would be better to convene an immediate first hearing of all interested parties to devise methods for appointing leadership, liaison and steering committee members.

American Ass'n for Justice (0043): AAJ has deep reservations about the creation of this new position. One alternative, it seems, might be to call this "liaison" counsel, but that change of name does not address the reality that the rule is not clear about who would be eligible or what criteria should guide the court's selection. Although the appointment of coordinating counsel is optional, a rule providing that the option may make it more likely than not that a coordinating counsel is designated by the transferee judge.

A. Layne Stackhouse (0046): This provision would cause more confusion than it would aid in the efficient and fair litigation of an MDL. The rule contemplates early designation of lead counsel for both sides, which is par for the course already. This new position is ill defined.

Charles Siegel (0060): Adding "coordinating counsel" will not measurably aid any MDL judge, but instead will introduce another layer of needless bureaucracy and complexity.

Gerson Smoger (0069): The coordinating counsel provision should be eliminated even though it is styled as permissive and not mandatory. Though the Note acknowledges that counsel are often able to organize themselves, adopting this rule will likely have adverse consequences. "Once set forth in a formal rule, experience is that it will soon become standard practice even when not expressly mandated." This provision addresses a "problem" that does not really exist.

16.1(c)(1) – Leadership Counsel

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: The concept of leadership counsel should not be inserted into the rules because it is too fraught with legal uncertainty. The leadership orders of MDL transferee judges have exhibited "the most extreme level of 'ad hockery.'" Many contain no directions for the appointed counsel. Some seem to allow leadership counsel to self-define their own roles. Reportedly, such court orders appointing leadership counsel lacked any limits on the activities of non-leadership counsel in some 22% of MDL proceedings. (See study by Prof. Noll.) But there is no obvious authority for courts to assign leadership counsel the duty to represent clients of other lawyers. Yet (c)(1) seems to embrace this dubious practice. Although appointment of leadership counsel is mentioned in the Manual for Complex Litigation, there is no identified source for this authority. 16.1 certainly does not flow from the MDL statute. The Committee should not enshrine the notion of overriding clients' choice of counsel when doing so is unsupported by law, contradicts state ethics rules, and is not consistent with the Rules Enabling Act. Directing leadership counsel to consult with other attorneys, as ordered by some MDL courts, does not resolve the ethical dilemmas. And such efforts blur the ethical responsibility to keep clients apprised of developments in the litigation. For example, suppose leadership counsel insist on using a particular science expert but other counsel believe another expert would be better equipped to prove plaintiffs' case. How can a court resolve such disputes? Must they be addressed in open court with defense counsel present?

John Beisner: In recent years, there has been a substantial change in MDLs. Until recently, the plaintiff attorneys organized themselves. The court did not have a hand in this activity. But recently the courts have migrated to using an application process to make leadership selections.

The biggest concern is the displacement of individually retained plaintiff lawyers. Their clients have hired them to prosecute their cases, yet this rule seems to say the court can tell those lawyers to stand back and leave everything to the leadership counsel selected by the judge. There is not even a rule that requires leadership counsel to consult with the other lawyers. Though one might say this is not the defendant's problem, in reality it is. There is an abiding fear that the excluded counsel will argue that due process requires that their clients get to be represented by the lawyers they selected, not by the ones picked by the judge.

Chris Campbell: Suggesting that the court promptly consider whether leadership counsel should be appointed is undesirable. No definition of leadership counsel is provided in the rule, so including this provision is confusing. The 2020 study by Prof. Noll shows that MDL leadership appointment orders are insufficient. Only about half enumerate the duties and responsibilities of leadership counsel. Additionally, suggesting that the court consider limits on the activities of nonleadership counsel is inappropriate as it asks lawyers who are not selected for leadership to stand down and neglect their client obligations. Though it is true that appointment of leadership is very common, it is also true that we need a specific and clear process.

Leigh O'Dell: From the plaintiff side, defense side worries about encroachment on plaintiff counsel, whether in leadership or not, are new to me. These are, after all, defense counsel, and they surely do not represent the many claimants gathered together in an MDL proceeding. Leadership counsel understandably focus mainly on the central liability issues and not individual causation issues. When I "can't find my client," too often it's because the client has died or is too ill (as a consequence of using defendant's product) to respond to my inquiries. That does not mean I made an unsupported claim, but only that getting that support sometimes take considerable time due to the harms suffered by my clients.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: In class action MDLs, the compensation of court-appointed class counsel occurs only if there is a class-wide settlement overseen by the court or a judgment at trial. And Rule 23(h) provides standards for such awards of fees.

Tobi Milrood: Consideration of several topics listed in 16.1(c) is untimely and imprudent before true leadership counsel are appointed. This could empower MDL courts to go beyond their charge of managing only the pretrial stage of these proceedings.

Jose Rojas: Leadership appointments in many MDLs have become a revolving door, with repeat players dominating the scene. That gives the court reassurance that the lawyers managing the MDL have the needed experience, financial resources and structural resources to advance the litigation. Those are all legitimate considerations. But "an over-emphasis on prior MDL experience often results in appointments that fail to be representative of the plaintiffs * * * and fails to ensure diversity of experience and background." To address these concerns, the following should be added to proposed Rule 16.1(c)(1)(A):

> In considering the appointment of leadership counsel, the transferee court should evaluate potential candidates based on their role in advancing the litigation to date, experience and

expertise relevant to the subject matter of the litigation, diversity of experience, diversity of background, geographical distribution, nature of claims, and other relevant factors. The court's responsibility is to ensure diverse and capable representation, without unduly emphasizing prior MDL experience.

Diandra Debrosse: The rule should expressly include diversity as a factor in leadership appointments.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: Rule 16.1(c)(1)(F) should be amended to read "whether and, if so, when to establish a means for compensating ~~leadership~~ counsel for common benefit work." The proposed text is ambiguous and does not reflect existing practice in large MDLs. The Note should be revised to recognize that the court "may decide to appoint leadership counsel, which may include lead counsel, members of a leadership committee (executive or steering committee), and chairs of subcommittees." This revision clarifies the scope of the rule provision. On the other hand, the Note at lines 170-75 (referring to the commonality requirements of class actions) should be changed because that language introduces the concept of mass-tort MDLs as quasi-class actions and may add confusion. The Note should also recognize the potential utility of "consensus-selection proposing a slate of candidates." In many situations, the slate-selection method is the most appropriate. Subparagraph (c) should acknowledge that court involvement in settlement should occur only when the timing is appropriate. At line 226, the Note should endorse using "a dynamic, online central-exchange platform" as a shared document tool. The Note does not mention technology tools, but they are becoming indispensable. Finally, the sentence at lines 245-47 should more explicitly suggest that the court defer deciding the percentage to be deposited into a common benefit fund, but not defer directing that there be such a fund. It would also be good to say that the fund provision may be adjusted as the proceeding continues.

Dena Sharp: The Committee should consider encouraging the court to use its initial MDL order to expedite leadership proceedings and provide guidance on the court's expectations and preferences in the leadership application process. For example, it might invite the court to state whether it is receptive to "slates" or prefers individual applications. Another useful specific would be whether the court wishes the parties to provide contact information for other judges before whom the applicants have appeared. Because there are often class actions included in MDLs, it would also be important to cross-reference Rule 23(g), or somehow explain how its criteria compare to those for leadership counsel under Rule 16.1.

Alan Rothman: What we need is something like the ticket- taker at a baseball game. The ticket-taker looks only to whether your ticket is to this stadium and shows this day's date. Once you are inside the stadium you need to get to the right seat, etc. What we don't have in MDLs (to draw on the Field of Dreams metaphor) is something like that. We need a quick and very early method to make sure these plaintiffs are in the right litigation stadium. This should require very limited information, but insisting on this admission ticket will greatly benefit the MDL process.

Feb. 6, 2024, Online Hearing

Ellen Relkin: 16.1(c)(1)(C) should be excised. For one thing, to have the stopgap "coordinating counsel" address settlement would be wrong. "I strongly believe that MDL judges

should not, in leadership orders, designate specific settlement counsel." Settlement is a responsibility of leadership counsel, not somebody else chosen by the judge. "I agree with some comments from the defense and plaintiffs' bar that this initial discussion i open court of settlement is premature and can be counterproductive, sending the wrong message to novices in the field." This provision could lead to the filing of more cases, based on a misapprehension that a settlement is in the works. On the other hand, the emphasis by some on the problems that flow from having "repeat players" involved undervalue the experience they can add to the proceeding. Certainly one would want an experienced surgeon for an important operation. So also with leadership counsel. In addition, the financial commitment leadership lawyers must make would present a major obstacle to new entrants and young lawyers.

Andre Mura: I think more specific guidance about methods of selecting leadership counsel should be added. A judge without a preferred method will not find much guidance in the Note, which merely mentions that various methods have been used. Some courts require applications to be filed publicly on the docket, while others request applications be sent to chambers for in camera review. Some courts prefer that plaintiff counsel self-organize into committees, which the court can then review and/or modify, while others are reluctant to consider proposed slates. I suggest the following four revisions to the Note:

> (1) Courts gain valuable insights from plaintiffs' attorneys when they ask which other applicants counsel would recommend. Asking this question is a way to gain insight into whether various individuals are hard-working, insightful, responsive, or collaborative.
>
> (2) Such information is best submitted in camera or ex parte.
>
> (3) Ordinarily the court should not defer the appointment of leadership. It makes little sense to prepare a report about how to appoint leadership because many courts have their own preferences and may not be interested in what the lawyers prefer that they do.
>
> (4) Using a reapplication process as the case progresses is a good idea. Among other things, this allows more attorneys to serve at point in the litigation. An annual review is good.

Jennie Anderson: Defense counsel should have no role in selection of counsel to represent plaintiffs, but the rule appears to require negotiations with defense counsel on that subject. Instead, plaintiff counsel should be allowed to organize themselves without interference by opposing counsel. In my experience, defense counsel have not taken the position that they should be allowed to influence the choice of leadership counsel of the structure for leadership counsel to employ. If a proper procedure is used to select counsel to represent plaintiff interests, I see no problem with initial consideration of the other issues in Rule 16.1(c) early in the proceeding.

Written Comments

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. In our experience, the court need not undertake an

active role in the selection of leadership counsel. Instead, the court should sit back and let plaintiff counsel organize themselves. Otherwise, there is a risk that the court may seem to be a kind of guarantor of the adequacy of representation provided by leadership counsel. The Committee Note suggests that the court has some such fiduciary duty, but we doubt that is supported by the law and think that it should not be undertaken without clear justification. We also agree with the caution in the Committee Note that the court take care not to interfere with the responsibilities that non-leadership counsel owe to their clients. We are uncertain about whether the federal court has authority to "tax" settlements in state-court proceedings to create a common fund to pay leadership counsel appointed by the federal court.

John Rosenthal and Jeff Wilkerson (0035): There are important and unanswered questions about the authority of leadership counsel to represent plaintiffs who have not retained them.

Amy Keller (0053): In class action MDLs, the question of an attorney fee award comes up only if the case is successful. Mass torts sometimes need to address common benefit orders, but that's not a concern in class action MDLs, given Rule 23(h).

16.1(c)(2) – Previously Entered Orders

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. We suggest that the rule should state that the transferee judge should stay all transferred actions pending further order of the court at the initial MDL management conference. In particular, undecided motions regarding discovery should be put on hold.

16.1(c)(3) – Identifying Principal Issues

Oct. 16, 2023, Washington, D.C. Hearing

Fred Haston (Int'l Assoc. of Defense Counsel): The emphasis should be on cross-cutting legal and factual issues instead of promoting settlement.

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The rule should specify that a separate document should be used for identifying the principal factual and legal issues. It is important to make clear that the stated positions are not part of the report, because that could cause unwanted problems. Then, lines 260-66 should be deleted, and the following language substituted because it is standard language in large MDLs:

> In a separate transmission to the court, the plaintiffs and defendants should submit to the court a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. The court should make clear that these statements will not be filed, will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings. The

parties statement should list all pending motions, as well as all related cases pending in state or federal court, together with their current status, including any discovery taken to date, to the extent known. The parties should limited to one such submission for all plaintiffs and one submission for all defendants.

Indeed, since this is separate from the report to the court, it probably should become a new 16.1(d) rather than remaining as part of 16.1(c).

Jan. 16, 2024, Online Hearing

Jeanine Kenney: In class action MDLs, the principal legal and factual issues as to everyone in the class are laid out in a single consolidated complaint and there is no need for a process to identify them.

Feb. 6, 2024, Online Hearing

Robert Johnston & Gary Feldon: The proposed rule has promise, but must go farther by giving more concrete guidance on a modern, merits-driven approach to MDL proceedings. Presently "too many federal courts have conflated efficiency with global settlement and entirely disregarded justice." But what we call the "merits-driven" approach has started to become the prevailing philosophy of MDL case management. Under this approach, transferee judges engage on the key legal and factual issues from the outset. The rule should instruct courts to pursue this approach. The rule should make it clear that, from the outset, the transferee court's obligation is to find ways to efficiently resolve the case inventory. 16.1(c) is not sufficiently directive in this regard. For example, it does not provide enough concrete direction about what constitutes a principal factual or legal issue that can lead to early resolution of claims. One example is general causation; addressing that issue as early as possible promotes merits-driven resolution of plaintiffs' case inventory.

16.1(c)(4) – Exchange of Factual Basis of Claims

Oct. 16, 2023, Washington, D.C. Hearing

Mary Massaron: This provision is too loose to do the job that needs to be done. Something like a 12(b)(6) scrutiny of individual claims at the outset is what is needed, and this provision is too loose. Something like this might be usefully included in the Manual for Complex Litigation as advice, but it does not suffice for the current state of MDL proceedings.

Alex Dahl (LCJ) & 0004: The overriding challenge of MDLs now is claim insufficiency, but this proposal conflates dealing with that problem with discovery. It does not offer a firm response to the Field of Dreams problem. Rule 16.1(c)(4) speaks of "exchange" of information, which connoted discovery. It should be revised as follows:

(4) how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a clam, including establishing the use of any products involved in the MDL proceeding, and the nature and

time frame of each plaintiff's alleged injury ~~about the factual basis for their claims and defenses~~.

The Note should also be significantly revised. It mentions "exchange" five times, and (like the rule) inappropriately includes defenses. It specifically promotes the use of abbreviated discovery methods such as fact sheets and census orders. It also conveys the sense that requiring claims to meet the most basic requirements of standing and stating a claim could be an "undue burden." This language destroys the whole point of (c)(4) by implying that courts should ignore the mass filing of unexamined claims because discovery will take care of that problem. The discovery plan should be addressed in regard to (c)(6) and play no part in (c)(4). That later provision is the place to mention fact sheets and census efforts. The Note should also make clear that the Committee has adopted (c)(4) to counter the filing of large numbers of unsupported claims. it is urgent that the rule make clear that plaintiffs must establish their standing at the outset. It is also worth noting that winnowing unfounded claims can assist the court in making leadership counsel appointments, which may be affected by claim volume.

The recent developments in the 3M earplug cases show the need for more aggressive action. Finally – years down the road – the judge is beginning to winnow the huge field of claims. The plaintiff bar realizes this is an invitation to file meritless claims. Focusing only on cross-cutting issues is not sufficient. For one thing, these can't be proper "actions" unless plaintiffs have standing to pursue the claims asserted on their behalf. It's critical to create an expectation in the plaintiff bar that they will have to satisfy standing up front. A clear barrier to such unfounded claims is needed in the rule itself. Judges cannot be expected to work this up by themselves. Even though the ordinary rules apply in theory, in practice there is no way to apply them if there are 20,000 plaintiffs.

Kaspar Stoffelmayr & 0008: Screening out unfounded claims should be Job 1. I favor the "fact sheet plus" approach, before any other actions are taken in the case.

Chris Campbell: We need a rule that specifically invites an early dispositive motion challenging the inadequate claims. Improper MDL early case management thwarts the ability to assess risks and allows meritless claims to linger. 16.1(c)(4) conflates information sharing and managing discovery without first questioning the plaintiffs' standing and ability to state a claim.

James Shepherd: It is important to provide transferee courts a rule that allows them to vet legally insufficient cases. The way to do that is to require plaintiff attorneys whose cases are included in an MDL to provide proof of use and injury within 30 days of transfer. This measure would help screen out legally insufficient cases. It would not be burdensome to plaintiff lawyers. Under Rule 11, they have a duty to use due diligence before signing a complaint, and that should include gathering the needed information. It is important to disincentivize plaintiff lawyers who might otherwise file such unsupportable cases.

Christopher Guth: This provision should be strengthened. It is not reasonable to expect the judge to handle thousands of motions to dismiss. As things stand now, these proceedings create chaos. The rule should include language regarding (i) when each plaintiff should provide information establishing standing and the facts necessary to state a claim, and (ii) the type of

information that must be provided, such a use of the product involved and the nature of their alleged injury. Plaintiff fact sheets do not do this job. They are more of a discovery mechanism, and have been adopted only because plaintiffs do not include necessary information in their complaints. And even fact sheets are employed only at advanced stages of MDL proceedings. They are really only a sort of discovery vehicle and insufficient to adequately address the issue of claim sufficiency. My experience in a number of product liability MDLs is that early and specific attention to the above matters expedites proceedings and focuses the court and the parties on the core issues of liability. The PFS process now ingrained in MDLs takes a lot of time and effort. Judges are too lenient with claimants who don't supply the information they are ordered to supply. In one MDL, the judge permitted plaintiffs in default on this need eight opportunities to cure. Meanwhile, the theoretical possibility of discovery by the defendant is not a real option given the number of claims. But until the groundless claims are squeezed out of the system defendants will not settle. Indeed, the good plaintiff lawyers agree that the presence of lots of unfounded claims complicates and delays the process, and harms their clients. The rule must require vigorous judicial scrutiny of individual claims up front. To take one recent MDL, the negotiation of the PFS took 17 steps. And there should be a stay on all other litigation activity until this initial screening is completed.

Fred Haston (Int'l Assoc. of Defense Counsel): The cause of docket escalation is the ease of "park and ride" filings. There has been an exponential growth in unwarranted filings. The solution is early scrutiny of claims – early scrutiny of individual claims. We endorse the LCJ position. The emphasize should be on pleading sufficiency. Judge Rodgers' 2021 article points up the need for screening. The MDL vehicle has made it too easy to get into court, and some plaintiff-side lawyers (not all of them) are exploiting this feature of the process.

Markham Leventhal: This provision raises serious constitutional issues respecting Article III subject matter jurisdiction over claims that are consolidated in large MDLs. There is no Article III exception for MDL proceedings, and the Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez* applies to such cases. Unfortunately, in many MDL proceedings, particularly with large numbers of plaintiffs and cases, the judges are not provided with essential information necessary to ensure that all plaintiffs have the necessary standing. Standing must, under *TransUnion*, be established for each plaintiff. So facts must be provided up front in MDL proceedings. Moreover, it cannot be argued that providing basic, essential facts to establish "injury in fact" and "traceability" to a particular defendant is an undue burden. The court must have sufficient information from each plaintiff to evaluate and establish that plaintiff's standing. But the rule does not require that the plaintiff satisfy this threshold. Accordingly, (c)(4) should be revised to include, at a minimum, that the report must address the following:

(1) whether all named plaintiffs have satisfied their burden of proving to the court with sufficient information to establish standing;

(2) if not, how and when sufficient information will be provided by each named plaintiff to establish Article III standing, including

(3) facts establishing the use of any products or services involved in the MDL proceeding, injury in fact (e.g., the nature and time frame of each plaintiff's alleged injury), and traceability to one or more named defendants; and

(4) if necessary, the mechanism to remove from the MDL proceeding claims that do not satisfy minimum standing requirements.

John Guttmann: The upsurge in groundless claims has at least three causes: (1) careless "harvesting" of claims relying on TV ads and the like: (2) the incentive to file as many claims as possible to get onto the leadership team; and (3) the likelihood that the number of clients a lawyer has will increase the size of the settlement pot from which the lawyer extracts a percentage fee. All of these conspire to neuter the ordinary requirements of Rule 11(b). (c)(4) offers only nonbinding guidance. But the problem of groundless claims is increasing and the situation will improve only with a clear, rule-based approach. "Unsupportable claims are relatively easy to weed out in mine-run litigation where there is little if any incentive, for example to file a claim against a pharmaceutical manufacturer where the claimant did not actually use the drug." But in MDL proceedings the problem of unsupportable claims creates asymmetrical issues of scaling. The rule should be amended to **require** specifically that the report include a **mandatory** proposal for addressing the supportability of claims. It would be desirable for the Note to make clear that the rule is designed to counter the upsurge of groundless claims. Treating this concern as relating to an "exchange of information" implies shifting to discovery, and this sort of filtering should occur before discovery begins. Even the AAJ Working Group's submission in 2018 candidly acknowledged that grounds claims can be a serious problem. At a minimum, each plaintiff must demonstrate standing to sue. In sum, there must be a "mandatory provision of information at the outset of the information necessary to establish each MDL plaintiff's Article III standing.

Harley Ratliff: To move the ball forward, there needs to be serious attention to addressing the viability of these lawsuits at the front end, not after years of expensive and potentially unnecessary litigation. Therefore, plaintiffs should be held to the standards that apply in an individual lawsuit. "For example, does the plaintiff actually have proof that they used the product in question (proof of use)? Does the plaintiff have proof that they used Defendant's products vs. some other, similar, product (product identification)? Have they been diagnosed with or, at the very least, have some basic medical corroboration that they have the injury they allege (proof of injury)?" Addressing these issues first, rather than last, will streamline proceedings. As things now stand, MDLs are treated by many filing attorneys as little more than part of their diversified investment portfolio. "File hundreds of cases, let the sit in the MDL, and hope for a return at a later time."

Deirdre Kole (Johnson & Johnson): It is important to make clear that the normal pleading rules are not somehow suspended in MDL proceedings. Instead, the rule should provide clear instructions for the early vetting of cases to ensure that claims in an MDL have at least a minimal factual basis. Requiring such information up front is not burdensome. Plaintiff counsel should obtain it as part of counsel's intake process. Moreover, Rule 11 requires lawyers to do such background work before filing suit. "Today, aggrieved plaintiffs do not seek out lawyers to achieve justice. Lawyers develop a tort theory, recruit investors, and use their money to advertise for plaintiffs and, in many situations, hire marketing firms to generate leads. Lawsuit ads are then

blasted on television, the internet, and billboards, instructing consumers to call, click, fill out forms, and their claims will quickly be filed." In ordinary individual lawsuits, the rules would permit defendants to challenge such claims, but that ordinary process does not work in MDL proceedings. For example, in an MDL involving Ethicon Pelvic Mesh devices, 46,511 cases were filed, but 24,695 – more than half – were dismissed for basic factual shortcomings or the inability to establish a cognizable injury. So the rule should have a Rule 11 analogue and require sanctions on lawyers who violate the rule. Within 30 days of filing or transfer to an MDL, plaintiff must be required to produce evidence such as medical records identifying the product used and documenting the injury involved. If that evidence is not forthcoming, the rule should direct the MDL court to dismiss the case with prejudice, impose sanctions on the plaintiff or the plaintiff lawyer and allow the defendant to recover its costs and attorneys fees incurred in defending that claim. "Only after these extraneous cases are removed and the core issues in the litigation are decided can the parties evaluate the merits of the litigation."

Leigh O'Dell: The use of master complaints and short-form complaints does not suspend the normal rules of pleading sufficiency. From the plaintiff side, she is certainly not advocating the lawyers not comply with Rule 11. But the eventual failure of individual claims – whether on pleading motions or at the summary judgment stage or at the settlement stage – does not show that it was improper to file them in the first place. I am not against sensible vetting of claims, and not in favor of robocall outreach to drum up claims.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: This process – the "plaintiff fact sheet" process – is applicable only to mass torts MDLs. In class actions, ordinarily there are only a handful of class representatives on the class complaint. The Note should say that this issue-identification process should only be employed in mass torts.

James Bilsborrow: Any early census or procedures to screen "unsupportable" claims are likely to vary significantly based on the claims and entities involved. "This is not a job for coordinating counsel and it is not a role that should be emphasized by an initial, organizational Rule 16.1(c) report. Instead, the transferee court should deal with these case-specific scenarios as transferee courts have done throughout the life of MDLs: by applying its discretion to manage complex litigation with input from the experienced attorneys appointed to leadership roles or retained by defense counsel."

Diandra Debrosse: This rule would wrongly limit the rights of millions of injured people and restrict their rightful access to the court. Already, such people "face a rigorous gauntlet of high-powered corporate defense machinations and challenging legal hurdles." They are "facing multinational, billion-dollar, lobbyist-protected Goliaths hiding behind the country's wealthiest defense firms." The "proof of product use" that is sought is not a fixed and defined term. Moreover, in many instances, the defendants or third parties are the gatekeepers of product use information. Indeed, in some MDLs the court has ordered defendants to produce core produce identification information. A rule change that would "require that plaintiffs prove key elements of their claims prior to discovery would do harm to plaintiffs.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The Committee note at lines 270-73 should be revised to recognize the screening function of fact sheets by saying that they are used not only to plan and organize the proceeding but also for "identifying unsupportable claims." There is a virtual consensus that large MDLs have unsupportable claims, and growing numbers of cases involve considerable efforts to remove these claims from the mix. "Fact sheets have become increasingly longer (e.g., 20-70 pages) and are used for screening purposes, with provisions requiring submission of some evidence of product use or exposure."

Jennifer Hoekstra: There is no prohibition against filing meritorious cases simply because defense counsel does not want to defend against a large volume of lawsuits by those harmed by the exact companies against who lawsuits are brought." "[T]he MDL process remains one of the only mechanisms in our country for consumers to hold companies accountable for their dangerous and defective products."

Emily Acosta (testimony & 0020): The "unsupportable claims" defined by the MDL Subcommittee should not be the focus of rulemaking. Identifying such claims is often difficult. For example, "compensable injuries" often evolve with litigation. And "time-barred" is often litigated, not clean-cut. It can happen that during the course of the MDL proceeding new scientific discoveries change the shape or direction of the claims being asserted. If the concern is that some lawyers don't do their homework before filing suit, we already have a solution – Rule 11. The fact the number of claims in MDL proceedings has risen is not inherently nefarious, but the result of broader distribution of consumer products. Moreover, the fact that there are lots of claims does not make the proceeding inherently unmanageable.

Lee Mickus: The rule should establish a disclosure requirement to eliminate claims that are not viable. Several judges who have handled proceedings with many groundless claims have recognized that this is needed. Moreover, including possible settlement as an initial topic of discussion worsens the problem by providing an incentive for plaintiff lawyers to file even more groundless claims. Though the proposed rule could permit defense counsel to persuade the judge to require something of the sort, it should not be necessary for them to do that. It should be automatic.

Scott Partridge: What is needed is a method of removing the meritless claims, and including settlement up front goes in the wrong direction. Particularly for a publicly traded defendant, the volume of meritless claims creates major headaches. What should e reported in quarterly and annual securities filings? What financial exposure should be disclosed? It is critical to develop a rule that takes account of the realities of corporate decision-making. If one wants to foster settlement, for example, one must appreciate that corporate counsel must consider an array of things, including fallout with regulators or shareholder, disclosures to insurers, information to be provided to customers, what reserve to create for settlement, and how or whether to borrow funds to complete a settlement, to name a few considerations.

Lise Gorshe: Exchanging some of the information Mr. Partridge (the prior witness) wants early on would be fine with me. But this information is often very difficult for the plaintiff lawyer to obtain. Any method that does not permit that information-gathering to be completed would be unfair to plaintiffs.

Alan Rothman: In 2021, I published an article entitled Early Vetting: A Simple Plan to Shed MDL Docket Bloat in volume 89 of the UMKC L. Rev. (The article is attached to the submission.) I believe that screening claimants would produce efficiencies, and that it can be done by obtaining limited information at an early stage of the proceeding. A copy of the article is attached.

Toyja Kelley (former president of DRI): I support the DRI proposals on screening out unjustified claims up front. The court must assure itself that the claimants before it have standing. Rule 11 recognizes that lawyers must vet their cases, and this rule also. In every case (not only mass torts) the court should require a Rule 11 type of affirmation.

Feb. 6, 2024, Online Hearing

Jonathan Orent: This provision should be eliminated; "setting forth this subject in a formal rule creates a strong likelihood that it would become standard practice for MDL defendants to try to use this as an opportunity to extinguish plaintiffs' claims before they can gain access to essential information through discovery." This provision "is not tied to existing discovery rules." Enabling defendants to press for early production of information about individual claims would be contrary to the objective of § 1407 to provide for the "just" conduct of litigation. Existing practices using plaintiff facts sheets have proven more than sufficient to address concerns about unfounded claims. This rule might force a court to adopt a rigid procedure unsuited to the MDL before it. MDL judges are very creative; this rule should not get in their way. Existing "big tent" practice ensures non-leadership participation.

Jessica Glitz: "Regardless of what has been presented, most MDLs are made up of Plaintiffs whose cases have been thoroughly reviewed and researched by Plaintiffs' counsel before filing." Sometimes the statute of limitations compels plaintiff counsel to file an action before full research has been completed. And Rule 11 already provides the court with a substantial amount of power to deal with groundless claims.

David Cooner (Sr. V.P., Becton Dickinson; on behalf of Product Liability Advisory Council) (testimony and no. 0047): We believe the MDL process is broken in many respects. The primary one is the proliferation of non-meritorious claims. I see lawyers boast of claim inventories, larding the MDL with cases that have little or no vetting. I have seen countless cases that would never have been filed were it not for the ease of aggregation and, worse, "protection within the MDL system." From the perspective of plaintiff counsel, the volume of cases escalates one's profile in an inevitable settlement program and improves the prospects of being appointed to leadership. But (c)(4) is more aspirational than compulsory. It does not describe the information that must be presented, or say when exactly it should be provided. Because it has no teeth, it will not "change the flaws that lard out courts with meritless cases, siphon costs, and delay justice for meritorious claimants." As things now stand, we on the defense side have no means to accurately assess the magnitude of the risk. PLAC agrees with the LCJ proposal. Rule 26(a)(1) disclosure is not a substitute for this sort of vetting process. But it would be a good step for the Note to stress obligations under rule 11(b). It's not enough that this rule would permit the defendants to request early and rigorous disclosure by plaintiffs, the rule should make that mandatory. Although precise data on unwarranted claims is difficult to obtain, but there are decisions that illustrate the problem.

Max Heerman (Medtronic): This rule is inadequate. For one thing, it is discretionary, and requires nothing. It treats the problem of non-cognizable claims as though it were the result of lack of adequate discovery. That is not the source of the problem. Instead, the problem is that (1) as a practical matter, the MDL system accepts the logic that "where there's smoke there's fire," and (2) an MDL can become "too big to fail." Plaintiff counsel create a lot of "smoke" by bringing as many claims as possible. This activity distorts the constitutional and statutory role of the federal court system. Claims that cannot be substantiated must be dismissed early in the life of the MDL. I agree with LCJ's suggestion that the new rule require each plaintiff to provide information to establish standing. For example, in one recent litigation, once the defense was able to challenge individual claims 60% were found unsupported.

Christopher Seeger: I believe firmly that the plaintiffs' bar has a responsibility to carefully vet cases before filing, in MDLs as in any other case. "The plaintiffs' bar can and should do better in meeting that responsibility." But the defense bar argument that the growth in MDL claims is driven in substantial party by frivolous cases is simply untrue. Though there are many cases filed in MDLs that would not be filed as stand-alone individual cases, but that does not mean they are groundless. For one thing, the public attention given MDLs means that the public is more aware of these cases, and more injured people learn of their possible rights to relief in court. The amendment proposal is appropriately careful to avoid any language that would demean the legitimacy of those ordinary people's claims. And there is no reason to try to force transferee judges to prioritize individual case screening over cross-cutting issues. I have worked collaboratively with plaintiffs' lawyers, defense counsel, and courts to resolve this problem in specific cases. The resulting solutions are driven by the specifics of the given MDLs. Those solutions are better than the sort of rigid limitations the defense bar endorses.

Lexi Hazam: Given that the exchange of such information already occurs through discovery, and that 16.1(c) already calls for a discovery plan, this provision seems both vague and unnecessary. The proposal seems to call for some unspecified form of early attacks on claims outside of motion practice and discovery. The consequence may be erect new barriers unmoored to discovery rules, rather than allowing courts and parties to design procedures that are fair and efficient for each case. It may place an undue burden on plaintiffs in cases where defendants have far more information regarding key components of plaintiff-specific evidence, such as in the Social Media MDL, where defendants possess reams of data about their young users' accounts and activities which the users themselves cannot access. Although this provision is not mandatory, its presence in a new Federal Rule is likely to encourage the standardization of such practices in MDLs. This would be a detrimental development.

Written Comments

DRI Center for Law and Public Policy (0010): Rule 16.1(c)(4) should be strengthened "to **require** specifically that the report called for by proposed Rule 16.1(c) include a **mandatory** proposal for addressing the supportability of claims pending or transferred into the MDL." Otherwise, the judiciary must bear the burden. The Panel must initially decide whether a given case is a tagalong. (DRI does not endorse the concept of "direct filing" orders.) Then the MDL transferee judge has the large burden of deciding whether individual claims are supportable. A rules-based solution is necessary to overcome these problems.

Bayer U.S. LLC (0011): The proposed rule does not address "the core problem with MDLs today" – that a significant number of claimants turn out eventually not to have supportable claims. Plaintiff Fact Sheets do not deter such claims. The are discovery tools, not an early vetting method. In the *Mirena* MDL, the PFS process required Bayer to interact with an unsupportable case eleven times, on average, to obtain final dismissal. This process could take 180 days for each claim, and it occurred 650 times in that MDL proceeding. In another MDL, one attorney filed a complaint on behalf of 127 plaintiffs, but 117 of them did not comply with the PFS order – 92% of those in a single complaint. Despite the PFS requirement, plaintiffs' lawyers still file such claims *en masse*. Bayer therefore supports LCJ's proposal, which would require the MDL transferee court and the parties to identify how and when "sufficient information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim." This requirement would permit the claims to be tested under Rules 8(a), 9(b), and 11. To make that clear, the Committee Note should say that this requirement is essential to establish the "constitutional minimum of standing."

Robert Johnston & Gary Feldon (0028): This rule does not go far enough to cull meritless cases. PFS practice and census practice is really just discovery. Though discovery helps the parties develop valid claims, there should be a showing up front that the claims before the court are indeed valid. This sort of showing in a products case should require preliminary proof of (1) use of the specific product; (2) alleged injuries due to use of the product; (3) the date of plaintiff's injury and the date on which plaintiff had notice of defendant's allegedly wrongful conduct; and (4) releases authorizing defendant to collect relevant records from third parties.

Washington Legal Foundation (0030): The rule should require early vetting of claims." Data shows that between 30% and 50% of all claims in MDLs are unsupportable." There is little cost to plaintiffs in filing claims, but defendants must pay for discovery and other costs. Often they also must report the existence of these claims to the Food and Drug Administration and to their shareholders. The rule should provide a tool to end this activity.

Hon. Charles Breyer (N.D. Cal.) (0031): I have conducted more than a dozen MDL proceedings. A "one size fits all" approach to MDL proceedings is inefficient and unjust. "For example, it may be appropriate in one case to address jurisdictional concerns at the outset, before additional resources are expended; in another case, a court may wish to address the legal sufficiency of the claims, or statute of limitations issues, in advance of costly merits litigation. In non-MDL cases, judges routinely balance these concerns. There is no reason to dictate to judges the order, or necessity, of adjudicating these concerns in MDL cases."

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. "The Rule might suggest that the transferee judge in mass tort personal injury cases require attorneys to go further than basic Rule 11(b)(3) representations to the court and to certify within a short period of time post-filing that counsel has undertaken a diligent review of the plaintiff's available medical records, exposure information, and information about the use of the item or drug. The goal of such order is to eliminate baseless claims derived from mass marketing. The Rule should prompt judges to consider adopting initial mandatory discovery disclosures before party-driven discovery." The transferee judge may

identify non-meritorious claim early in the litigation's life-cycle using plaintiff fact sheets and may require certification of pre-filing due diligence.

John Rosenthal and Jeff Wilkerson (0035): "There is consensus – among judges, defense practitioners, and even many plaintiffs' lawyers – that mass filing of unexamined claims is occurring in large MDLs." In the Roundup litigation, Judge Chhabria established a "wave" process to move cases through the MDL. But despite that many cases were moved into later and later waves, and then eventually voluntarily dismissed, often because plaintiffs' counsel did not have any ability to show that these plaintiffs had the relevant medical diagnosis or any meaningful exposure to this product. "The existence of such unvetted claims increases the cost, and slows the pace, of discovery." It also hampers the ability of both sides to assess the potential exposure and thus renders settlement more difficult. The mass filing of claims "can make the traditional Rule 12 process impractical and prohibitively expensive." But the rule not only fails to set forth required procedures to deal with these problems, it does not even provide guidance about the nature of the problem. Many will read the Committee Note as suggesting nothing more than bilateral discovery. We urge that the draft be changed to stress that this provision is not merely about discovery, but early vetting of claims.

Judge Casey Rodgers (N.D. Fla.) (0036): Based on my experience with the 3M Combat Arms Earplug MDL, the largest MDL in history, I oppose any mandatory rule governing the vetting of claims in an MDL.

> While it is true that mass filings of unvetted clams plague many MDLs, in my view, mandatory rules governing how and when to address the issue would not be an effective solution. Beyond that, a mandatory rule in general is unnecessary and would have negative, albeit unintended, consequences.

In the 3M MDL, an early vetting rule would have been impossible to comply with or enforce. Nearly 99% of the needed records were in the possession and control of the Department of Defense and/or the V.A. In the view of those agencies, a "filed action" was required to obtain such records. We eventually were able to devise an administrative docket for nearly 300,000 claimants, and with that in place the needed information could be obtained. Using that information led to dismissal of more than 90,000 claims. "This could not have happened 'early' in the litigation. And, importantly, the 3M experience demonstrates that proper and effective vetting can – and does – occur in the absence of a mandatory rule, even with unprecedented numbers." A rule mandating early vetting cannot account for critical variables in different MDL proceedings. Such a rule "would only serve to frustrate and stifle creative case management in the very litigation needing it most."

New York City Bar (0037): "Proposed Rule 16.1(c)(4) provides a valuable mechanism to ensure early exchange of information to prevent insufficient claims and defenses from clogging the MDL. The proposed rule reflects the current practice in many MDLs and is designed to protect all parties and the court from the burden of insufficient claims and defenses." But we believe it should be made clear in the Note that this provision is not itself designed to weed out insufficient claims, and instead clarify that this is a form of early discovery. The rule should not implicitly or explicitly alter the pleading or dismissal standards. "Such a substantive change should not be buried in a case management rule and should not be unique to MDLs." "As currently proposed,

Rule 16.1(c)(4) does not appear to alter either pleading or dismissal standards, and the City Bar supports that aspect of the provision."

Melissa Payne (0042): This proposal adds an extra burden on plaintiffs. "Often faced with filing deadlines, plaintiffs would be faced with the added expense of expediting orders for medical records to meet the early discovery rule."

American Ass'n for Justice (0043): The defense bar's push to include a provision addressing claim insufficiency should be rejected. The Advisory Committee has already considered and rejected the requirement of fact sheets at the outset of every MDL. LCJ's proposal to amend (c)(4) to address "claim sufficiency," is a step backwards. this issue is highly contentious, and the term is often featured in so-called tort reform proposals pushed by the defense bar. The rule should instead set the framework for managing the entire MDL. Consolidation can occur very quickly, while proof of product use takes time. It is impracticable – if not impossible – to require proof of product use up front.

A. Layne Stackhouse (0046): The suggestion that the court should address "unsupportable claims" is unwarranted. For one thing, statutes of limitation mean that attorneys sometimes have to file before the complete a full workup of a case. And determining which claims are not supportable is difficult or impossible before discovery. And there are already effective tools available: "Plaintiffs' counsel can voluntarily dismiss these claims, defense counsel can move to have them dismissed, and Rule 11 already provides the court with the requisite power to deal with bad actors and to deter inappropriate behavior."

Warren Burns, Daniel Charest & Korey Nelson (0048): Adding an early bout of fact discovery about the proof available for individual plaintiffs' claims will mainly create additional paperwork burdens. The better way to proceed is to select some cases for bellwether trials and work up those cases with case-specific discovery. This way defendants will receive the individual information they say the need. "Plaintiffs who cannot provide that basis as part of discovery will either dismiss their cases or have them dismissed. If a case settles before discovery reaches that point, plaintiffs will have to provide that information as part of the claims process." And implications that the presence of some claims for plaintiffs who do not qualify for an award suggests inadequate pre-filing investigation is simply wrong. The challenge of obtaining health care records, even on behalf of the patient, is quite daunting and time-consuming.

Lawyers for Civil Justice (0053): "Empirical data demonstrate that insufficient claims are prevalent in mass-tort MDLs." This should be "the bullseye of the Committee's rulemaking effort." But proposed (c)(4) is not a solution, or even an improvement over the status quo. It may even be a step backward. A few modest changes to the rule would solve the problem. "Despite the general consensus of the problem, data regarding insufficient claims are hard to find." We propose that dismissals of claims asserted in MDLs be used as data to prove the existence and extent of the problem. At pp. 3-6, the submission cites 7 specific federal MDLs (and one California consolidated proceeding and a bankruptcy court proceeding) in which the percentage of dismissals (some after summary judgment rulings) ranged from 15% to 75%. But (c)(4) is "written as a flexible menu rather than a mandatory rule." The current proposal is inadequate because it uses "exchange" and refers to "defenses" as well as claims. It should be rewritten as follows:

(4) how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's alleged injury ~~about the factual bases for their claims and defenses~~.

In addition, the Committee Note should state that Rules 8(a) and 9(b) apply in MDL proceedings, as does Rule 11. These revisions would make dismissal a ministerial task and obviate motion practice.

In-house counsel at 33 corporations (0056): Enforcement of the requirements of FRCP 3, 7, 8, 9, 10, 11 and 12 can ensure that the constitutional requirements of Article III standing are satisfied. But these rules are ineffective in mass tort MDLs. The solution is to revise (c)(4) as follows:

how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's alleged injury ~~about the factual bases for their claims and defenses~~.

This language would not require a claim-by-claim compliance process, but requiring a discussion of the disclosure process would provide assurance that judges and parties will secure better information for making early case management decisions.

Andrew Trask (0066): The testimony and written comments "have conclusively demonstrated the widespread existence of unsupported claims * * * and the availability of simple, appropriate solutions." Any suggestion that this is not a problem unless proved by empirical study ignores the reports from federal judges who have identified these problems in their MDLs. Usually the information needed to show that the plaintiff has a genuine claim is in the plaintiff's hands, not the defendant's hands. But mass tort lawyers do not vet their cases. If there really is a timing problem for plaintiff's lawyer to obtain such information, the lawyer can seek a good faith extension of time. "[B]ecause the mass filing of unsupported claims is a creation of the MDL process it is bet addressed by changes to the rules governing MDLs."

16.1(c)(5) – Consolidated Pleadings

Alex Dahl (LCJ) & 0004: The rules should not invite "pleadings" that are not authorized by Rule 7(a). As evidenced by the 2007 amendment to Rule 7(a), the Committee views this rule strictly. Rule 7(a) only contemplates judicial authority to require one additional pleading besides those the rules require – a reply to an answer if ordered by the court. But the use of the word "pleadings" in (c)(5) creates the presumption that the word has the same meaning as in other rules. If the notion of "consolidated pleadings" is introduced into the rules, that is certain to generate litigation about its meaning. In Gelboim v. Bank of America, 574 U.S. 405, 413 n.3 (2015), the Court expressly questioned the legal effect of such documents; they should not be installed in the rules.

Kaspar Stoffelmayr & 0008: This is my no. 2 concern (after aggressive vetting of claims). The rules say there are not pleadings beyond those listed in Rule 7(a). So when an MDL transferee court endorses a "master complaint" there is nothing to explain what that is or how the defendants can challenge it. Rule 12(b)(6) is nullified because nobody can realistically move to dismiss. And "short form" complaints usually contain almost no facts or particulars about the given plaintiff.

Chris Campbell: 16.1(c)(5) conflicts with Rule 7(a), which does not mention "consolidated pleadings" and says that the only permitted pleadings are those listed in 7(a).

Gregory Halperin: At a minimum, the Note should emphasize that when there is a master complaint and short-form complaints, the two together must satisfy Rule 8(a)(2) [and perhaps Rule 9], and that the defendant can challenge their adequacy using Rue 12(b)(6). The Note must make it clear that (c)(5) does not excuse compliance with these basic requirements in every case. Large MDL proceedings often substitute a "master complaint" and "short-form complaints" with allegations about each plaintiff. This process undoubtedly introduces efficiencies, as plaintiffs need not draft full individualized complaints and defendants are absolved of the need to serve individualized answers. But there is no "MDL exception" to the Federal Rules, and a complaint is not a mere box-checking exercise. There must be an opportunity for the defendants, before they undergo costly or burdensome discovery, to challenge the legal sufficiency of the claims. The Committee Note should explain that if a master complaint is employed, together with the short-form complaints it provides the information defendants need to make motions to dismiss. Otherwise the master complaint process is fundamentally at odds with the pleading rules. But some courts have permitted plaintiffs pleading fraud (covered by Rule 9(b)) to make extremely vague allegations. For example, in the J&J Talcum Powder MDL plaintiffs needed only aver that they experienced "a talcum powder product(s) injury" without specifying what that injury was. It is important that the Committee Note say that using master complaints and short-form complaints must satisfy Rule 7(a)(1) requirements for complaints. "If the Federal Rules are going to encourage consideration of 'consolidated pleadings,' the Advisory Committee Notes should clarify that those consolidated pleadings are not immune from challenge under Rule 12(b)(6) or subject to a standard of review that is different from any other complaint filed in federal court."

Jan. 16, 2024 Online hearing

Jeanine Kenney: In class actions, this is provision risks confusion. The issue is in mass tort cases, not class actions. Suggesting a "consolidated complaint" in a class action MDL is worrisome. Indeed, neither the Note nor the proposed rule provides any guidance on what types of MDLs present the sort of management challenges that call for employing its provisions.

Dena Sharp: This provision would not fit a class action, where the class action complaint "serves the critical purpose of aggregating all the class's claims into a single pleading." The master complaint in a mass tort MDL, by contrast, often serves the distinct purpose of providing a single complaint defendants may move against through "cross-cutting" Rule 12 motions. I would add the following to the Note: "Cases proceeding under Rule 23 may, for example, require only a consolidated complaint which supersedes individual class action complaints failing with the class or classes defined in the consolidated complaint."

Feb. 6, 2024, Online Hearing

Kellie Lerner (President, Committee to Support the Antitrust Laws): In a class action, the consolidated complaint often is the work of interim class counsel, who selects the factual allegations, causes of action, and class representatives that are included in the consolidated amended complaint, which becomes the single operative pleading for the MDL. "Only interim class counsel is empowered to make decisions for the class and litigate the action."

Written Comments

Amy Keller (0053): The idea of a "consolidated complaint" has little application in class action MDLs. Instead, in those proceedings what matters is a "superseding" complaint, setting forth (among other things) the proposed class representatives who would satisfy the adequacy requirement of Rule 23(a)(4).

16.1(c)(6) – Discovery Plan

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The Note should be fortified with the following: "Information on methods to handle discovery efficiently can address, for example, the following: (i) common-issue discovery; (ii) procedures for handling already-completed common-issue discovery in pre-MDL cases; (iii) establishment of early ESI protocols; (iv) overall time limits on each side's number of deposition hours; (vi) necessary early protective orders; and (vii) procedures to handle privilege disputes."

16.1(c)(7) – Likely Pretrial Motions

Written Comments

Robert Johnston & Gary Feldon (0028): This rule fails to provide genuine guidance to transferee courts. These courts should not abuse their discretion over the remand decision by having cases sit, warehoused in the MDL, when efficient remand for trial is possible. Instead, the court and parties should be focused from the outset on setting a schedule for efficiently pushing cases toward resolution by motion or trial.

16.1(c)(8) – Additional Management Conferences

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: At lines 313-14, the Note should mention that courts often conduct management conferences online so that counsel from around the country can participate. Highlighting this possibility could be useful.

16.1(c)(9) – Facilitate Settlement

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: Tips for facilitating settlement do not belong in the rules because good litigation management is the key to success, not settlement promotion. The draft "escalates settlement into a top priority in MDLs." The words "settle" and "settlement" appear 12 times in the draft rule and note. The draft Note says that "[i]t is often important that the court be regularly apprised of developments regarding potential settlement," but many federal judges would disagree with that assertion. The over-emphasis on settlement is inappropriate because it fosters a presumption of liability, conveys that the judge has an agenda, is inconsistent with the MDL statute' focus on pre-trial preparation and puts the cart of settlement before the horse of litigating the claims. The proposal "furthers the misperception that an MDL is primarily a vehicle for paying – rather than adjudicating – claims." Suggesting that MDL courts immediately focus on settlement at the initial management conference does not encourage sound management of such proceedings. Instead, settlements are usually the by-product of case management focused on resolving merits issues.

Chris Campbell: 16.1(c)(9) improperly promotes settlement as a top priority. It is noted 12 times on the draft, and the rule even suggests that the MDL court provide "measures to facilitate settlement."

James Shepherd: Early consideration of settlement is a bad idea. The purpose of the MDL statute is to coordinate pretrial proceedings, not to resolve litigations via settlement. This attitude presupposes liability and hinders the real purpose of MDL combination.

Fred Haston (Int'l Assoc. of Defense Counsel): The draft overemphasizes MDL as a settlement device. This emphasis exacerbates the docket explosion we have seen. The emphasis should be on procedures for resolving cases on their merits, not on promoting settlement.

Harley Ratliff: MDLs should not be viewed as simply a mechanism for transferring money from the defendant to the attorneys who have filed suit. "In my experience, MDL judges may often view liability as a foregone conclusion and the only (or easiest) solution to the problem is early resolution." This rule provision implies that settlement is the first step in the litigation, not the last. That makes MDLs a magnet for dubious filings.

Jan. 16, 2024, Hearing

Tobi Milrood: "The fact that AAJ agrees with LCJ that topics 16.1(c)(9) and (12) should be removed from the list is a strong indicator that these topics should be excised from the proposed rule.

John Rabiej (Rabiej Litigation Center) (0005) & 0026: The phrase "at the appropriate time" should be added to the Note. Adding this phrase could eliminate unnecessary controversy about whether the MDL serves solely or mainly as a method to obtain overall settlement. It fortifies a point already made – the decision to settle is ultimately an individual one.

Emily Acosta: The rule calls for discussion of settlement too early in the proceeding. That can be harmful to the plaintiffs.

Lee Mickus: Settlement is mentioned frequently in the Committee Note. That topic would ordinarily be premature at the time of the initial management conference. The plaintiff and defendant "sides" are aligned on the proposition that including settlement on the list is risky. But this rule perpetuates the notion that MDL is really a resolution device, not a way to streamline pretrial preparations (which is what Congress intended in 1968). Most of the time, this is a cul-de-sac.

Written Comments

Robert Johnston & Gary Feldon (0028): We agree with other commenters that it is premature to address settlement at the initial management conference.

John Rosenthal and Jeff Wilkerson (0035): The draft places undue emphasis on settlement and could suggest a presumption that settlement is an appropriate or expected outcome of all MDLs.

16.1(c)(10) – Manage New Filings

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: Inserting the idea of "direct filing" orders into the rules could be "a radical decision because direct filing is inconsistent with Rule 3, which 'governs the commencement of all action.'" It also contradicts the MDL statute, which commands that all transfer decisions must be made by the Judicial Panel, not the transferee judge. In addition, several courts have held that MDL courts lack subject-matter jurisdiction over direct-filed actions. Such orders require defendants to waive objections to personal jurisdiction and introduce uncertainty about choice of law questions. The result would be to "set up MDL judges for unrealistic expectations about waivers and unintended complications when claims are not filed in the appropriate venue. (c)(10) should be removed from the proposal.

Kaspar Stoffelmayr & 0008: Direct filing orders are contrary to defendant's rights to insist they cannot be sued in a jurisdiction in which venue is improper or they are not subject to personal jurisdiction with regard to this claim. "We are forced to do this." Direct filing creates severe problems of personal jurisdiction and choice of law. Sometimes we are forced to waive service of process.

Chris Campbell: 16.1(c)(10) prompts consideration of direct filing orders. That would conflict with Rule 3 and contradicts § 1407. It also provokes questions related to personal jurisdiction, venue, and choice of law.

Fred Haston (Int'l Assoc. of Defense Counsel): The rule should not seed direct filings. What you say will be used, and there is no need to mention this possibility. They are contrary to Rule 3 and the MDL statutory framework. Adopting this provision will frustrate the promise of

this new rule. Under Rule 3, cases are supposed to be filed in the correct court. Only the Panel can decide whether to add them to an MDL proceeding.

John Guttmann: Under the statute, the protocol is that the JPML rules of procedure require that counsel notify the Panel of potential tag-along actions, and then the Panel may decide whether to transfer them or not to transfer them. That is not up to the MDL court, but rather a decision by the Panel.

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Center) (0005): The Note should be revised as follows: "identifying the appropriate transfer district for transfer ~~at the end of the pretrial phase~~ on remand . . ." This clarification could be helpful.

16.1(c)(11) – Actions in Other Courts

Jan. 16, 2024, Online Hearing

John Rabiej (Rabiej Litigation Center) (0005): The Note should be revised as follows: "If the court is considering adopting a common benefit fund, it should consider~~ation~~ the relative importance of the various proceedings ~~may be important~~ to ensure a fair arrangement and be aware of the unsettled law regarding assessing common benefit fees on lawyers involved in related state-court actions, with or without their consent." If the goal of the current Note is to address Judge Chhabria's concerns about such funds, the language is opaque. The suggested language clarifies the intent.

Frederick Longer (0019): Though the rule is about whether related actions have been filed or are expected, the Note veers into avoiding overlapping discovery and a "fair arrangement" about common benefit funds. I think those tangential and speculative concerns should be removed from the Note.

16.1(c)(12) – Reference to Master/Magistrate Judge

Alex Dahl (LCJ) & 0004: There is little if any utility to suggesting that MDL courts obtain the parties' views on appointment of a magistrate judge or a master. We already have rules dealing with such appointments, and adding (c)(12) to the rules will cause confusion by communicating an explicit endorsement of appointing masters, contrary to the Committee Note for Rule 53. Inserting this provision into 16.1 creates a risk of "perpetuating a misconception that the raison d'etre of an MDL proceeding (almost literally from day one) is to steer the litigation toward settlement."

Chris Campbell: 16.1(c)(12) contradicts Rule 53, which says use of masters should be the "exception not the rule," and that they should be appointed only in "limited circumstances." It raises issues with delaying resolution of cases, lack of transparency in selection of masters, the cost of using masters, and the authority they may wield.

Written Comments

Federal Magistrate Judges Association (0018): "The FMJA Rules Committee members strongly endorse the recognition that Magistrate Judges can be of great assistance with respect to discovery, conduct of bellwether trials and settlement." These judicial officers are selected by District Judges and often provide experience and skills to expedite resolution of MDL proceedings. "Indeed, empirical studies show that MDLs with special masters lasted 66 percent longer than those managed within the court, regardless of size and complexity. * * * Magistrate Judges also comply with the Judicial Code of Ethics such that use of Magistrate Judges obviates any concerns about self-dealing or bias of a privately funded special master, as well as that judicial authority is being unnecessarily delegated. In fact, Federal Rule of Civil Procedure 53, which authorizes appointments of a special master, establishes a presumption in favor of the assignment of a Magistrate Judge to assist with the management of complex cases, including MDLs. Finally, Magistrate Judges enjoy working on complex cases and often come to the court with a background litigating such cases and have a strong knowledge of ediscovery issues."

John Rosenthal and Jeff Wilkerson (0035): We are concerned about the inclusion of this item in the proposed rule. For one thing, there are already rules regarding the appointment and use of special masters, particularly Rule 53. Our experience is that masters have been broadly used in the MDL context, and sometimes assumed broad responsibility for the pretrial conduct of a case. "We believe that the inclusion of this provision could be read as an endorsement for appointing masters, which is contrary to the current Federal Rules." Including masters might erode the presumption in favor of appointing magistrate judges instead. With masters, there is a concern about transparency. "All too often, parties have a special master foisted upon them with little chance to suggest candidates, vet candidates, and/or object to their appointment." The Committee Note should be revised to emphasize (a) that appointment of a master is the exception, not the rule, that a referral to a master should be clearly defined and limited in nature, and that "broad delegation of pretrial proceedings to a master" is not appropriate.

16.1(d) – Initial Management Order

Jan. 16, 2024, Online Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0016: Rule 16.1(d) should be revised as follows: " After the conference, the court should enter and initial ~~MDL~~ management order addressing the matters addressed in the report or at the initial management conference ~~designated under Rule 16.1(c)~~." The present language is ambiguous about whether the lawyers must address all the matters in 16.1(c), or only the ones selected by the judge. And the current version may be read to omit reference to items that the lawyers themselves raise independently. The rule should not be read to exclude matters raised by the lawyers. In addition, the Note should be revised as follows: "Because active judicial management of MDL proceedings must be flexible, the court should ~~be open to~~ anticipate modifying its management order . . . ."

Written Comments

Robert Johnston & Gary Feldon (0028): There is "little point in the Potemkin exercise of creating a rule without content." The draft does not instruct courts to follow the approach contemplated by Rule 16.1. The rule itself should instruct the court to "be open to modifying its initial management order in light of subsequent developments in the MDL proceedings." That appears in the Note, but should be in the rule.

## II. ONGOING SUBCOMMITTEE PROJECTS

Due to the effort involved in responding to the public comment on the privilege log amendments and Rule 16.1 proposal, the Advisory Committee had limited time to focus also on other subcommittee matters. Most of these subcommittee efforts have already been presented to the Standing Committee. Each of these ongoing topics was covered in some detail in Advisory Committee agenda book for the April 2024 meeting, which Standing Committee members may access via the link below. As to those topics already presented to the Standing Committee, this report will briefly describe the ongoing work and direct Standing Committee members seeking additional details to the pertinent pages in the agenda book for the Advisory Committee's April 2024 meeting. Additional details can be found in the draft minutes for the Advisory Committee's April 2024 meeting, included in this agenda book.

### A. Rule 41(a) Subcommittee

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, continues its work considering amendments that would resolve differing interpretations among the circuits regarding voluntary dismissal. The Subcommittee was formed in October 2022 in response to two submissions (21-CV-O, 22-CV-J) that pointed out a circuit split regarding whether the rule permits unilateral voluntary dismissal of only an entire "action" or something less, such as all claims against a single defendant or one of several claims against a defendant.

After substantial outreach and research, the subcommittee has reached a consensus that the rule should be revised to explicitly increase the flexibility of parties to dismiss one or more claims from the case, whether unilaterally before the filing of an answer or motion for summary judgment, by stipulation, or by court order. The subcommittee believes that such a change would be consistent with both prevailing district-court practice and the policy running throughout the rules in favor of narrowing the issues in the case throughout the litigation. As a result, the subcommittee hopes to present a draft amendment at the Advisory Committee's fall meeting changing the references in Rule 41(a) to "an action" to "a claim," with an explicit statement in the committee note that this language allows voluntary dismissal of one or more claims asserted in the complaint.

The subcommittee is also considering other amendments to the rule, including of the requirement that a stipulation of dismissal be "signed by all parties who have appeared." Most courts have interpreted this language to mean that all parties *currently* in the litigation must sign the stipulation; those who are no longer parties need not sign. But some courts have held that all those who have *ever* been parties to the litigation must sign, even if they are no longer in the case. The subcommittee's tentative view is that this latter interpretation may present undue obstacles to settlement or simplification of the action, and the rule should be amended to make clear that only current parties to a case need to sign a stipulation of dismissal.

The subcommittee expects that it will bring a proposal to the full advisory committee at the upcoming fall meeting.

### B. Discovery Subcommittee

Having completed its work on the privilege log amendments listed in Part I, the Discovery Subcommittee continues to work on two items that were included in the Standing Committee agenda book for the January 2024 meeting. Owing to the demands of the public comment period, only limited progress has been made on these matters.

This report will provide a brief description of this ongoing work of the Discovery Subcommittee. For details on the work, Standing Committee members may consult pp. 258-69 of the agenda book for the Advisory Committee's April 2024 meeting via the link provided above.

(1) Manner of service of a subpoena: Rule 45(b)(1) now specifies that "[s]erving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law." There seem to be notable differences in whether this direction is satisfied even though in-person service is not accomplished.

The Subcommittee continues to focus on authorizing service of a subpoena by various methods authorized for service of initial process under Rules 4(d), (e), (f), (h), and (i), and has also begun to focus on the possible logistical difficulties presented by Rule 45's requirement that the witness be tendered the fees for one day's attendance and mileage.

(2) Filing under seal: The Advisory Committee has received a number of submissions – some of them quite long – urging that the rules explicitly recognize that issuance of a protective order under Rule 26(c) invokes a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. There seems to be little dispute about the reality that the standards for protective orders and filing under seal are different, though different circuits have articulated and implemented the standards for filing under seal in somewhat distinct ways. The Subcommittee's current orientation is not to try to displace any of these circuit standards.

As has been presented to the Standing Committee before, amendments to Rules 26(c) and 5(d) could make clear in the rules that a different standard applies to granting a protective order regarding materials exchanged during discovery and authorizing filing under seal in court. Ongoing work focuses on whether and how to provide national directions for procedures regarding filing under seal, including whether motions to file under seal may themselves be filed under seal, whether there should be a waiting period before decision of such motions to seal, the possibility of "provisional" filing under seal pending decision of a motion to file under seal, when the seal would be removed, etc. Some feedback on these procedures has already been obtained from representatives of the Federal Magistrate Judges Association, and reactions for court clerks will be sought via the Advisory Committee's clerk liaison.

### C. Rule 7.1 Subcommittee

The Rule 7.1 subcommittee, chaired by Justice Jane N. Bland, has continued its work on the disclosures required of nongovernmental corporations. Currently, the rule requires a

"nongovernmental corporate party or a nongovernmental corporation that seeks to intervene" to disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The goal of the rule is to ensure that district judges can comply with their duty to recuse when they have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). Because the statute requires recusal for both legal ownership and indirect equitable ownership, the current rule does not require that parties disclose sufficient information for judges to evaluate their statutory obligation in all cases.

The subcommittee has been considering whether an expanded disclosure requirement would be feasible and beneficial. Its work is informed by new guidance issued by the Codes of Conduct Committee regarding recusal based on a financial interest. This new guidance focuses on ownership of an interest in an entity that "controls" a party; that is, if the judge has a financial interest in a parent that "controls" a party, that judge has a financial interest requiring recusal. The current rule likely ensures disclosure of most such circumstances, but not all. Therefore, the subcommittee is considering an amendment that would require parties to disclose any beneficial owners or those who in fact exercise control over the party. The subcommittee is also continuing research on other possibilities, including perhaps some alternatives borrowed from state law and local rules. The subcommittee hopes to present draft rule language at the upcoming fall meeting.

### D. Cross-Border Subcommittee

At the end of the Advisory Committee's October 2023 meeting, a Cross-Border Discovery Subcommittee was created. The Chair is Judge Shah, and the members are Judge Boal, Professor Clopton, Judge McEwen (liaison to the Bankruptcy Rules Committee), and Joshua Gardner of the DOJ. This topic was presented to the Standing Committee during its January 2024 meeting. Since that time, the Cross-Border Discovery Subcommittee has met and initially concluded to focus first on handling of discovery for use in U.S. litigation and the application of the Hague Convention in some circumstances. Information-gathering outreach is underway with interested bar groups and will continue. Standing Committee members can find details on the current efforts at pp. 296-311 of the agenda book for the Advisory Committee's April 2024 meeting.

## III. INFORMATION ITEMS

The Advisory Committee also has ongoing work on a number of other topics that are described below. Standing Committee reactions would be helpful.

### A. Random assignment of cases

Over the course of the last year, the advisory committee has received several requests for rulemaking on civil case assignment in cases seeking injunctions against executive action. These requests are motivated by the concern that some plaintiffs are engaged in a precise form of "judge shopping": filing cases in single-judge divisions to ensure assignment of the case to the (presumably favorable) judge in that location. Proponents of rulemaking seek to have such cases randomly assigned among all of the judges in the district.

The advisory committee first discussed this issue at its October 2023 meeting, and the reporters were tasked with considering (1) whether such a rule would be authorized by the Enabling Act, and (2) whether such a rule would require invoking the Act's supersession clause since 28 U.S.C. §137 currently provides that a district's business "shall be divided among the judges as provided by the rules and orders of the court," and that "the chief judge of the district court shall be responsible for the observance of such rules and orders and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe." Arguably, a rule requiring random assignment of some cases would contravene this statutory delegation of the assignment power to the districts themselves. If this interpretation of the statute is correct, then the rule would necessarily have to supersede the statute. Whether such a supersession is contemplated by the Enabling Act is a challenging question, as noted by several members of the Standing Committee when this issue was discussed at the January 2024 meeting. The Department of Justice submitted a detailed letter arguing that supersession would not be necessary.

In any event, shortly before the advisory committee's April 2024 meeting, on March 12, 2024, the Judicial Conference announced a new policy to the districts providing that cases seeking to bar or mandate nationwide enforcement of a federal law be randomly assigned. As the Judicial Conference clarified, however, this policy is only guidance and not mandatory. The policy attracted significant attention from various Senators, some of whom urged districts to follow the policy, and some of whom did not.

The advisory committee discussed these developments at its April 2024 meeting. The general consensus was that this remains an extremely important issue and that the reporters should continue their research efforts. In the meantime, the reporters will also closely monitor the degree to which districts follow the Judicial Conference policy. Because it will surely take some time for receptive districts to implement the policy, the reporters will keep track of any new local rules or orders to report to the Advisory Committee at its October meeting.

### B. Use of the word "master" in the rules

This issue is new to the Standing Committee. The American Bar Association has submitted 24-CV-A, proposing that the word "master" be removed from Rule 53 and from any other rule that refers to the possibility of appointing a "master." The ABA suggests substituting "court-appointed neutral." In April, The Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) submitted 24-CV-J, supporting the ABA proposal. It would be helpful to the Advisory Committee to know of any views of Standing Committee members on this proposed change in the use of the word "master," which has been employed in Anglo-American legal systems for centuries.

Besides Rule 53, the term "master" appears in at least six other Civil Rules (and in Rule 16.1, proposed for adoption in the action items above). It is also used by the Supreme Court's rules and in at least one statute (28 U.S.C. § 636(b)(2)). Further work will be needed to determine whether the term also appears in other statutes. In addition, it appears that, without relying on Rule 53, judges use the term when making appointments to assist in the conduct of litigation, particularly complex litigation.

The submissions urge using the term "court-appointed neutral" as a substitute for "master." A variety of other terms has been employed in similar contexts in the past. Whether "neutral" would be a good substitute term could be debated. It might produce ambiguities of its own. To illustrate, at least one district (N.D. Cal.) has for decades had a program involving "early neutral evaluation," relying on experienced lawyers to provide guidance in possible resolution of civil cases. Lawyers who have undergone a training program are appointed to a panel maintained by the court, so using "court-appointed neutrals" might cause confusion in at least this district.

Further information about this topic can be found at pp. 637-43 of the agenda book for the Advisory Committee's April 2024 meeting. It would be helpful to the Advisory Committee to know whether members of the Standing Committee have views on (a) whether it is advisable to discard the longstanding use of the term "master" in the Civil Rules, and (b) if so, what term should be substituted for "master."

### C. Remote testimony

This topic is new to the Advisory Committee's agenda. 24-CV-B, from a number of prominent plaintiff-side lawyers, proposes that an amendment be adopted to resolve a split in the courts about the interaction of Rule 45(c)'s limitations on where a witness must appear under subpoena and the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena.

A new Rule 43/45 Subcommittee has been appointed to examine these issues. It is chaired by Judge Hannah Lauck (E.D. Va.) and includes Justice Jane Bland (Texas Supreme Court), Advisory Committee members Joseph Sellers and David Burman, and Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee, which has a related proposal before it).

Additional details about these topics can be found at pp. 587-94 of the agenda book for the Advisory Committee's April 2024 meeting.

The Rule 43(a) proposal would significantly relax present limits on the use of remote testimony in trials or hearings:

> **(a) In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal state, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. ~~For good cause in compelling circumstances and with appropriate safeguards,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, must require witnesses to testify ~~may permit testimony~~ in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

The Bankruptcy Rule proposal is less aggressive. It would not apply in adversary proceedings. In other matters, it would remove the requirement that "compelling circumstances" be presented in addition to good cause to justify use of remote means for testimony.

It would be helpful to the new subcommittee to know about views of Standing Committee members about use of remote testimony in trials and hearings.

The Rule 45 proposal was prompted by the decision in In re Kirkland, 75 F.4th 2030 (9th Cir. 2023), that even when Rule 43(a) authorizes remote testimony a subpoena may not be used to compel an unwilling witness to provide such testimony within the range authorized by Rule 45(c). The 2013 amendments to Rule 45 centralized the rule's provisions about where a witness subject to a subpoena could be required to attend and testify, generally limiting that to 100 miles from the residence of the witness or any point within the state of residence of the witness. The Committee Note to the 2013 amendments said that a subpoena could be used for such a purpose, but the Ninth Circuit panel held that a subpoena could not.

### D. Jury Demand After Removal – Rule 81(c)

As presented previously to the Standing Committee, it has been proposed that an amendment of Rule 81(c) be pursued because, as restyled in 2007, it could create confusion about whether a jury trial must be demanded after removal from state court if there has not yet been a jury demand in the state court proceedings.

As restyled, Rule 81(c)(3)(A) says that no demand for jury trial need be made after removal "[i]f the state law *did* not require an express demand for a jury trial * * * unless the court orders the parties to do so within a specified time." Though the rule seems to have been intended to excuse post-removal jury demands (absent a court order setting a deadline for making a demand) only after removal from state courts in which there is never a requirement to demand a jury trial, and not in instances of removal from a state court in which a jury demand must be made under state practice, but was not yet required as of the time of removal. In that way, it presumes that lawyers in states in which jury demands are required at some point will realize they need to worry about when that is required in federal court after removal. For those unaccustomed to ever having to demand a jury, the requirement that the court set a deadline for such demands is protective in calling their attention to this federal-court requirement. But that was surely clearer before restyling, when the rule required a jury demand after removal if no such demand had been made before removal "[i]f the state law *does* not require an express demand for a jury trial."

The style change could be read to indicate that the question under the restyled rule is whether *at the time of removal* state court practice already required a jury demand. But it appears that the courts continued to interpret the restyled rule to require a post-removal demand under Rule 38 unless such a demand is never required in the state court from which the case was removed.

Two possible solutions are under review. First, the style change could be reversed, making it clear that a post-removal jury demand is required if none has been made before

removal whenever a jury demand is required under the practice of the pertinent state court. But that could leave some ambiguity about which state court practices excuse a demand absent a court order.

The other possible approach would involve removing the exemption for those state court systems that never require a jury demand and requiring a post-removal demand in every case if none was made before removal. That would remove any ambiguity about whether a given state's practice supported an exemption from the jury demand requirement. But that change might surprise lawyers in states in which no jury demand is required. Research by Rules Law Clerk Zachary Hawari indicates that as many as nine states appear not to require jury demands unless the presiding judge directs the parties to make such demands.

The Advisory Committee has not determined which of these two courses to pursue. More details can be found at pp. 350-57 of the agenda book for the Advisory Committee's April 2024 meeting.

**PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE**[1]

**Rule 16. Pretrial Conferences; Scheduling; Management**

* * * * *

**(b) Scheduling and Management.**

* * * * *

**(3)** ***Contents of the Order.***

* * * * *

**(B)** *Permitted Contents*.

* * * * *

**(iv)** include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of

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

privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

**Committee Note**

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words – "and management" – are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may

identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes, it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case there is no overarching standard for all cases. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

---

**Changes Made After Publication and Comment**

There were no changes to the rule amendment after the public comment period. Two small modifications were made to the Committee Note.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE**[1]

**Rule 16.1. Multidistrict Litigation**

**(a) Initial Management Conference.** After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

**(b) Report for the Conference.**

**(1)** ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

**(2)** ***Required Content: the Parties' Views on Leadership Counsel and Other Matters.*** The report must address any matter the court designates — which may include any matter

[1] New material is underlined in red.

in Rule 16 — and, unless the court orders otherwise, the parties' views on:

**(A)** whether leadership counsel should be appointed and, if so:

**(i)** the timing of the appointments;

**(ii)** the structure of leadership counsel;

**(iii)** the procedure for selecting leadership and whether the appointments should be reviewed periodically;

**(iv)** their responsibilities and authority in conducting pretrial activities and any role in resolution of the MDL proceedings;

**(v)** the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;

**(vi)** any limits on activity by nonleadership counsel; and

**(vii)** whether and when to establish a means for compensating leadership counsel;

**(B)** any previously entered scheduling or other orders that should be vacated or modified;

**(C)** a schedule for additional management conferences with the court;

**(D)** how to manage the direct filing of new actions in the MDL proceedings; and

**(E)** whether related actions have been — or are expected to be — filed in other courts, and whether to adopt methods for coordinating with them.

**(3)** ***Additional Required Content: the Parties' Initial Views on Various Matters.*** Unless the court orders otherwise, the report also must address the parties' initial views on:

**(A)** whether consolidated pleadings should be prepared;

**(B)** how and when the parties will exchange information about the factual bases for their claims and defenses;

**(C)** discovery, including any difficult issues that may arise;

**(D)** any likely pretrial motions;

**(E)** whether the court should consider any measures to facilitate resolving some or all actions before the court;

**(F)** whether any matters should be referred to a magistrate judge or a master; and

**(G)** the principal factual and legal issues likely to be presented.

**(4)** ***Permitted Content***: The report may include any other matter that the parties wish to bring to the court's attention.

**(c) Initial Management Order.** After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

**Committee Note**

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased since the statute was enacted but has leveled off in recent years. These actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation (MDL proceedings) in the Civil Rules. The addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. Of course, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies in handling those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

**Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop an initial management plan for the MDL

proceedings and, thus, this initial conference may only address some of the matters referenced in Rule 16.1(b)(2)-(3). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b)(2)-(3) should be of great value to the transferee judge and the parties.

**Rule 16.1(b)(1).** The court ordinarily should order the parties to meet to submit a report to the court about the matters designated in Rule 16.1(b)(2)-(3) prior to the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters.

**Rule 16.1(b)(2).** Unless the court orders otherwise, the report must address all of the matters identified in Rule 16.1(b)(2) (as well as all those in 16.1(b)(3)). The court also may direct the parties to address any other matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

The rule distinguishes between the matters identified in Rule 16.1(b)(2)(B)-(E) and in Rule 16.1(b)(3) because court action on some of the matters identified in Rule 16.1(b)(3) may be premature before leadership counsel is appointed, if that is to occur. For this reason, 16.1(b)(2) calls for the parties' views on the matters designated in (b)(2) whereas 16.1(b)(3) requires only the parties' initial views on those matters listed in (b)(3).

Rule 16.1(b)(2)(C) directs the parties to suggest a schedule for additional management conferences during

which the same or other matters may be addressed, and the Rule 16.1(c) initial management order controls only until it is modified. The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceeding. Experience has shown, however, that the matters identified in Rule 16.1(b)(2)(B)-(E) and Rule 16.1(b)(3) are often important to the management of MDL proceedings.

**Rule 16.1(b)(2)(A).** Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointments may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel and many times this will be one of the early orders the transferee judge enters. Rule 16.1(b)(2)(A) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first topic is the timing of appointment of leadership. Ordinarily, transferee judges enter orders appointing leadership counsel separately from orders addressing the matters in Rule 16.1(b)(2)(B)-(E) and 16.1(b)(3).

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Rule 16.1(b)(2)(A)(ii) therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

The procedure for selecting leadership counsel is addressed in item (iii). There is no single method that is best for all MDL proceedings. The transferee judge is responsible to ensure that the lawyers appointed to leadership positions

are able to do the work and will responsibly and fairly discharge their leadership obligations. In undertaking this process, a transferee judge should consider the benefits of geographical distribution as well as differing experiences, skills, knowledge, and backgrounds. Courts have considered the nature of the actions and parties, the needs of the litigation, and each lawyer's qualifications, expertise, and access to resources. They have also taken into account how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries and also claims by third-party payors who paid for medical treatment. The court may need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

Item (iv) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such

means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

An additional task of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Item (v) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As item (vi) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, item (vii) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for the management of case staffing, timekeeping, cost reimbursement, and related common benefit issues. But it may be best to defer entering a specific order relating to a

common benefit fee and expenses until well into the proceedings, when the court is more familiar with the effects of such an order and the activities of leadership counsel.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify one or more classes, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

**Rule 16.1(b)(2)(B)-(E) and (3).** Rule 16.1(b)(2) and (3) identify a number of matters that often are important in the management of MDL proceedings. The matters identified in Rule 16.1(b)(2)(B)-(E) frequently call for early action by the court. The matters identified by Rule 16.1(b)(3) are in a separate paragraph of the rule because, in the absence of appointment of leadership counsel should appointment be warranted, the parties may be able to provide only their initial views on these matters at the conference.

**Rule 16.1(b)(2)(B).** When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which they were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

**Rule 16.1(b)(2)(C).** The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceeding to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

**Rule 16.1(b)(2)(D).** When large numbers of tagalong actions (actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceeding) are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for remand at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related litigation (e.g., state courts and bankruptcy courts) at the case management conferences.

**Rule 16.1(b)(2)(E).** On occasion there are actions in other courts that are related to the MDL proceeding. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may happen that a party to an MDL proceeding is a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceeding. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such actions in other courts have been filed or are anticipated.

**Rule 16.1(b)(3).** As compared to the matters listed in Rule 16.1(b)(2)(B)-(E), Rule 16.1(b)(3) identifies matters that may be more fully addressed once leadership is appointed, should leadership be recommended, and thus, in their report the parties may only be able to provide their initial views on these matters.

**Rule 16.1(b)(3)(A).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers, in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in all MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceeding. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

**Rule 16.1(b)(3)(B).** In some MDL proceedings, concerns have been raised on both the plaintiff side and the

defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that in many cases an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are issues that should be addressed early in the proceeding (e.g., jurisdiction, general causation, or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information may be ordered independently from the discovery rules, which are addressed in Rule 16.1(b)(3)(C). Alternatively, in some cases, transferee judges have ordered that such exchanges of information be made under Rule 33 or 34. Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

**Rule 16.1(b)(3)(C).** A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceeding may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

**Rule 16.1(b)(3)(D).** Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

**Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution.

**Rule 16.1(b)(3)(F).** MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

**Rule 16.1(b)(3)(G).** Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

**Rule 16.1(b)(4).** In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

**Rule 16.1(c).** Effective and efficient management of MDL proceedings benefits from a comprehensive management order. An initial management order need not address all matters designated under Rule 16.1(b) if the court determines the matters are not significant to the MDL proceeding or would better be addressed in a subsequent order. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

---

**Changes Made After Publication and Comment**

Three changes were made to the rule amendment after the public comment period: (1) The "coordinating counsel" provision in preliminary draft Rule 16.1(b) was

removed; (2) The various reporting matters in preliminary draft Rule 16.1(c) were subdivided into Rule 16.1(b)(2) and (b)(3); and (3) the rule was revised to mandate reports on all those matters unless the court orders otherwise. The Committee Note was revised to reflect these changes.

**PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]**

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

* * * * *

**(f) Conference of the Parties; Planning for Discovery.**

* * * * *

**(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

**(D)** any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and – if the parties

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

agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

**Committee Note**

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties.

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

This amendment also seeks to provide the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the

privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment, and should minimize problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

---

**Changes Made After Publication and Comment**

There were no changes to the rule amendment after the public comment period. The Committee Note was shortened.

# TAB 6B

# MINUTES
# CIVIL RULES ADVISORY COMMITTEE
# Denver, CO
# April 9, 2024

The Civil Rules Advisory Committee met in Denver, Colorado, on April 9, 2024. The meeting was open to the public. Participants included Judge Robin L. Rosenberg, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland, Judge Jennifer Boal, Brian Boynton, David Burman, Professor Zachary Clopton, Judge Kent Jordan, Judge M. Hannah Lauck, Judge R. David Proctor, Joseph Sellers, Judge Manish Shah, Ariana Tadler, and Helen Witt. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper as Consultant. Judge John D. Bates, Chair, Judge D. Brooks Smith, Liaison (remotely), Professor Catherine T. Struve, Reporter, and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Clerk liaison Carmelita Shinn also participated**.** The Department of Justice was also represented by Joshua Gardner. The Administrative Office was represented by H. Thomas Byron III, Allison Bruff, and Zachary Hawari. The Federal Judicial Center was represented by Dr. Emery Lee and Dr. Tim Reagan (remotely). Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Judge Rosenberg opened the meeting by welcoming all observers with appreciation for their participation and interest in the rulemaking process. She then acknowledged the invaluable contributions of several committee members whose terms will expire prior to the Advisory Committee's next meeting: Judge Kent Jordan, Judge Jennifer Boal, Joseph Sellers, Carmelita Shinn, Ariana Tadler, and Helen Witt. Judge Rosenberg thanked each of them for their commitment to and hard work for the committee. Judge Rosenberg also acknowledged Rakita Johnson, a new Administrative Analyst on the Rules Committee Staff at the Administrative Office and thanked her for her work in organizing the logistics for the meeting.

With respect to reports on the January 2024 meeting of the Standing Committee and the March 2024 meeting of the Judicial Conference of the United States, Judge Rosenberg referred members to the materials included in the agenda book. With respect to the status of proposed amendments to the Federal Rules, Allison Bruff pointed members to a detailed chart in the agenda book showing the progress of various rule amendments. In particular, she directed members' attention to page 54 of the agenda book, which notes that the recent amendment to Rule 12 has been approved by the Supreme Court and would be transmitted to the Congress by May 1. Rules Law Clerk Zachary Hawari then directed members to a chart in the agenda book detailing pending legislation that would directly or effectively amend the Federal Rules. Mr. Hawari indicated, however, that there was no legislation that would demand the committee's attention at the meeting.

## Action Items

*Review of Minutes*

Judge Rosenberg then turned to the first action item: approval of the minutes of the October 17, 2023 Advisory Committee meeting, held at the Administrative Office. The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

*Final Approval of Amendments to Rules 16(b)(3) and 26(f)(3)*

Judge Rosenberg then turned to the next action item: final approval by the Advisory Committee of the amendments to Rules 16(b)(3) and 26(f)(3), which require the parties to address any possible issues regarding privilege logs early in the litigation and to report any areas of disagreement to the judge.

Both proposed amendments had been approved for publication by the Standing Committee at its June 2023 meeting with only minor changes to shorten the committee note. At that meeting, there had been some discussion of adding a cross-reference to Rule 26(f) in Rule 26(b)(5)(A), but the Standing Committee opted against it and instead approved the rule as proposed for publication.

With Discovery Subcommittee Chair Judge David Godbey unable to attend the meeting due to an ongoing trial, Judge Rosenberg asked Professor Marcus to describe the events since publication. Professor Marcus then explained that the advisory committee had held three public hearings on the proposed amendments. The testimony offered at those hearings is summarized at pages 107-131 of the agenda book, as are the comments received during the publication period. Professor Marcus noted that the testimony and comments confirmed a stark division in attitude regarding how much detail a privilege log should contain among lawyers who typically find themselves as "requesters" of discovery material and those who are typically "producers." Neither the amended rule nor the committee note take a side on these contentious matters. Rather, the goal of the rule is to prompt parties to address the issue and agree on a protocol up front in the litigation and to bring any disagreements to the judge's attention as early as possible. Moreover, Professor Marcus noted that the committee note directs the parties to notify the judge if they are not yet capable of getting into all of the details at an early status conference. Professor Marcus ended his presentation by noting that this should be an easy matter to approve, thanks in large part to the attorney members of the subcommittee, who had done astonishing work over a long period of time.

Judge Rosenberg then sought comment from subcommittee members and committee members, but none were offered. A motion to approve the rule followed. The motion was seconded and approved unanimously.

*Final Approval of New Rule 16.1*

Judge Rosenberg then introduced proposed new Rule 16.1 for final approval by the Advisory Committee. Prior to getting into the substance, Judge Rosenberg acknowledged that the work of many people had brought us to this moment, including Judge Bates, former Advisory

Committee and MDL Subcommittee Chair Judge Robert Dow, the attorney members of the subcommittee, the style consultants, and the reporters. This was the best possible rule because of the efforts of so many people. The subcommittee has listened and learned an enormous amount over the seven-year gestation of this rule. The subcommittee held three public hearings, received extensive commentary on the draft from attorneys, organizations, and judges, including seasoned MDL transferee judges including Judge Charles Breyer (N.D. Cal.) and Judge M. Casey Rodgers (N.D. Fla.), an esteemed group of California state court judges, and the Federal Magistrate Judges Association.

Judge Rosenberg then noted that the latest draft of the rule varies in non-substantive ways from the rule approved for publication in response both to testimony and to comments provided to the Advisory Committee, and the input of the style consultants. Aside from the removal of the provision related to coordinating counsel (discussed below), all of the changes are structural.

Judge Rosenberg then turned the presentation over to the subcommittee's chair, Judge Proctor. He thanked all those integrally involved in the process of drafting the rule. He thanked the style consultants, Joseph Kimble and Bryan Garner, whose suggestions were very helpful.

Judge Proctor then recounted the public-comment period, including three public hearings and many written submissions. He also noted that the subcommittee received some submissions after the close of the formal comment period, but that those submissions were considered equally with those that were timely submitted. In particular, Judge Proctor cited "en masse" support for the rule from MDL transferee judges, with whom he met in October 2022 and October 2023. The transferee judges are of the view that the set of prompts in the rule will facilitate better early case management in MDLs, particularly for first-time transferee judges. The Chair of the Judicial Panel on Multidistrict Litigation, Judge Karen K. Caldwell (E.D. Ky.), is a strong supporter of the rule and indicated that it would be the focus of trainings at future MDL Transferee Judges Conferences.

Turning to the final draft,[1] Judge Proctor noted that the draft rule now contains two lists of issues, in subsections (b)(2) and (b)(3). Subsection (b)(2) includes issues that the parties should discuss their views on early in the proceeding, including appointment of leadership counsel, if warranted. Subsection (b)(3) lists issues on which the parties should state their initial views to assist the judge in getting acquainted with the case. These are not two separate "tiers" of issues in terms of importance. Rather, the goal was to provide significant flexibility to transferee judges in addressing issues as they become pertinent in the proceeding. In particular, subsection (b)(3) focuses on "initial views" of the parties, in recognition that more definitive views of these matters before leadership is appointed may not be possible, but judges may nevertheless be able to learn a fair bit about the case from the parties' initial views on these matters. The changes to the rule do not change the substance.

Post-publication, the provision calling for the appointment of coordinating counsel for purposes of preparing a report for the initial management conference was deleted. This proposal

[1] The version referred to as the "final draft" was added to the end of the agenda book for the April 9, 2024 committee meeting. For the benefit of the committee members and public observers, the final draft was projected onto a screen in the meeting room and shared via Microsoft Teams, and the minor style changes from previous versions of the rule were summarized.

was criticized both by lawyers who typically represent plaintiffs and by those who typically represent defendants as adding an unnecessary and potentially complicating layer of process. Based on the lack of support for this provision, it was dropped. The only other change to the rule after publication was "reversing the default" to require the parties to address the issues listed in the rule unless the judge says otherwise.

Professor Marcus added his view that this rule had been worked on for seven years and the subcommittee's main conclusion was that for MDL proceedings, one size does not fit all. Judges require the flexibility to tailor arrangements to the circumstances of each MDL. This rule aims to provide them the information to do so in a productive way at the outset of MDL proceedings.

Judge Rosenberg then sought comment from subcommittee members. One attorney member offered two observations: (1) MDLs come in all shapes and sizes, so any rule that would accommodate all of them demanded "movement in the joints;" (2) in response to feedback from some lawyers the subcommittee has made clear that Rule 16.1 does not preempt Rule 23 in class actions transferred into an MDL. Judge Rosenberg added that the note makes clear that Rule 16.1 does not preempt any other rule, including Rule 23.

Another attorney subcommittee member added support for the rule and confirmed that the changes since publication were primarily stylistic. This member noted that although the subcommittee did not adopt all commenters' suggestions, "the perfect is the enemy of the good and the enemy of done." In this member's view, the subcommittee had done stellar work.

Another attorney subcommittee member agreed that the rule was excellent and expressed appreciation for the collegiality of the subcommittee, many of whose members started in different places but eventually reached consensus. This member also lauded the flexibility in the rule for judges, lawyers, and litigants. The rule gives parties the ability to ask the judge to do things differently to suit the needs of a particular MDL. In this member's view, the proposed rule is as close to perfect as a rule covering an area this broad and diverse could be.

A judge member of the subcommittee added that this was one of the most remarkable group efforts she had seen and was honored to be a part of this prodigious and thoughtful work.

Judge Rosenberg then sought input from those representing the Standing Committee. Judge Bates began by noting his presence at the inception of this project when he was Chair of the Advisory Committee and formed a subcommittee under the leadership of Judge Dow. The Standing Committee will of course have to review the rule if it is approved by the Advisory Committee, but it is a wonderful effort. Judge Bates noted that the division of issues in subsections (b)(2) and (b)(3) was an important change because it recognizes that there will be some issues on which the parties may not yet be prepared to take firm positions at the initial management conference. Judge Bates agreed that because of the variety of MDL proceedings, the task of creating a rule that would fit them all was a challenge, and he applauded the effort and the excellence of the product. Professor Struve added her gratitude for the excellent sustained work and her admiration for the expertise that has gone into it.

Judge Rosenberg then sought feedback from other members of the Advisory Committee. One judge member declared that he was a "relatively enthusiastic yes," despite continuing reservations about a rule that is largely precatory, in that it is more like a series of suggestions rather than a mandatory rule in the traditional sense. Nevertheless, this judge was persuaded by the widespread support for the rule among transferee judges; if the judges tasked with handling the most complex cases are in favor, that is of great importance. Another judge member indicated her support of the rule but sought clarification of the use of the word "actions" in the rule – the reporters responded that because only entire civil actions are transferred into an MDL, the use of that term should not create confusion.

Another committee member sought clarification on the "early exchange of information" provision of the rule and how it might interact with discovery and initial disclosures. Professor Marcus responded that because initial disclosures usually do not occur in some MDLs, it was better to draft the rule to provide flexibility for the transferee judge. A judge member added that such an early exchange could be considered discovery in some cases, but it is best left to the transferee judge how to address the issue in the context of a particular case. Judge Proctor agreed with that observation. Professor Cooper added that one size does not fit all when it comes to early exchange of information, and the rule allows for such flexibility. Judge Rosenberg added that the goal of the rule was to get these issues before the transferee judge early so that she may decide the best course of action in a particular MDL. Professor Bradt opined that what the rule requires is a *report* from the parties on these issues; it does not mandate any particular course of action for the transferee judge or displace any other civil rule.

Judge Bates then stated that the Standing Committee would benefit from the views of the Advisory Committee on whether the changes to the rule since publication required republication. Judge Rosenberg responded that the relevant standard for republication is whether substantial changes have been made since publication, unless republication would not assist the work of the rules committees. In her view, these changes are not sufficiently substantial to trigger the republication requirement, and even if they were, after the lengthy process of generating this rule, republication would not be helpful.

Professor Marcus agreed that these are not substantial changes contemplated by the republication provision. The main change to the rule was omitting the coordinating counsel provision in response to public comment. All other changes were organizational and stylistic in nature. Professor Marcus noted other examples of changes made after publication of proposed rules that were greater than those made to this rule, but republication was not required, including post-publication changes to Rule 37(e), Rule 34, Rule 23(e), and Rule 30(b)(6). Professor Marcus added that even if these were substantial changes, the committee would not gain anything from additional input. Professor Cooper then noted that the string of anecdotes of changes to rules after publication that did not require republication could go on. He cited the omission of required lists of disputed issues from a proposed amendment to Rule 56, and the omission of proposed procedural changes to Rule 23. In neither case did dropping a portion of a proposed amendment demand republication. Professor Bradt agreed that after seven years' worth of extensive public outreach that engaged all of the experts in this area republication would be unlikely to yield any new information that would affect the proposed rule.

Judge Proctor noted that the subcommittee had considered an array of possible provisions, including early vetting of claims, case censuses, mandatory interlocutory appeal, judicial supervision of settlement, disclosure of any third-party funding, and protocols for leadership appointments and bellwether trials. Adding any of those provisions to the rule at this point would surely require republication. But, aside from the deletion of coordinating counsel, this rule is substantively the same as the one published for public comment. In his view, therefore, the post-publication changes to the rule are neither substantial, nor would the committee benefit from additional public comment.

A judge member then asked Judge Bates how the Standing Committee approaches the question of republication. He responded that the Standing Committee would make its own judgment under the applicable standard, but that it would benefit from the views of the Advisory Committee expressed at this meeting. Professor Struve agreed and confirmed that omission of coordinating counsel should not raise concerns because omissions in response to negative feedback are typical. The only remaining change that might trigger republication is reversing the default that parties must include each listed item in their report unless the judge orders otherwise. In her view, however, such a change would not require republication, both because the change is sufficiently subtle and because it was discussed during the public-comment period, meaning that lawyers would not consider the change an "ambush."

Judge Rosenberg added that the subcommittee had thoroughly considered the question of republication. At each meeting, the reporters raised the question, and the subcommittee discussed it. The subcommittee concluded that, aside from omitting coordinating counsel, the content of the rule is unchanged. The judge has the same discretion to decide which issues must be addressed in the report. Moreover, the subcommittee concluded that there was nothing more it could learn that would be helpful in developing *this* rule. The process has been transparent and collaborative. Given the extensive outreach to the bench and bar since the subcommittee's creation in 2017, all relevant parties have had sufficient opportunity to be heard.

A motion was then made for final approval of the rule. The motion was seconded and approved unanimously.

## Information Items

*Report of the Discovery Subcommittee*

Judge Rosenberg began by noting that the Discovery Subcommittee had been exceptionally busy with the hearings and post-publication comments on the privilege-log amendments, but that it had not lost momentum on the other items on its agenda. She again thanked the attorney members of the subcommittee for their efforts and thanked those members whose terms are expiring.

With Judge Godbey not in attendance, Professor Marcus presented on behalf of the subcommittee. The subcommittee had two information items on the agenda on which it sought feedback: manner of service of a subpoena and rules issues related to filing under seal.

(1) Manner of serving a subpoena. Rule 45(b)(1) says that serving a subpoena requires "delivering a copy to the named person." There are different interpretations of the rule, particularly about whether in-hand service is required. These varying interpretations create real problems for lawyers that ought to be avoidable. As demonstrated by a memorandum prepared for the subcommittee by former Rules Law Clerk Christopher Pryby, there are many different approaches to the method of service required in the states, so there is no dominant model for the Federal Rules to follow. One approach an amended rule could take would be to add the language from the venerable *Mullane* case defining the notice required by the Due Process Clauses, with a provision explicitly allowing courts to adopt more specific methods by order or local rule. One judge member expressed support for including the *Mullane* language because it appears to be a stable holding and it would not hurt to explicitly inform lawyers that due process is implicated here. Professor Marcus also noted that the current rule does not include a time period for notice, partly because it does not differentiate between a subpoena for deposition and one for trial or hearing, which may be more urgent. Professor Marcus asked for views of committee members on these issues, especially those of departing members.

One subcommittee attorney member expressed that another problem created by the current rule is the requirement to tender travel fees if the subpoena requires the person's attendance. Tendering such fees may not be easily accomplished alongside some electronic methods of service, such as email, which are reliable and should be encouraged. Having to tender the fees via a process separate from service can be a hassle and a rule amendment should take account of modern technology. Another attorney subcommittee member agreed with these comments and reiterated that any new rule should not constrain modern methods of reaching people electronically, although it should also continue to permit service "the old-fashioned way."

A judge member confirmed that there can be expensive litigation involving tendering fees, especially when the person being subpoenaed is "ducking" service and suggested that the rule permit tendering fees when the subpoenaed party produces documents or appears. With respect to the amount of time to produce documents in response to a subpoena, the judge suggested a "reasonable" time, such as 14 days, especially if the documents must be produced for a scheduled trial or hearing. Recipients of such subpoenas need ample time to both prepare to respond and perhaps seek a protective order. This judge also indicated that a bright-line deadline would have benefits, especially for pro se litigants who may benefit from clear guidance, but that such deadlines may also enable sharp tactics.

Judge Bates asked whether a new rule would include provisions facilitating waiver of service, as in Rule 4(d), with mandatory consequences for a person who refuses to waive service. Professor Marcus responded that the subcommittee had not yet discussed that question but would consider it.

(2) Filing Under Seal. Professor Marcus noted that the Advisory Committee had received several submissions urging that issuance of a protective order under Rule 26(c) be assessed under a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. As Professor Marcus noted, district and circuit courts understand well that the standard for filing under seal is more demanding than what is required to issue a protective order, but that tests and standards vary across courts. One mechanism for such a change, outlined in the agenda book at page 262, would be to amend Rule

26(c) to provide that filings may be made under seal pursuant only to a new Rule 5(d). Such a new rule would state that unless filing under seal is mandated by a federal statute or these rules, no paper shall be filed under seal unless it would be justified and consistent with the common law and First Amendment rights of public access to court filings.

Professor Marcus then referred to an array of other issues, outlined in the agenda book at pages 265-267, including: procedures for filing under seal, who may seek to unseal documents and when, and the like. There is an array of local rules on these topics, and any rule that would address all issues related to sealing could be quite complicated. For instance, the suggested rule submitted by the Sedona Conference was seven single-spaced pages long. Professor Marcus added that these are issues of great significance to lawyers, especially if they find themselves under time pressure due to a court deadline. Questions such as whether the motion to seal may itself be filed under seal, whether documents may -- pending the decision on the motion to file under seal -– be filed under a provisional seal, and how such documents might be redacted can be critical. Moreover, there are complex questions about who may intervene to unseal documents, and what happens to sealed documents after a case has concluded.

One judge member opined that both judges and litigants would benefit from a uniform rule addressing at least some of these issues. This judge reported that the rules committee of the Federal Magistrate Judges Association (FMJA) had met and agreed that a beneficial rule would make clear that absent a statute or order, nothing should be filed under seal without a preceding motion and that such a motion should be recorded on the docket. The FMJA committee did not, however, reach consensus on what should happen to documents delivered to the clerk's office if a motion to seal is denied, or what should happen to the documents at the close of a case. The FMJA did however urge that clerks' offices be consulted on any possible change since implementing any such rule could prove logistically challenging.

Another judge member agreed that this was a serious issue but urged a "less is more" approach to any rule amendment. This judge expressed concern that the endless array of circumstances in which sealing issues could arise would make drafting a national rule a challenge. Such a rule would have to be very general to cover all possible circumstances but may then be too general to provide any benefit. An attorney member agreed with these concerns.

A different judge offered the local rule of that judge's district as a potential model. It provides that documents proposed to be filed under seal go to the judge for in camera inspection. The judge might deny the motion, in which case the documents are not filed and go back to the party seeking sealing. Alternatively, the judge might grant the motion, or do so provisionally pending a hearing.

Another judge indicated that many states have a higher bar for sealing than mandated by the common law or First Amendment, and that those statutes should be considered, as well.

With respect to the practical challenges created by a diverse set of standards across different courts, one attorney member reiterated the additional challenges time pressure often creates. This attorney expressed concerns both about attempting to file under seal but not receiving permission in advance of a filing deadline and the converse problem of receiving documents from adversaries that are so heavily redacted as to be useless. Another attorney

member confirmed these observations and added that while he often views his adversaries as "overdesignating" documents for sealing, they often don't fight over it because of other more pressing matters. This attorney also noted additional questions regarding documents received from third parties and whether those parties must be notified before their materials are filed.

With respect to redaction practices, several committee members weighed in. One judge suggested an approach whereby documents are filed under seal but the attorneys need to prepare a redacted version for the public record that would at least inform non-parties of what's confidential and what's not. Another judge indicated that such a practice is common among magistrate judges. A different judge, however, noted that while redacting a brief is usually relatively simple, redacting appendices of exhibits, which can sometimes run into the thousands of pages, is far more burdensome.

Ms. Shinn offered a perspective from clerks' offices noting that differences in nomenclature in this area can create difficulties. For instance, a "sealed" document may mean a document that is filed but never referenced on the docket at all, a "restricted" document that is docketed on CM/ECF but is accessible only to court staff and the parties, or a document that is referenced on the docket but cannot be accessed by anyone.

Judge Bates added his perspective that courts will likely go along with what the parties want to do, so long as there is a public redacted version of anything filed. But when a judicial opinion requires reference to documents filed under seal, there is an additional problem because judges need to be able to tell the world on what materials they are basing their decisions. He gives parties 24 hours' notice before releasing an opinion that cites to sealed material, but this practice may not work in every district. Districts have distinct issues and cultures, so crafting a national rule could be quite challenging.

*Rule 41 Subcommittee*

Judge Bissoon reported on the work of the Rule 41(a) subcommittee. This committee, which has been examining potential amendments to Rule 41 to clarify issues related to voluntary dismissal, hopes to present draft rule language at the next Advisory Committee meeting. Professor Bradt noted that the subcommittee had reached a consensus that the rule should be amended to make clear that a plaintiff may dismiss one or more claims under the procedures outlined in the rule, as opposed to the entire action. This flexibility is both consistent with the policy of narrowing claims and issues during the pendency of the litigation and the practice of many district courts. Professor Bradt added that his research indicated that such increased flexibility was consistent with the original intent of the rule, based on contemporaneous evidence. Professor Coquillette agreed, noting that the history of the original Federal Rules supports the view that the drafters likely intended parties to be able to voluntarily dismiss one or more claims in the litigation.

Moreover, the subcommittee continues to consider an amendment to the rule that would clarify that only current parties to a litigation need to sign a stipulation of dismissal, as opposed to all parties who have *ever* been part of the litigation, as the Eleventh Circuit has recently held. One attorney member expressed support for a change in the rule that would increase flexibility,

especially with respect to stipulations. This member suggested going even further than the above proposal by requiring only the signatures of parties to the claim they seek to dismiss.

*Rule 7.1 Subcommittee*

Judge Rosenberg introduced the issues currently being investigated by the Rule 7.1 subcommittee, chaired by Justice Jane Bland. Judge Rosenberg noted that this subcommittee, formed after the March 2023 Advisory Committee meeting, is considering expanding the corporate disclosures mandated by Rule 7.1(a)(1) to better inform judges of financial interests in a party that would trigger the statutory requirement to recuse. Although the subcommittee is not yet at the point of circulating draft rule language, it would benefit from feedback from Advisory Committee members.

Justice Bland noted that shortly after the subcommittee's most recent meeting, on February 23, 2024, the Judicial Conference Codes of Conduct Committee issued a new advisory opinion providing judges new guidance on their recusal obligations based on their financial interest in a party. The new guidance endorses the current rule to the extent that it uses 10% ownership of a party as a proxy for financial interest, because 10% ownership creates a rebuttable presumption of "control" of a party. The goal of Rule 7.1 is aimed less at providing guidance on whether to recuse than to ensure that judges have the information necessary to make that judgment, consistent with the recusal statute and canons of judicial conduct. The goal is to align the disclosure requirement as much as possible with the considerations prompted by the guidance.

Professor Bradt noted that it is likely impossible to craft a rule that would ensure that all possible financial interests are disclosed. Indeed, too great a reporting burden would not only be onerous, it would be unlikely to yield useful information in many cases. Moreover, the more disclosure that is required, the more likely it may be that the only relevant information disclosed is overlooked. The subcommittee has been looking at various possibilities to ensure the optimal amount of disclosure, drawing on numerous examples from state and local rules. One possible approach is to require parties to disclose what is currently required by the rule and any "beneficial owners" with the power to exercise control over the disclosing party.

One attorney member noted that corporations have "many arms and legs," including constantly evolving corporate forms and structures that judges are unlikely to invest in. On the other hand, as such investment vehicles proliferate, it may not be a safe assumption that judges would not hold any stake.

Professor Cooper, who was Reporter for the most recent revision of Rule 7.1, stated that he was taken aback by the new guidance from the Codes of Conduct Committee, particularly its emphasis on "control" of a party as a proxy for financial interest. Not only was the rule not drafted with that concept in mind, 10% may in many cases not be consistent with control at all (as in a joint venture among three parties, two of which each have 45% control and the other only 10%). Professor Cooper also noted the array of potential structures and the dynamic nature of both corporate ownership and judges' investments.

Justice Bland thanked committee members for their valuable feedback and noted that the subcommittee would be working on draft rule language and seeking outreach to the bar.

*Cross-Border Discovery Subcommittee*

Judge Rosenberg introduced the work of the Cross-Border Discovery Subcommittee, chaired by Judge Manish Shah. This subcommittee was created after the October 2023 Advisory Committee meeting to address issues raised in a recent Judicature article by former Advisory Committee members Judge Michael Baylson and Professor Steven Gensler. The subcommittee held its first meeting on January 30, 2024.

Judge Shah reported that the subcommittee had begun its work, using the Baylson/Gensler article as a jumping-off point. The first question the subcommittee is considering is whether there is a problem that can be profitably addressed by a federal rule. Parties in cross-border cases can find themselves at the intersection of the Federal Rules and foreign law, especially with respect to whether discovery in a foreign nation should be conducted according to the rules or the Hague Convention. The problem can become especially challenging if the discovery is illegal in the country or the subject of a "blocking statute" prohibiting disclosure. One question is whether a rule mandating consideration of these issues at a case-management conference would be helpful. The subcommittee has begun initial research and outreach to the bench and bar, including feedback from the Department of Justice and the Federal Magistrate Judges Association (FMJA). The subcommittee will also follow up with the Sedona Conference and the ABA's cross-border institute.

Professor Marcus added that he has received several overtures from groups monitoring what we are doing. There seems to have been a significant increase in cross-border discovery in recent years. Because U.S. discovery remains an outlier, conflicts with other countries are prevalent.

Magistrate Judge Boal noted that there was not significant support from the FMJA to add cross-border discovery to the list of topics to be discussed at a pretrial conference, because the issues come up naturally.

Joshua Gardner, of the DOJ, stated that the consensus in the Department is that current Rules 16 and 26(f) are sufficient to allow parties to raise cross-border discovery issues if they are relevant in a particular case.

Professor Marcus noted that perhaps there are sufficient tools for judges to address these issues as they arise. The intersection of the rules and the Hague Convention is a "labyrinth" but perhaps consultation and collaboration can solve specific problems better than a rule.

*Random Case Assignment*

The Advisory Committee has been asked to consider a rule requiring random district-judge assignment in cases seeking injunctions mandating or prohibiting enforcement of federal law. The proposal arises from concerns about a specific form of "judge-shopping," whereby a party files a case in a division with only one sitting judge. In some districts, that judge will receive all cases filed in the division, meaning that the choice to file there carries with it the

choice of the presiding judge. At the October 2023 Advisory Committee meeting, Professor Bradt was tasked with researching questions related to rulemaking authority in this area, and whether the supersession clause of the Enabling Act would need to be invoked, given that there is currently a federal statute, 28 U.S.C. § 137, that delegates the power to assign cases to the districts. Professor Bradt indicated that these were complex questions and that his research would continue over the summer.

Judge Rosenberg indicated that this is an extraordinarily important issue that will remain on the Advisory Committee's agenda. But several weeks before the Advisory Committee meeting, the Judicial Conference Committee on Court Administration and Case Management issued guidance to the district courts suggesting random assignment of the same cases that would likely be the focus of a new rule. This guidance is not, however, mandatory, and it is unclear how many districts will choose to comply. Professor Bradt reported that he, with the assistance of Rules Law Clerk Zachary Hawari, will monitor the districts' responses to the guidance over the coming months.

Brian Boynton, representing the Department of Justice, which recently submitted an extensive suggestion supporting a rule change, endorsed the approach of monitoring the district courts to see if they uniformly follow the Judicial Conference guidance. If they do not, in his view, rulemaking may be necessary, so research should continue on the viability of such a rule.

Professor Bradt stated that his research would continue in earnest over the summer and that he would report findings to the Advisory Committee at its next meeting.

*Social Security Numbers*

Rules Committee Chief Counsel Thomas Byron reported on recent developments concerning the redaction of Social Security numbers (SSN). Senator Wyden has asked for a reexamination of the current provisions in the privacy rules (including Civil Rule 5.2) that allow filings to include only the last four digits of the SSN. Redaction of the entire SSN may be preferable, and because such a shift would require amendments across all sets of federal rules, Mr. Byron has convened several meetings of all committee reporters to consider the issue as a working group. A memo in the agenda book, at page 342, outlines possible rule amendments. One question, however, is whether all of the privacy rules should be reexamined, since they have not received a close look in around 20 years. Mr. Byron indicated that such a reexamination could be undertaken by a joint subcommittee, the reporters' working group, or one advisory committee, which could take the lead.

Professor Marcus noted the importance of uniformity across the federal rules on these issues. There may not be a strong need for any SSN to appear in a civil filing, but there may be such a need in bankruptcy cases, in which case the needs of the bankruptcy courts may take precedence. Professor Marcus also took note of Civil Rule 5.2(h), which waives privacy protections for documents that are filed without redaction and not under seal. The clerk's office liaison added that any changes regarding privacy rules should take special consideration of the burdens of redacting personal information on court reporters.

Mr. Byron indicated that work would be ongoing on this issue and thanked the Advisory Committee for its feedback.

*E-filing by pro-se litigants*

Professor Struve presented on the ongoing effort to consider access to electronic filing by pro se litigants. She noted that a proposal would not be forthcoming at this meeting, but that the working group intended to convene with the aim to develop a proposal this summer.

*Unified District Court Bar Admission*

Professor Struve and Professor Bradt reported on the Joint Subcommittee on Unified District Court Bar Admission, chaired by Judge Paul Oetken (S.D.N.Y.). This subcommittee was formed in response to a proposal from Dean Alan Morrison and others supporting more seamless admission to federal district court bars. The subcommittee has met and is still in early stages of investigating the issue, and this was the first opportunity to seek feedback from the Advisory Committee. Although Dean Morrison's initial proposal was to create a national bar of the federal district courts, overseen by the Administrative Office, there was a lack of momentum for this idea in both the joint subcommittee and the Standing Committee at its June 2024 meeting. As a result, the subcommittee has instead turned toward considering less adventurous options, such as potentially preempting the requirement in some districts that applicants to the district court bar be members of the bar of the state in which the district is situated. Other possibilities remain under consideration, such as pro hac vice admissions and the potential impact of any rule change on the fees districts receive from bar applications. The subcommittee is also examining other possible effects of loosening bar-admission requirements, such as, perhaps, increased expectations of local counsel.

Professor Struve reported that at its January meeting, several members of the Standing Committee expressed support for the general idea of facilitating bar membership for lawyers with significant federal-court practices spanning multiple states, particularly lawyers of limited means or those who must move around a lot, such as military spouses. But some Standing Committee members expressed some skepticism, emphasizing the importance of districts' control over the quality of lawyering in their courts and the diversity of admission requirements reflecting aspects of local district culture. The subcommittee's next steps include: investigating the scope on Enabling Act authority for rulemaking in this area, examining closely relevant local rules, and working with the Appellate Rules Advisory Committee to better understand the effectiveness of Fed. R. App. P. 46, which takes a relatively permissive approach to admissions to Court of Appeals bars.

Professor Marcus asked about whether this project might affect a district's ability to require that its bar members adhere to its state's rules of professional responsibility. This concern prompted Professor Marcus to remind the committee of the prior unsuccessful effort to generate nationwide rules of professional responsibility for the federal courts. Professor Coquillette added his own view that such efforts were "a complete disaster," and should not be repeated, in part because the intersection between state rules of professional responsibility and applicable statutes barring unauthorized practice of law is an "absolute thicket." Professor Struve responded that

national rules of attorney conduct are not on the subcommittee's agenda, but that this prior experience is instructive.

A judge member of the committee asked why this would be an appropriate topic for rulemaking at all. Instead, in this judge's view, this is a topic best left to the districts and states because they have the on-the-ground responsibility of ensuring quality of lawyering in their courts. This judge also contested the use of the relatively lax appellate rule as a viable comparison because an appellate argument is a one-time, brief affair, while attorneys in the district court will inevitably appear more often. This judge also expressed concerns that too many nonlocal lawyers would water down the sense of community among lawyers and judges within the district.

Another judge member expressed similar reservations, noting that each district has a specific culture. One example is the oath bar members must take in this judge's district, which has not been modernized so as to better preserve a tangible link to past generations. This judge inquired whether pro hac vice admission was insufficient to address rulemaking proponents' concerns. A third judge agreed, noting that often bar-admission requirements are determined as much by local practitioners as judges, such as lawyers who may sit on district courts' local rules committees. This judge also noted that there may be valid reasons that some bars do not want local attorneys to be displaced by outsiders.

Professor Struve thanked Advisory Committee members for their feedback and promised to report it to the joint subcommittee investigating these issues.

*Rule 81(c)*

As presented previously to the Standing Committee, it has been proposed that an amendment to Rule 81(c) be considered because, as restyled in 2007, it could create confusion about whether a jury trial must be demanded after removal from state court if there has not yet been such a demand in the state court proceedings. As restyled, Rule 81(c)(3)(A) says that no demand for jury trial need be made after removal "[i]f the state law *did* not require an express demand for a jury trial" (emphasis added). The rule is arguably ambiguous with regard to states in which a jury-trial demand is required, but the deadline for such a demand had not yet passed at the time of removal. The rule appears to have been designed to excuse jury-trial demands after removal when the state from which the case was removed would *never* have required such a demand. This motivation for the rule was clearer under the rule prior to restyling, which provided that no federal jury demand would be necessary "i[f] the state law *does* not require an express demand for jury trial" (emphasis added). In sum, the change of verb tense creates an ambiguity in the applicability of the rule.

As Professor Marcus noted, courts seem to interpret the restyled rule as having the same effect as the prior rule, i.e., that a federal jury demand is required after removal unless it would never have been necessary in the state court from which the case was removed. Professor Marcus suggested two possible fixes that are under review: (1) reverting to the old language, which would make clear that a post-removal jury demand is required if none has been made before removal whenever a jury demand is required under the practice of the pertinent state court; or (2) removing the exemption for those states that do not require a jury demand and making clear that

an express jury demand must be made post-removal in every case if none was made post removal. Professor Marcus cautioned, however, that many lawyers practice only rarely in federal court so the Advisory Committee should be mindful that a change in the rule might unfairly surprise some practitioners. One lawyer member stated that this is an important issue and any such rule should strive to be as unambiguous as possible and therefore leaned toward the option that would require a jury demand in all cases after removal. The clerk's office liaison to the committee indicated that in their state there is no jury-demand requirement, so any such change would have to be accompanied by extensive outreach efforts in similar states to inform the local bar. The Advisory Committee has not yet decided which course to pursue.

*Remote Testimony*

Professor Marcus presented the following new issue: Several plaintiff-side lawyers recently submitted a proposal to resolve a split in the courts about the interaction of Rule 45(c)'s limitations on where a witness must appear under subpoena and the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence can be secured only by subpoena. The proposal was prompted by a Ninth Circuit decision, In re Kirkland, 75 F.4th 2030 (9th Cir. 2023), that even when Rule 43(a) authorizes remote testimony a subpoena may not be used to compel an unwilling witness to provide such testimony within the range authorized by Rule 45(c). The committee note to Rule 45, as amended in 2013, states that a subpoena could be used for such a purpose, but the Ninth Circuit held that it could not. The proposal also sought amendments to Rule 43(a) that would significantly relax present limitations on remote testimony in trials or hearings.

Professor Marcus noted that in the wake of the CARES Act and the pandemic, some rules regarding remote testimony may now look "antique," and revisiting them may be worthwhile. Rule 43 was amended in 1996 with an emphasis on the value of face-to-face communication when possible. But the Ninth Circuit's conclusion nevertheless seems odd in that under its interpretation the rule cannot compel remote testimony across the street from the subpoenaed person's home.

One attorney member expressed support for the proposed amendment, citing positive experiences with remote testimony in recent arbitrations in which the Federal Rules of Evidence applied. In this member's view, remote testimony worked well.

Another attorney member noted, however, that there are significant concerns about remote testimony with respect to witnesses perhaps receiving off-camera assistance in their testimony. A judge member agreed, noting the possible effects of artificial intelligence and "deep fakes." Professor Marcus indicated that it is not clear the changes to Rules 43 and 45 must be considered in tandem, but it will be important that considering changes to one of those rules take account of the effect those changes could have on the other rule.

Judge Bates queried whether a change to Rule 45(c) would effect a significant difference in how Rule 43(a) is applied. Professor Marcus indicated that any changes to Rules 43 and 45 would have to be considered in tandem. Professor Cooper noted that the first step would be to decide whether we simply want to have the district judge decide whether to permit remote

testimony; if so, the subsequent question will be figuring out how to tell the witness how to comply.

Because the interplay of changes to Rules 43 and 45 would be quite complicated, Judge Bates suggested formation of a subcommittee. Based on her experience serving on a similar project in Texas, Justice Bland volunteered to serve on the subcommittee, noting that remote testimony can be very useful if the integrity of the process is well safeguarded.

Subsequent to the Advisory Committee meeting, such a subcommittee was formed, to be chaired by Judge M. Hannah Lauck.

*Deletion of the Word "Master" in the Rules*

Professor Marcus introduced this proposal by the American Bar Association to eliminate the use of the word "master" in the rules and to replace it with "court-appointed neutral." The word "master" has been employed in Anglo-American legal systems for centuries and appears throughout the rules, most prominently in Rule 53. Professor Marcus also noted that there is a concurrent proposal to similarly amend Bankruptcy Rule 9031 to allow Rule 53 to apply in bankruptcy proceedings. Prior to the Advisory Committee meeting, the Association of Court-Appointed Neutrals submitted a letter in support of the ABA proposal.

Professor Marcus noted that while there does not appear to be any connection between the use of the word "master" in the rules and slavery, updating rule language to keep up with prevailing norms is not an unprecedented project. For instance, in the 1980s, the rules were updated to use gender-neutral language. Professor Struve noted that there is also an Appellate Rule using the term master, so any efforts should consult that committee. Another judge questioned whether the Standing Committee might take jurisdiction over this matter if the word master needed to be changed across all of the rule sets.

One judicial member stated that there was unlikely to be significant confusion if the language were to change since Rule 53 is more "task-driven," and nothing turns on the terminology used. Professor Struve reported that there is some precedent for this from the "synonym subcommittee" that looked at the entire universe of terminology employed in the federal rules, but that subcommittee ultimately did not act.

One judge asked whether this change could be applied to Rule 16.1, which uses the word "master." Judge Bates replied that such a change to the now-approved rule should not be made, and that if this project goes forward it would be better to amend 16.1 in the normal course.

*FJC Research Projects*

Dr. Emery Lee and Dr. Tim Reagan (remotely) presented on current research projects of the Federal Judicial Center, as reflected in a memo in the agenda book at page 653. Dr. Lee stated that while such reports had been typical, the practice had fallen into desuetude. His hope was that reintroducing the practice of reporting on FJC projects would highlight the role the FJC plays in supporting the rules committees and other Judicial Conference committees. Dr. Lee also indicated that an FJC study on unredacted private information would be forthcoming this summer, and that the report could inform the reporters' working group looking at SSN redaction.

Judge Rosenberg noted the importance and reliability of the work of the FJC, including on the ongoing revision of the Manual for Complex Litigation, on whose board of editors Judge Rosenberg serves. The FJC is working tirelessly on that complex project, alongside the valuable work it does for the rules committees.

*Conclusion*

Judge Rosenberg thanked the Administrative Office staff for its tireless work and incredible responsiveness in support of the Advisory Committee. Judge Rosenberg then thanked Judge Bates for this support of the committee. Prior to the meeting's adjournment, Judge Bates took a moment to congratulate Judge Rosenberg on receiving the 2024 Distinguished Federal Judicial Service Award presented by the Chief Justice of the Supreme Court of Florida. Judge Rosenberg then adjourned the meeting.

Respectfully submitted,

Andrew Bradt
Associate Reporter

# TAB 7

# TAB 7A

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



# MEMORANDUM

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

**FROM:** Hon. James C. Dever III, Chair
Advisory Committee on Criminal Rules

**RE:** Report of the Advisory Committee on Criminal Rules

**DATE:** May 7, 2024

---

## I. Introduction

The Advisory Committee on Criminal Rules met in Washington, D.C., on April 18, 2024. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents the following information items.

- The Committee heard and discussed an interim report from the Rule 17 Subcommittee, which is studying the possibility of amending the rule to expand the availability of third-party subpoenas.

- The Committee heard an interim report from the Rule 53 Subcommittee, which is studying the possibility of amending the rule to permit broadcasting under some circumstances.

- The Committee provided input on several cross-committee projects, including those dealing with pro se access to electronic filing, redaction of social-security numbers, and bar admission in the federal courts.

- The Committee decided to refer a suggestion on the protection of minors' privacy to a new Privacy Subcommittee that would also review other suggestions for amendments to the privacy rules, including Criminal Rule 49.1.

- The Committee deferred action on a proposal to amend Rule 40 pending the possible receipt of a related but more comprehensive proposal under consideration by the Magistrate Judges Advisory Group.

## II. Rule 17 subpoena authority (22-CR-A)

The Subcommittee has continued to move in a careful and deliberate fashion to consider the many issues raised by the proposal to amend Rule 17. As reported at the Committee's November 2023 meeting, the Subcommittee has tentatively concluded that amendments are warranted both to clarify the rule and to expand the scope of pretrial subpoena authority for third parties before trial, because the *Nixon* standard,[1] as applied in most districts, is too narrow to provide a basis for obtaining much of the material the defense needs from third parties. The Subcommittee also tentatively concluded that an amended rule should provide case-by-case judicial oversight of each subpoena application, express authorization of ex parte subpoenas, and different standards or levels of protection for personal or confidential information ("protected information") and unprotected information.

At the April 2024 Committee meeting, the Subcommittee reported on the additional tentative decisions it had reached after the November meeting.

A. <u>The purpose of the proposed amendment and framing.</u>

The Subcommittee decided to place the amendments in Rule 17, rejecting the suggestion that it consider placing expanded subpoena authority in a new rule. The Subcommittee decided it was important to place any changes within Rule 17 to make it clear that these were incremental changes intended to bring the Rule into conformity with practices in several districts where it was working well. The Subcommittee did not want to suggest this was an entirely new discovery provision, which might generate unwarranted opposition.

[1] *United States v. Nixon*, 418 U.S. 683, 700 (1974), requires a party seeking documents through Rule 17(c) to "clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity." The Court also stated that when a party seeks pre-hearing production of documents, it must establish: (4) "that [the documents] are not otherwise procurable reasonably in advance of [the proceeding] by exercise of due diligence"; and (5) "that the party cannot properly prepare for [the proceeding] without such production and inspection in advance of [the proceeding], and that the failure to obtain such inspection may tend unreasonably to delay the [proceedings]." *Id*. at 699-700.

B. Articulating the showing required to obtain a subpoena.

The Subcommittee had made significant progress in drafting the standard required for a subpoena seeking information that is not personal or confidential, such as surveillance video from a business, and will turn to the requirements for subpoenas seeking information that is personal or confidential next.

C. Procedural issues.

*Regulating disclosure of material produced to opposing party.* Although the practice is not uniform, several courts have required all material subpoenaed by one party to be disclosed to the opposing party, even if the subpoena was granted ex parte. The Subcommittee concluded that this practice undercuts the utility of allowing ex parte subpoenas. Each party's disclosure obligations are governed by other provisions, particularly Rule 16, and seeking a subpoena under Rule 17 should not alter those obligations. Accordingly, the Subcommittee tentatively concluded that the rule should make it clear that if the court grants an ex parte subpoena, it may not require disclosure of all material produced to the other party. Rather, the Subcommittee agreed, the Rule should explicitly note that access to such information by other parties is regulated by existing disclosure rules (Rules 12.1, 12.2, 12.3, 16, and 16.1(b)). Even if a party can show when requesting the subpoena that the evidence it seeks is admissible, it does not follow that the party will necessarily introduce any of it. But whatever a party does intend to use, that party must disclose to other parties under the discovery rules, at the time required by Rule 16.

*Regulating who receives returns.* A related issue is who should receive the subpoena returns. Rule 17(c)(1) states that the court "*may* direct the witness to produce the designated items in court before trial or before they are to be offered into evidence." Despite its permissive language, some courts have concluded that Rule 17 requires the court to order returns to the court, and does not permit a subpoena recipient to produce material to a party. The Subcommittee concluded that the rule should (1) clearly authorize the court to order a witness to produce the items to the party requesting the subpoena, but (2) require returns to the court in two circumstances: when a subpoena is requested by a party without representation or when it seeks material that is personal or confidential. In those two circumstances, the Subcommittee thought that greater judicial oversight would be critical before disclosure to the party seeking the subpoena.

D. Notice to a person or entity whose information is sought.

Consistent with its view that Rule 17 should not override other bodies of law, the Subcommittee tentatively concluded that the Rule should not address disclosure to the persons or entities whose information is sought by a subpoena. Rather, any disclosure requirements should continue to be governed by these other laws. Many federal and state laws protect privacy and limit the disclosure of certain kinds of information. Familiar examples are the federal and state laws protecting health information and school records, as well as the Stored Communications Act. Many of these laws also include provisions concerning when—and to whom—disclosures should be made (and not made).

The Subcommittee noted, however, that Rule 17(c)(3) already requires notice to victims about subpoenas for personal or confidential information, and the Subcommittee is not considering any change to that provision.

E. Application to proceedings other than trial.

The Subcommittee is considering language that would clarify that subpoenas under Rule 17 are available not only for trial but also for at least some other proceedings. Parties are entitled to present evidence at a number of proceedings, and they may need a third party subpoena to do so.

F. Discussion at the April meeting.

Discussion at the meeting raised a number of issues the Subcommittee will continue to consider as it moves forward. Judge Bates and several members advised the Subcommittee to consider judicial workload concerns. For example, draft language under consideration would require the judge to make multiple determinations when the parties seek ex parte subpoenas: (1) whether the material sought is personal or confidential; (2) whether the applicable standard for obtaining the subpoena has been met, and (3) whether good cause has been shown to have the subpoena issue ex parte. If the material is returned to the court for in camera review, the court would also have to make a fourth determination what to disclose and to whom to disclose it. Judge Bates also raised a concern that the breadth of the term "personal or confidential" would require most subpoena returns to be made to the court.

A member also raised a new issue: whether the court could order the person or entity receiving a subpoena not to disclose it. For example, could the court order an internet service provider (ISP) not to disclose a subpoena to the customer whose records were sought? If so, should the Rule address this?

A member also requested that the Subcommittee consider whether the Rule should address who can challenge a subpoena. For example, should the government be able to challenge a defense subpoena to a third party?

## III. Rule 53 and broadcasting criminal proceedings

Rule 53 currently provides "[e]xcept as otherwise provided by a statute or these rules, the court must not permit … the broadcasting of judicial proceedings from the courtroom." Because no current statute or rule permits the broadcasting of criminal proceedings, Rule 53 prohibits the broadcasting of the proceedings in all federal criminal proceedings. A coalition of media organizations[2] proposed that Rule 53 be revised to permit the broadcasting of criminal

[2] The media organizations are Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting, Inc., Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company (operator of Court TV), Los Angeles Times Communications LLC, National Association of Broadcasters, National Cable Satellite Corporation d/b/a C-SPAN, National Press Photographers Association, News/Media Alliance, The New York Times Company, POLITICO LLC,

proceedings, or to at least create an "extraordinary case" exception to the prohibition on broadcasting. In November of 2023, Judge Dever appointed a subcommittee to study the proposal.[3] The Subcommittee included Judge Conrad as chair with members Judge Burgess, Judge Harvey, Ms. Mariano, and Mr. Wroblewski. Judge Conrad's appointment as Director of the Administrative Office of U.S. Courts required changes in the membership of the Subcommittee. Judge Michael Mossman has joined the Criminal Rules Committee, and he will serve as a member of the Rule 53 Subcommittee.

A. The Subcommittee's report.

The Committee heard an interim report on the work of the Rule 53 Subcommittee. The Subcommittee reported on its initial meeting, which focused on identifying the issues of greatest interest and concern, and the topics on which members wished to have more information. At the reporters' request, Mr. Hawari provided the Subcommittee with a memo and supporting materials detailing the history of Rule 53, including all prior efforts to amend the rule. Regarding the issues of concern, Subcommittee members stressed concerns about the impact on victims and jurors, witness intimidation, and broadly speaking the administration of justice. Broadcasting could also be dangerous for certain defendants. Several Subcommittee members found particularly helpful in identifying concerns Judge Becker's statement for the Judicial Conference in 2000 opposing a bill to allow camera coverage of judicial proceedings.[4]

Subcommittee members expressed great interest in collecting more information about what is happening in the states, including rules and policies now in use, and studies about the effects of the state procedures allowing broadcasting, especially experience in criminal proceedings. Subcommittee members also emphasized the need to work collaboratively with other relevant committees, particularly the Committee on Court Administration and Court Management (CACM), which announced a policy in September 2023 permitting audio broadcasting of proceedings in civil and bankruptcy cases when no testimony is being taken. Members expressed interest in learning more about the information CACM relied upon, noting that the policy suggested ongoing studies of its impact.

At its meeting, Subcommittee also discussed the importance of limiting its deliberations to public access to criminal proceedings, distinguishing the different topic of remote *participation* in proceedings. Remote participation in proceedings by judges, parties, counsel, witnesses, and victims may raise different issues, such as the need to protect the right to counsel by ensuring that

Radio Television Digital News Association, Society of Professional Journalists, TEGNA Inc., Univision Networks & Studios, Inc., and WP Company LLC d/b/a The Washington Post.

[3] To the extent the media coalition's proposal also sought broadcasting of the "fast-approaching trial in United States v. Donald J. Trump, 23-cr-257-TSC (D.D.C.)," consideration of such a case-specific exemption from the Rule is foreclosed for the same reasons that the Committee, at its November 2023 meeting, declined to pursue a request in a letter from 38 members of Congress that the Judicial Conference "explicitly authorize broadcasting in the court proceedings in the cases of United States of America v. Donald J. Trump." The Committee recognized that under the Rules Enabling Act it has no authority to exempt or waive in a particular case the application of Federal Rule of Criminal Procedure 53.

[4] Prepared Statement of Hon. Edward R. Becker, Hearing before the Senate Subcommittee on Administrative Oversight of the Court (Sept. 6, 2000).

counsel and defendant can communicate confidentially. In addition, access to criminal proceedings may involve different considerations than access to civil proceedings, including the Sixth Amendment right to a public trial. Finally, Subcommittee members emphasized the importance of considering all of the issues, and possible approaches, including permitting only audio access, or only delayed access, or only access to certain types of proceedings.

B. Comments at the April Committee meeting.

In response to the Subcommittee's report, Professor Coquillette stressed the importance of the Subcommittee's plan to focus on the history of prior attempts to amend the rule to permit broadcasting, noting lessons learned from that experience. He noted that CACM has a major stake in these issues, and it is important to recognize its operating procedures and philosophy differ from those of the Rules Committees. A Committee member also expressed interest in learning more about the views of defense counsel in state criminal cases that have been broadcast.

## IV. Cross-committee projects

A. Self-represented litigant access to electronic filing.

The Committee received a report from Professor Struve describing the activities of the working group. Although no draft language was available, she said the working group would be convening over the summer to work on proposals for electronic access for filing purposes and also modifying the service requirement in cases where a self-represented litigant is receiving a notice of electronic filing through CM/ECF.

B. Unified Bar Admissions.

The Committee received an oral report from Professor Struve, who described the Joint Subcommittee's information gathering and the pared back proposals it was considering. Professor Coquillette provided some of the relevant history, including a memorable description of an earlier effort to establish uniform rules of attorney conduct in the federal courts as the Charge of the Light Brigade in rulemaking. Members suggested several issues the Joint Subcommittee might consider, including how the Supreme Court handles state disbarments as well as Rules Enabling Act issues.

C. Social-security numbers and other privacy issues.

Mr. Byron reported regarding the redaction requirements for social-security numbers and other privacy issues. The Criminal Rules (and the parallel provisions in the Bankruptcy, Civil, and Appellate Rules) allow the inclusion of the last four digits of social-security numbers in court filings. Previous suggestions to require the redaction of the full social-security number had been rejected on the grounds that the last four digits were useful in bankruptcy cases, and the value of uniformity outweighed any concerns that might differ in other contexts.

Senator Wyden had suggested that we amend the privacy rules—not just the Criminal Rule 49.1, but the others as well—to require complete redaction of social-security numbers, no longer permitting the inclusion of the last four digits. That suggestion prompted discussion among the reporters and the Rules staff about whether there are other issues concerning the privacy rules that warrant consideration. Because there are some related issues that are worth considering in terms of the specifics of the Rules amendments—some cutting across the privacy rules in different rule sets, and some specific to particular rule sets such as Bankruptcy or the Criminal Rules—the working group is tentatively recommending that the suggestion from Senator Wyden be considered in the context of a larger review.

Mr. Byron asked for feedback and suggestions about the best way to undertake the next steps here. Would it make sense to continue the efforts of the Reporters Working Group, working with the Rules Committee staff? Should one advisory committee take the lead on any cross-cutting issues across the rule sets and the privacy rules to the extent that they have common language and common approaches? Or should this Committee and others ask the Standing Committee to appoint a joint subcommittee as sometimes seems appropriate? He noted that the next agenda item for this Committee is a recommendation from the Department of Justice about pseudonyms for minors. He understood that Judge Dever was creating a new subcommittee, chaired by Judge Harvey, to consider the pseudonym proposal and other issues that may arise from the working group. This led to the discussion of the next item.

## V. Reference to minors by pseudonyms (24-CR-A)

The Department of Justice has submitted a proposal to amend Rule 49.1 to protect the privacy of minors. Rule 49.1(a)(3) now requires the use of initials to mask the identity of minors in various court documents. As the letter explains, Child Exploitation prosecutors within the Department have raised serious concerns that this practice does not effectively protect minors' identities, and it would be better to use pseudonyms.

Judge Dever announced a new Privacy Subcommittee, headed by Judge Harvey, to consider this proposal as well as other issues under Rule 49.1, including the redaction of social-security numbers. Given this development, Mr. Byron suggested that it might be beneficial for Criminal Rules to take the lead in moving forward on the issues under Rule 49.1. Mr. Byron commented that uniformity concerns would continue to remain paramount.

## VI. Ambiguities and gaps in Rule 40 (23-CR-H)

Magistrate Judge Bolitho submitted a proposal to clarify Rule 40 as it applies when a defendant from outside the district is arrested for violating her pre-sentencing release. In Judge Bolitho's view, the Rule does not clearly answer two key questions: Is the defendant entitled to a detention hearing in the district of arrest? If so, what is the standard?

Judge Harvey informed the Committee that the Magistrate Judges Advisory Group is preparing a comprehensive request concerning additional amendments to Rule 40 that would address several issues of concern, including the situation raised by Judge Bolitho. After thanking Judge Harvey for developing information that would be helpful in addressing Judge Bolitho's

suggestion, Judge Dever announced that the Committee would defer consideration of Judge Bolitho's suggestion pending receipt of a more comprehensive proposal.

# TAB 7B

**ADVISORY COMMITTEE ON CRIMINAL RULES**
**DRAFT MINUTES**
**April 18, 2024**
**Washington, D.C.**

## Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 18, 2024, in Washington, D.C. The following members, liaisons, and reporters were in attendance:

Judge James C. Dever III, Chair
Nicole M. Argentieri, Esq.[1]
Judge André Birotte Jr.
Dean Roger A. Fairfax, Jr.
Judge G. Michael Harvey
Marianne Mariano, Esq.
Judge Michael W. Mosman
Angela E. Noble, Esq., Clerk of Court Representative
Catherine M. Recker, Esq.
Susan M. Robinson, Esq. (via Microsoft Teams)
Jonathan Wroblewski, Esq.
Judge John D. Bates, Chair, Standing Committee
Judge Paul J. Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

Several Committee members were unable to participate in the meeting. Judge Timothy Burgess and Judge Jane Boyle were in the midst of trials, and Judge Jacqueline Nguyen was ill. Judge Michael Garcia had travel problems.

The following persons participated to support the Committee:

H. Thomas Byron, Esq., Secretary to the Standing Committee
Allison Bruff, Esq., Counsel, Rules Committee Staff
Zachary Hawari, Esq., Law Clerk, Standing Committee
Dr. Timothy Reagan, Federal Judicial Center (via Microsoft Teams)

### Opening Business

After the usual short briefing on security, Judge Dever opened the meeting by recognizing and congratulating Professor Sara Beale, Reporter for the Committee since 2005, on her retirement from teaching. She taught her last class yesterday at Duke Law School, after 45 years of excellence in every way. Professor Beale was his professor for criminal procedure

[1] Ms. Argentieri and Mr. Wroblewski represented the Department of Justice.

adjudication (when they were both much younger). She has been an extraordinary teacher and role model for generations of law students at Duke Law School, and Judge Dever joined the Committee in thanking her for everything that she had done for the Committee, and for so many students through the years.

Judge Dever welcomed Judge Michael Mosman, appointed to replace Judge Robert Conrad, who left the Committee to become the Director of the Administrative Office. Judge Mosman has a wide range of experience that will be beneficial to the Committee. He graduated first as valedictorian of Utah State, then from BYU, followed by clerkships with Judge Wilkie on the D.C. Circuit and Justice Powell on the Supreme Court. After some time in private practice in Portland, Judge Mosman served as an Assistant U.S. Attorney for more than a decade before becoming U.S. Attorney, and he was part of the team in the Department of Justice that responded to the events of 9/11. He has been on the District Court bench since 2003 and served on the FISA court with Judge Bates. He will make a terrific contribution to the Committee.

Judge Dever then recognized the three members who were at their last meeting after six years of distinguished service on the Committee, noting that they would have the opportunity to make comments about their service at the end of the meeting.

Judge Dever said Ms. Recker had been an incredible member of the committee in many ways, including her vital work on Rule 17 and her participation in countless meetings on Rule 62. She brought wisdom and intellect to help shape the Rules over the last six years and has been a pleasure to work with. He thanked Ms. Recker for serving with such distinction.

Next, Judge Dever recognized Susan Robinson, also in her sixth year on the Committee. Ms. Robinson had also been instrumental in countless ways, including with Rule 23. He noted that she now handles both civil and criminal work, and has brought this experience—as well as her prior work as an Assistant U.S. Attorney—to the Committee. She has been a terrific member and the Committee will miss having her, though it is grateful for all she has done.

Judge Michael Garcia was also finishing six years on the Committee. Judge Garcia played an important role on many issues, particularly on the Rule 6 Subcommittee, which he chaired with distinction. Judge Garcia, too, brought his various experiences, as the U.S. Attorney, his New York private practice, and now as a judge on the New York Court of Appeals. We are grateful to him for his work.

Judge Dever congratulated Dean Roger Fairfax on his appointment as Dean of the Howard University School of Law. Judge Dever commented that Howard could not have picked a better person as its new leader, and he was glad that Dean Fairfax was staying on the Committee.

Finally, Judge Dever acknowledged those attending remotely, including Professor Dan Coquillette, and he thanked the members of the public who were attending.

The Committee then unanimously approved the minutes from the fall meeting, subject to the correction of any typos that may be discovered between now and the final adoption.

Ms. Allison Bruff from the Rules office provided a brief report, referencing the chart at page 74 in the agenda book, on the status of proposed amendments to Rules. No criminal rules will go into effect December 1, 2024, absent congressional action.

Mr. Hawari, the Rules Law Clerk, reported on pending legislation that would directly or effectively amend the Rules, referencing the charts that began on page 82 of the agenda book. Since the last criminal rules meeting, Senate Bill 3250 (p. 82) had been enacted. It will provide remote access to criminal proceedings for victims of the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.

Mr. Wroblewski informed the Committee that a legislative proposal had been drafted within the Department of Justice that would authorize judges to allow victims to have access to the trial through closed circuit broadcasting more generally, rather than require one-off legislation for each particular case. This preliminary draft had been circulated within the Department, but not approved by the Department or sent to Congress. The Department was hopeful that instead of proceeding with a legislative proposal, the draft could be revised and presented to the Rules Committee. He wanted the Committee to be aware those discussions were happening with Mr. Byron from the Rules Office and Ms. Shapiro from the Department. Mr. Wroblewski emphasized that the draft legislation would allow remote access for victims only to certain proceedings involving sentencing or release of a defendant, and only via closed circuit.

**Rule 17**

Noting that Subcommittee chair Judge Nguyen was unable to participate because of illness, Judge Dever then recognized Professor Beale to give an update on the activities of the Rule 17 Subcommittee. Professor Beale directed the Committee's attention to the memo beginning on page 88 of the agenda book. She explained that the Subcommittee was seeking feedback, not presenting an action item requiring a Committee decision. She reviewed prior tentative decisions of the Subcommittee that the amended rule should provide

- case-by-case judicial oversight of each subpoena application,
- express authorization of ex parte subpoenas, and
- different standards or levels of protection for personal or confidential information ("protected information") and unprotected information.

Professor Beale noted that participants in the Phoenix meeting had described the need to subpoena various forms of unprotected information, such as recordings from security cameras on the street where a robbery allegedly occurred, or video from a casino of money being counted out to a defendant who wished to demonstrate cash in his possession was not drug proceeds.

Since the 2023 fall meeting, the Subcommittee had met twice and would meet again after the current meeting. It was moving step by step, with a lot of research and deliberation on each point. Among the tentative decisions of the Subcommittee at its most recent meetings was the decision to keep the amendments in Rule 17 instead of creating a new rule. The Reporters had suggested that the subcommittee consider putting the expanded subpoena authority in a new Rule 17.2 or 16.2. That idea provoked a lot of discussion, and the subcommittee unanimously decided

to make any changes within Rule 17, to make it clear that it was revising the Rule into conformity with practices in several districts where it was working well. The Subcommittee did not want to suggest this was an entirely new discovery provision, which might generate unwarranted opposition.

The Subcommittee also decided to make it clear that the material produced by an ex parte subpoena should be disclosed to the opposing party only as already required by the rules regulating discovery between the parties. Professor Beale said they had heard earlier from practitioners (and later confirmed in case research) that judges had allowed ex parte subpoenas but then ordered that the information that had been produced must be shared with the opposing party. Professor Beale observed that requiring all subpoenaed material to be disclosed automatically to the opposing party really undercut the point of having an ex parte subpoena. Requirements for disclosure to opposing parties are already in Rule 16, 12.2, 12.3, and so forth. Those reflect the right balance. Having an ex parte subpoena should not enlarge the court's authority to require additional disclosure to opposing parties.

A third issue was where returns should go. The rule has not been clear on that. Some courts have concluded, for example, that it's improper to allow the returns to go directly to the party who requested the subpoena. The Subcommittee tentatively decided that the rule should clearly authorize the court to order a witness to produce items directly to the party requesting the subpoena. But it should require returns to the court under two situations: (1) when the subpoena is requested by a party who is not represented, and (2) when the subpoena requests personal or confidential information. Unrepresented individuals don't have the same training or ethical obligations as lawyers, and requiring that a return or personal or confidential information go to the court means that it can exercise some control over what is disclosed.

The Subcommittee also rejected the idea that the rule require notice to the person whose information was being sought. She reminded the Committee that the subpoena authority would potentially reach material that is covered by many different laws, including school records, health records, and records regulated by the Stored Communications Act. The Subcommittee has been clear all along that it is not trying to override those laws, which cover not only what you can get, but also who should get notice. For example, the Stored Communications Act does not provide for notice in certain situations. But Rule 17(c) already requires notice to victims under certain circumstances, and the Subcommittee was not proposing to change that.

The Subcommittee is moving toward deciding the required showing to obtain a subpoena. The language quoted on page 90 of the agenda book had not been approved by the Subcommittee, but it provided a sense of what the Subcommittee has been considering as the standard for obtaining *unprotected* information. It is quite different from *Nixon*, it does not require admissibility, but it must be specific enough that the recipient would understand what they were being asked.

The Subcommittee is also looking at language that would be applicable not only to the trial but to other proceedings, but it had yet to determine what those other proceedings might be.

Parties are entitled to present evidence at a number of proceedings, and they may need a subpoena to get it, or to determine what that evidence would be.

Professor King added thanks to Mr. Hawari, the Rules Law Clerk, and his predecessors who had also been very helpful in providing research to the Subcommittee. She observed that each new step the Subcommittee takes has the potential to raise concerns about prior, tentative decisions because the decisions interact, and that's to be expected. The Subcommittee had yet to address the standard for obtaining subpoenas for personal and confidential information, the type of review that the judge will do in camera, and other procedures. It was taking this step-by-step incrementally. The Subcommittee values any feedback Committee members have to offer.

Judge Bates commented from the judicial perspective, noting that for almost every subpoena request, the judicial officer would have to make three determinations. First, whether the standard is met, whatever the language winds up being to obtain the subpoena. Second, whether good cause has been shown to have the subpoena be ex parte. And third, a determination based on the kind of material sought as to whom the return should be made. Those would be three separate determinations that the judge would have to make for virtually every request.

Professor Beale responded that they would not all be ex parte, but many of them would be.

Professor King noted there would be a fourth determination if the subpoena is one that's returned to the judge for in camera review. Then the judge would have to decide what to disclose and who to disclose it to. She clarified that is a later determination not made at the time the subpoena is sought.

Judge Dever observed that building the standard on the front end helps provide sufficient facts for the judge to be able to evaluate the material if it is returned to the court, so the court understands why the party asked for this, why judicial authority has been allowed to subpoena this. He's had subpoenas seeking personal or confidential material. In that situation, judges reference back to what defense counsel said she was looking for, and then ask whether this is responsive to what the lawyer articulated in the subpoena request, in connection with it being exculpatory or whatever the standard called for. He agreed with Judge Bates's statement of the three process questions that will probably come up almost every time. And then a fourth will be animated by the standard we adopt to even get the subpoena, because once the judge gets the return, the judge will have to compare it to the request to see if it is responsive.

A member noted that there might be an additional determination. He understood the Subcommittee thought that the rule should be silent on whether there should be any notification given to whosever information is being sought, but he thought consideration should be given to acknowledging that the court would have the discretion to order notice. He said that also raises an additional issue: the extent to which the court will have the power to gag, say an internet service provider (ISP) that receives a subpoena and whose policy is to disclose to their customer that they have received a subpoena about the customer's information. When it is truly important to the case and the district judge has made the decision that this has to remain private, is there going to be that power, which is what happens all the time with magistrate judges and warrants?

Magistrate judges in his district routinely get motions not only to seal, but to gag the ISPs, who, since the Snowden case, have policies that they will disclose if there's no gag order.

Professor King said it was important to hear this concern. She said there are several issues like this that come up with subpoenas regularly, that may be controversial among courts, and the Subcommittee will be working through which of those issues to bite off. Is it going to solve this circuit split, and this circuit split, and this other circuit split in the rule? Or are there some things that we don't have to load into a proposed amendment? We had this experience over the years many times, including Rule 12, with several years of being asked, "Do we have to decide that? Can we just say we're not reaching it?" So that may be an issue that ends up in the proposal, but it also may be one of the several issues that are not included, in part to smooth the way through the process. The more controversial things we add, the more difficult it is to get the core changes made. It could be an issue like that, but it's certainly something that the Subcommittee will address.

Mr. Wroblewski offered that the Department likes to use the phrase "delayed notification" rather than "gag." The Subcommittee has talked about this to some extent, and there are provisions in law dealing with when delayed notification is appropriate and when it's not. As the Reporters mentioned, the Subcommittee is not going to try to overrule anything that is already in an existing statute. He asked the member if he thought Rule 17 should be self-contained, meaning that you don't have to flip open your book to somewhere else where it addresses all these kinds of issues that the member is talking about.

The member responded that it depended on the issue. He received such requests frequently, made entirely by the government to protect its investigation. But the subpoenas under the proposed rule will mostly be used by the defense, because the government has many other ways to get information. So the defense is trying to protect their own theory of the case, trying not to tip the government off as to what it is they're looking at. These subpoenas may lead to potentially inculpatory information, rather than exculpatory information, and he hadn't thought about how that might play into a delayed notification. He thought it was a better question for the district judges, because they will be the ones handling these requests. A rule that has as much as possible in it to guide the judge during a major change like this will be important, especially in those districts such as D.C. where there's not a lot of Rule 17 practice. This is going to be a big change, so there may be some reluctance, and the more you can clarify where those rights exist, it would be helpful.

Judge Bates asked the member if the gagging or delayed disclosure issues arise most frequently where there is a criminal case pending, or most frequently where there is not yet a criminal case pending. Because these subpoenas will generally be where there is a criminal case pending.

The member replied that the issues arise when there is an ongoing investigation, but the government has power to continue to investigate its case, even after an indictment is returned. There are no longer grand jury subpoenas, but there are 2703(d) and search warrants. The government routinely seeks the same sorts of things. And the court looks more closely at those

requests because of the question why the government is still hiding the nature of this investigation when the case is already existing. But it happens.

Another member observed that the protected information that the Subcommittee is looking at is in large part subject to a whole range of protections: some is simply confidential, some is protected but qualified. She asked if the member who just spoke had been suggesting that the rule add something in addition to what the statutory framework already requires.

The member responded that might be more of a question for the defense attorneys who are going to be using the rule. There are certainly categories of information that have various statutory protections. Can you issue a delayed notification order to protect the interests of the defense case? But even for those categories of information for which there is no outstanding statutory protection, defense attorneys may not want anyone to know what they are doing. It might be important to the defense, for example, to preclude the casino from disclosing its receipt of the subpoena. Without making a judgment about whether that should happen, the member could imagine that might be important. And there is no statute that says the court can do it.

Another member said that part of the problem is that there are so many other rules governing the disclosure of information. For example, she will sometimes have to get a subpoena to obtain a client's own records when a release is not sufficient, and a court order is required. Generally, her office obtains the necessary court order by requesting a subpoena. There are some state statutory limitations that provide the right to not have that information disclosed. If defense counsel requests those same records for the *victim,* the same statute would likely require notice to that victim and the government will immediately know that a subpoena has been issued. Even if the request is ex parte, articulating the reason why those records are important to the judge in order to get the subpoena is still important, and it is important to the defense to be able to do that ex parte. But the idea that the government won't know about the subpoena is unlikely. And the idea that a gag order would be issued by a court was hard to imagine where a subpoena seeks the victim's records.

Another example is a subpoena to a law enforcement agency seeking records of a cooperator. Although the member knew of no statutory guidance or rules guidance, there may be ways for the defense to ask the court to issue a gag order to that other law enforcement agency. It would be a pretty uphill argument, and it would have to be fairly specific as to why that would be necessary. Absent that, what is going to happen is that before the defense gets the records, they will hit the desk of her opponent, and then compliance with the subpoena will be fulfilled. She said Rule 17 is a vehicle for gaining access to information, but a lot of other rules are in play. Notice, in particular, is covered by many different federal and state statutes. The one area where others could be more specific is white collar, dealing with huge, voluminous requests through subpoenas. Whether that type of request could ever be under a gag order seems unlikely, but she couldn't say what the notification provisions for bank records, for example, would be. If there's a concern that there should be notification, the district judge can require the requesting party to brief that. But putting it in the rule would complicate the rule's relationship with a lot of other statutory requirements in all of the states and federally.

A member asked to go back to page 90 on the return issue. He noted that as the language characterizing the Subcommittee's tentative conclusion is written, the Rule would authorize the court to direct the return directly to the party requesting, but require return to the court if the information being sought is personal or confidential. Did that second clause mandate that the return would be made to the court in cases whenever the information being sought was personal or confidential? How broad is that characterization "personal or confidential," and from the perspective of whom? He imagined almost all information being sought would be personal or confidential from the perspective of someone.

Professor King responded that the Subcommittee's tentative decision was that the material produced by any subpoena for personal and confidential information goes first to the judge so that the judge can sort through who gets to see it. And that was in part because of the potential breadth of what that category of materials includes. It includes privileged material, closely held material of corporations, medical and therapy records, things like that. The judge would review all of this material first before disclosing it, even to the person who requested it.

Professor King said the scope of that characterization is something the Subcommittee must tackle. It's a tentative decision to bifurcate the standards in that way. There was a debate over how to characterize the two different buckets. "Personal and confidential" appears in Rule 17(c)(3), so it has the advantage of at least some track record available to judges who are applying it. But it may be something that eventually the Subcommittee revisits or describes more fully in some way. In doing so we'd have to be mindful of the existing language in the rule, which has been there for some time.

Judge Bates raised the concern that so much of the material sought with subpoenas would fit into the loose category of personal and confidential that this would be requiring most subpoena returns to be made to the court. That would be a very substantial change and one that the Committee would need to think through quite carefully.

Professor Beale responded that the Subcommittee did discuss what might potentially narrow that. The rule might refer to information that is protected by federal or state statute and other bodies of law that indicate the material has a special, protected quality. The tentative decision — not unanimous — was to stick with the more general category already in the rule. But this does not preclude reconsideration when we see the whole package and think again about things like whether it imposes too much of a burden to put on the courts. When the Subcommittee puts all the pieces together, it will reassess. If it is a broad category and includes things that are not highly, highly, highly sensitive, that may be a much easier decision for the judge to make, seeing no tremendous concern about turning it over.

Mr. Wroblewski said one of the tensions we'd been wrestling with is that if you have a much tighter standard, something much closer to the *Nixon* standard, which is going to limit the information that's coming in, there's obviously less protection and review that has to happen on the back end. But there's also an interest in having the standard at the front end much broader, something more like "material to preparing the defense," which then may require more back-end protections, whether those are protective orders or review by the court. That's one thing the

Subcommittee had been wrestling with — where and when to put those limits, whether it's early on in the standard or later on in the review.

Ms. Argentieri thanked the Committee for having her at the meeting. She first raised a concern about ex parte subpoenas. If the request comes in early in the case, post indictment, and there has been little motion practice, the judge may not be aware of the full scope of the government's case in the absence of highly litigated motions in limine such as Rule 404(b). This puts a burden on the judge to become a document reviewer, where these documents may be voluminous, and to call balls and strikes about what needs to be produced. She asked what the Subcommittee was thinking about that burden and what additional guidance resources would be provided. She commented that in a big white collar case it might overwhelm a chambers and slow down criminal litigation.

A second concern, Ms. Argentieri continued, is not having the government be a part of this. Having been on the defense side for years she totally understood there might be cases where the defense doesn't want to reveal strategy, and perhaps the government shouldn't have a place at the table because you're trying to figure out if you might be developing additional inculpatory evidence. On the other hand, not having the government at the table to provide that other perspective also limits the information the court is getting when making important decisions.

In addition, Ms. Argentieri remarked, if the standard for a subpoena becomes information that is material to the defense or prosecution, if the government receives such information it would have to provide it to the defense. When she was on the defense side, they never made Rule 16 productions. Usually the defense did not make Rule 16 productions until the witness was on the stand. She asked if the Subcommittee was thinking about giving additional guidance about what eventually must be produced to the prosecution. Otherwise it could potentially be kind of a litigation by sandbag.

Based on what the Committee heard in Phoenix at the October 2022 meeting, Judge Dever said, at least in the districts that allow ex parte subpoenas, counsel seek them for material they think will be helpful to the defense case, but they don't really know. They may get material that is both helpful and harmful, and they have to decide what to use at trial. Rule 16 covers their disclosure obligations for trial. He thought the Subcommittee views Rule 16 as covering what you have to disclose and when you have to disclose it. In contrast, Rule 17 was about getting access to the information, recognizing that you think it is going to be helpful, but you may get material that is somewhat helpful and somewhat harmful. Then your obligation is to look to Rule 16.

Professor Beale explained the Subcommittee thinks other parts of the Rules deal with what you have to disclose if you get something ex parte. You might get this information in many different ways. You can get it earlier in a grand jury subpoena, or somebody could volunteer it and bring it in. The government doesn't have to disclose it unless required to do so by Rules 16, 12.2, 12.3 or its *Brady* obligations. (Of course, the defense has no *Brady* obligations.) But the ability to get this information does not mean that you have to turn it over. It is only if some other body of law says you have to turn it over. The Subcommittee understood that those other bodies

of law reflect policy choices about fairness and transparency, but also the ability to build your own case and keep trial strategy secret. The Subcommittee is not seeking to override any of those policy choices. It is trying to allow parties to get access to information, but not to determine if and when they should have to hand it over to an opposing party.

Professor King responded to Ms. Argentieri's first question, whether this could overwhelm the judge with document reviews. She said that the Subcommittee is very aware of that concern, which Judge Bates raised as well. One of the things that the Subcommittee had considered all along, and that it would continue to consider, is how any burden will differ from what exists now. If judges now must run through all of those issues under the *Nixon* standard, is it going to be different from that in terms of burden, and if so how? Also, we have and will continue to look at jurisdictions that have systems that are like the ones we are considering, to see what the burdens are there and how they're handled by the judges in those districts. We will definitely pay attention to those as we go forward.

Another member stated her view that the Subcommittee has done an excellent job framing out some of these initial issues. First, she emphasized the recognition of the chilling effect that any automatic disclosure of the documents would have if a defendant were required to immediately turn over all of the records obtained by a subpoena. The member said it is critical that the rule enable a defendant to conduct his own investigation and defend himself. Requiring automatic disclosure would undermine that process. Second, she noted that getting away from *Nixon*'s admissibility requirement is critical here, as the Subcommittee had recognized. Third, the reporters mentioned that the Subcommittee is considering not only trial but other proceedings where subpoenas could be used. If there are proceedings to challenge evidence (perhaps even in detention, although it might take too long to get documents that might be helpful initially for that), those could be important proceedings. On sentencing, to make mitigation arguments it is very helpful, for example, to be able to obtain her client's educational and medical records that the client no longer has the ability to obtain. Subpoenas are critical, important, and helpful for those proceedings.

The member also addressed delayed notification. In a case where a state agency is a purported victim, if the defense is subpoenaing records from that agency, it expects the agency to share the subpoenas with government. The government gets a little information from the subpoena, but the member stressed that it was important that the government not get the supporting motion, which described to the court why the defense needed the subpoenaed documents, how they were going to be used, or why they were important in the case.

The member raised the question who can challenge these subpoenas. Is it only the third party or does the government have standing? Can the government, independent of the agency itself, challenge the subpoena and file a motion to quash? It might be important to address that with this rule. When she has litigated these issues, the court has said the government really does not have standing, but then it turns to the other party and gets very mushy. There may be instances where the third party would not challenge the subpoena, would not feel that it had reason to, but the government might jump in for whatever their reasons and motivations are. It might be important to address that. Overall, the member said, this was a terrific start.

Another member noted that the Committee had learned that there are vast differences in practice, and her experiences had been very different from Ms. Argentieri's. For example, in her district she can ask for an ex parte subpoena. If the judge wants to hear from the government, the judge will say "We can disclose your request, or you can withdraw it." She had never had a judge give the subpoenaed material to the government without giving the defense an opportunity to withdraw the request. The member also noted that the courts in her district were quite adept at making sure that they had all the necessary information, particularly if it is not the eve of trial, when perhaps the court is more aware of the case and can put more context into the request.

The member commented that Rule 16 has some teeth in her district because the defense can get subpoenas, either ex parte or otherwise. The judge knows very well when she got the information. If she did not provide reciprocal discovery required by Rule 16, there would be a motion to preclude the evidence, which would be granted. The Subcommittee was focusing on whether the court should be able to require all material subpoenaed ex parte to be turned over. Because as others have noted the defense requests information without necessarily knowing the fine details, and it could receive something it ultimately decides not to introduce. But even if the defense decides not to use the material obtained by subpoena, it aids the defense preparation to know what was there. If something is provided that we intend to use, judges will absolutely expect that that the defense to comply with its disclosure obligations under Rule 16. She thought that was what the Subcommittee was trying to resolve, and this discussion highlights in many ways why that will be difficult.

Judge Dever commented on the point Ms. Argentieri and Judge Bates had raised. One of the things that the Committee heard in Phoenix and that the Subcommittee is considering is whether the front-end standard should include some kind of diligence regarding alternative sources. One important point is the difference between the white collar practitioner and the CJA defense lawyer. The Criminal Justice Act (CJA) defense lawyers from districts where they can obtain subpoenas were uniform in saying they have no interest in getting a terabyte of data from someone. They say, "I wouldn't have time to review it anyway." If they were defending a Hobbs Act robbery case or something, their subpoena requests would be very targeted.

And in terms of judicial review of an overwhelming amount of documents, Judge Dever said, when we move to the white collar bucket, we underestimate the capacity of companies that have big data to send their lawyers in to initially try to negotiate with the lawyer, saying "We're not going to produce, we're going to litigate this unless you tell us more narrowly what it is exactly you want." That's a back-end safeguard, and it's legitimate. Is a terabyte of data going to come into a chambers? One of the safeguards against that is the capacity of a third party who gets a subpoena to itself say, "Who is the defense lawyer that sought this? I'm calling that defense lawyer," and saying, "We will move to quash this because it's unreasonable and oppressive to us, unless we can negotiate a narrowing of what it is exactly that you're looking for." So we have some safeguard that we can hopefully build in on the front end explaining what it is you're trying to get, and then we also have some safeguards later. You see that in civil cases all the time of when a third party gets a subpoena.

A member emphasized that defense counsel doesn't want a terabyte of data. That whole process of narrowing is definitely something that we would be interested in. Just because it's a white collar case and there is an extraordinary amount of data, it doesn't mean we want it all.

A member said the word "designated" items in the standard can do a lot of work. To what extent do you need to particularize what those items are to narrow it? It is important to address all of these issues with respect to the volume that's going to be returned and the potential burden on the district judge. Part of this as you think about the standard is some sort of particularization, to the extent that the defense can. Another issue is, at least for ISPs, they don't do a lot in terms of culling in response to government requests. They don't have the manpower or the interest to do it. Apple recently said that they will not even date restrict the data that's coming in, and that has become an issue because typically there's some restriction to the date in responses to subpoenas or to search warrants. But it is easier for them to produce everything, and then the FBI has an army of agents and analysts who are going through all of this data to try to figure out what can be seized and used as part of the investigation. That will be a challenge for a district judge.

A member drew attention to the difference between government search warrants and defense subpoenas. Defense attorneys are limited by the Stored Communications Act. Since they cannot obtain the content of stored communications, isn't the burden on the ISP very limited?

The other member agreed that the defense cannot obtain content, but it can get subscriber information with the IP information, which can be over time and not be related to the particular time that's at issue in the case. The extent to which ISPs will be willing to cull information is an issue, even in response to a subpoena. It was not clear to the member what ISPs would do. To the extent the information you can subpoena is considered personal and confidential, that may go to the district judge. Then how does the judge figure out this data file, which the FBI knows how to deal with?

The reporters and Judge Dever thanked the members for their helpful comments.

**Rule 49**

Judge Dever moved to access to electronic filing and Rule 49 with a report from Professor Struve. She explained the working group does not have a draft for the Committee this spring, but will be convening in the coming months over the summer. It is indebted to Ms. Noble and everyone else, including the reporters, for their wise input on the project. The group will work over the summer on the proposals both on electronic access for filing purposes and also modifying the service requirement in cases where a self-represented litigant is receiving a notice of electronic filing through CM/ECF.

Professor Beale added that this is another example of attempts to bite off parts of what was a much broader proposal that could not possibly go forward as submitted. There is a sense that there are some smaller pieces that would be feasible for this Committee and other committees to implement, and the task is to target and identify some specific provisions that could be useful.

**Rule 53**

After thanking Professor Struve, Judge Dever moved to the next item on the agenda: Rule 53 (page 94 of the agenda book), the broadcasting of criminal proceedings. He noted that before his appointment to head the Administrative Office, Judge Conrad had chaired the Rule 53 Subcommittee, and Judge Mosman is joining that Subcommittee. Judge Dever stated the agenda book included the Reporters' memorandum and the proposal from the media coalition organization, page 98. Mr. Hawari's excellent memo, beginning on page 115, explains the history of Rule 53, which has been largely unchanged since its adoption. In 1992 there was a proposal to add a clause at the end of the current rule providing "except as such activities may be authorized under guidelines promulgated by the Judicial Conference of the United States." That proposal would have allowed the Judicial Conference to promulgate guidelines allowing broadcasting in specified circumstances. A nonunanimous Criminal Rules Committee recommended the proposal to the Standing Committee, where the chair broke a tie and sent the proposed amendment to the Judicial Conference. The Judicial Conference rejected the proposal.

Judge Dever said the Subcommittee's first meeting had been very productive. The coalition's letter said that some parts of criminal proceedings may be televised in 49 states, and the Subcommittee hopes to learn more about what is going on in the States. CACM has had a significant role on issues concerning broadcasting, and it just promulgated a revised policy. The Subcommittee hopes to learn more about CACM's views and its research. Judge Dever also expressed his gratitude to Mr. Hawari for the great historical memo, and he noted that the Subcommittee was in the process of gathering more information.

Professor Beale offered comments she thought might be useful not only for the group in the room, but for members of the public and the proponents of this proposal. The Committee is not writing on a clean slate. This is a proposal to change a rule to allow greater broadcasting. Similar proposals have been considered multiple times, and the rule has not been amended. The Subcommittee feels that it has to understand the original reasons for banning broadcasting, and the reasons for retaining that rule. It also needs to understand the received wisdom underlying the rule. But it is also very important to understand the current environment. Technology and other things have changed, so we are trying to understand the foundations of this rule and then enlarge our understanding of what's going on in the other jurisdictions, and what the FJC and other groups that are studying this are finding, before there would be any possibility that we could make a recommendation going forward. And we are not the only actors here. For example, the Committee on Court Administration and Court Management (CACM) has a lot of responsibility in this area, and it has recently made changes that reflect its own policy judgments and the information it has gathered. The Subcommittee hoped to work in tandem with CACM. But coordination will raise some issues. CACM has its own responsibilities. It is not a public committee that reports generally or has open meetings like this. It operates on a different schedule. So trying to figure out exactly how that will work is also part of what we're doing along with, as Judge Dever said, trying to understand what's going on in the states. Fortunately, we don't have to be the only researchers in this area. The National Center for State Courts and others gather this information, and other groups have published their own accounts of what different states and courts within particular states are doing. But quite a lot of information must

be gathered before the Subcommittee would be prepared to begin making any kind of recommendation.

Judge Dever referenced the Reporters' memo at page 94, and invited the members to comment if there is anything else that would be helpful to consider.

Professor Beale added that it was important to keep in mind the difference between the participants and the general public, and that whatever the rules provide for participation by the various parties, witnesses, and victims could be potentially quite different from remote access or broadcasting to the public at large. The Committee and Subcommittee need to remain sensitive to that difference. Obviously concerns about the privacy of jurors, witnesses, and so forth are things that must be kept in mind.

Professor Coquillette concurred in the praise for Mr. Hawari's outstanding historical memo. As someone who's lived through one iteration of this, he thought that focusing on that history would be one of the most useful things that the Committee and Subcommittee could do. He identified several lessons from that experience. First, he acknowledged the challenges of working with CACM. They have a different philosophy, they are not a sunshine committee, they operate differently, and they have a big, big stake in this. Secondly, there are some powerful lobbies involved here that are very influential. The committees do not normally look over their shoulder at Congress, but this is one where we might need to do so. Finally, the Judicial Conference did something unprecedented in rejecting a recommendation from the Standing Committee in 1994. It was a split vote. So taking time to build a consensus is an excellent idea because there are so many moving parts.

One member commented that she had always felt categorically opposed to cameras in the courtroom, but she had been very intrigued with Ballard Spahr's letter and its the description of the experience with the George Floyd related trials. She was really surprised and thought that accumulating information broader than the Ballard Spahr letter about that experience might be helpful. Judge Dever agreed.

**Rule 43**

Judge Dever reported on a different but related issue. The Committee received a letter from Judge Ludwig in the Eastern District of Wisconsin, who asked the Committee to revisit Rule 43 and the defendant's presence requirement in connection with Rule 11 proceedings. The Committee did not receive the proposal in time to include it in the agenda book. The Rule 53 issue is that broadcasting could allow many people to see what is going on in the courtroom. That is distinct from the Rule 43 proposal, he emphasized, which concerns the use of technology to lawyers and parties to *participate* in a proceeding. The use of technology to allow remote participation in judicial proceedings is different than the use of technology by observers. He expected that the reporters would prepare a memo for the Committee's November meeting that will describe the history of the consideration of this type of proposal for remote participation in criminal proceedings. Obviously, there was a big exception made in the CARES Act with respect to Rule 11 and with respect to sentencing proceedings. That exception has expired. As he

understood the proposal, it says, "We found that experience [under the CARES Act] to be good. We think you ought, as a Committee ought to revisit that issue."

Judge Dever said the Committee last considered this Rule 43 issue when Judge Kethledge was the chair. At that time, the Committee had no desire to change the rule (and it had considered the issue before). Judge Dever noted that he found it very helpful to understand the history of a rule. He expressed his appreciation for the historical memos prepared by the reporters and lawyers (like Mr. Hawari) in the AO that help us before we even think about changing anything. The reporters would prepare a memo for the November meeting, and the Committee will discuss whether to set up a subcommittee to study that issue in the suggestion letter.

Professor Beale said the reporters would try to summarize the history in their memo for the November meeting.

****The meeting was recessed at this point when remote access dropped building wide, and resumed when internet access was restored.****

**Redaction of Social Security Numbers and Other Privacy Issues**

Judge Dever moved to page 125 in the agenda book with the redaction of Social Security numbers and a privacy rules working group update from Mr. Byron.

Mr. Byron said that the memo on page 125 updates everyone on the work of the reporters' privacy rules working group. As explained there, Senator Wyden has suggested that we amend the privacy rules—not just the Criminal Rule 49.1, but the others as well—to require complete redaction of Social Security numbers, not permitting (as we have for the last nearly 20 years) retention of the last four digits. That suggestion prompted discussion among the reporters and the Rules staff about whether there are other issues that warrant consideration as amendments to the privacy rules. We have now received some specific suggestions, including a recent one from DOJ proposing the use of pseudonyms rather than initials for known minors.

Because there are some related issues that they thought were worth considering in terms of the specifics of the Rules amendments—some cutting across the privacy rules in different rule sets, and some specific to particular rule sets such as the Bankruptcy or Criminal Rules— the working group had tentatively recommended that the suggestion from Senator Wyden be considered in the context of a larger review.

The materials on page 126 sketch what a complete Social Security number redaction amendment might look like if it were undertaken in isolation. Professor Struve noted that the working group was not asking that the Committee consider or vote on that particular idea or sketch of an amendment. Instead, it was asking for broader feedback about whether it is a good idea to pursue Social Security number redaction in isolation, or instead consider a broader review of the privacy rules as a whole. Relatedly, if we were to undertake a broader review of the privacy rules, what other issues should we look at?

Mr. Byron also asked for feedback and suggestions about the best way to undertake the next steps here. Would it make sense to continue the efforts of the reporters working group, working with the Rules Committee staff? Should one advisory committee take the lead on any cross cutting issues across the rule sets and the privacy rules to the extent that they have common language, common approaches? Or should this Committee and others ask the Standing Committee to appoint a joint subcommittee as sometimes seems appropriate? He noted that the next agenda item for this Committee was a recommendation from DOJ about pseudonyms for minors. He understood that Judge Dever was creating a new subcommittee, chaired by Judge Harvey, to consider the pseudonym proposal and other issues that may arise from the working group.

Judge Dever confirmed that was the plan, and asked Mr. Wroblewski to explain the specific DOJ proposal regarding referring to minors by pseudonyms before opening discussion to include any other issues on the privacy rule.

Mr. Wroblewski drew the Committee's attention to the Department's letter at page 132 of the agenda book, which presented an issue raised by Child Exploitation prosecutors within DOJ. The current practice under Rule 49.1(a)(3) is to use initials to mask the identity of minors in various court documents. As the letter explains, there are serious concerns that is not effective to protect minors, and it would be a better practice to use pseudonyms.

Professor King asked Mr. Wroblewski for the current DOJ policy regarding protecting the privacy of adult sexual assault victims. He did not know but he offered to find out. He noted that in his own experience those names are in the public record. Three other judges agreed that that was the practice in their districts.

Turning to the new subcommittee, Judge Dever commented that if members thought it would be useful, its charge could be broadened. The subcommittee would be chaired by Judge Harvey, and its members would be Judge Birotte, Ms. Mariano, Mr. Wroblewski, Dean Fairfax, and Ms. Noble. He noted Ms. Noble's participation would be particularly useful because many of the issues come up in the clerk's office. He asked for comments on whether there were any other parts of the rules that that we needed to look at.

Mr. Byron commented that given the appointment of the subcommittee, it was possible that the other advisory committees (with the blessing of the Standing Committee) might want Criminal Rules to take the lead on some of these questions, especially to the extent they were motivated in part by concerns not unique to the Criminal Rules. He thought it might make sense in terms of efficiency and resources for Criminal Rules to take the lead if the new subcommittee has the time and attention to consider some of these broader cross-cutting issues as well. He noted that he was open to the Committee's feedback about what would work best.

Judge Dever said the initial charge for Judge Harvey and the Subcommittee was to look specifically at the DOJ proposal, but then to broaden that out to the extent that there are Social Security number references in the rules.

Professor Beale referenced page 127 right before the asterisks, identifying a potential issue raised at one point several years ago about 49.1(b)(8) & (9) search warrants and charging documents. There may be something else in 49.1, once we open it up, that we should look at now. But, she commented, we don't want to open the patient more than once if we can avoid it. Accordingly, she asked members to identify any other issues concerns about Rule 49.1 during the meeting or as soon as possible after the meeting. It is helpful to the Committee to make all of the changes to a rule at one time, and bad for those who use the Rules when we do not. When there are multiple amendments within a short period of time, it generates confusion and decreases the input we receive. So if there are any other potential issues, this is the time to put them on the agenda for evaluation.

Professor Beale observed that there are some style conventions in the Rule (such as "social-security") that we would not be able to change, and if the advisory committees go in lockstep we might not get exactly everything we want. But for the parallel provisions, we would be able to give our input, and if we took the lead we might even set the agenda. But she thought there was a good chance that these rules will continue to be uniform across all the provisions and issues that are shared.

Mr. Byron added that the uniformity concern has been paramount since the beginning, and driven in part by statutory concerns as outlined in the memo. But it has also been driven by concerns that many of these issues arise in many types of proceedings. DOJ's suggestion to use pseudonyms rather than initials to identify minors is a good example. Although it was aimed principally at Criminal Rule 49.1 and criminal victims and witnesses, the same provision appears in the Civil and Bankruptcy Rules, and it applies in the Appellate Rules too. So whatever this Committee recommends on that question will need to be considered by the other Advisory Committees.

**Rule 40**

Hearing no additional comments, Judge Dever moved to the proposal to amend Rule 40, and the Reporters' memo at page 136 arising from a proposal received from Magistrate Judge Bolitho in the Northern District of Florida. The memo outlines the issue that Judge Bolitho identified as a perceived ambiguity in the rule, its relationship with the Bail Reform Act, and how he resolved it. In preparation for this meeting, Judge Harvey had gathered additional information to help the Committee decide whether it sees this as a significant problem.

Judge Harvey said he had reached out to some colleagues on his court, to individuals in his judges' class, to a representative for the Magistrate Judge's Advisory Group (MJAG), and the Rules Committee of the Federal Magistrate Judges Association. Generally, everyone who responded had views on Rule 40. They were universal in the view that the rule is confusing and difficult to apply. They each have different issues with what they think needs to be addressed, not necessarily the issue raised by Judge Bolitho. As for that issue, he learned the MJAG is going to be submitting in the next few months a more comprehensive request regarding amendments to Rule 40, which would encompass the issue raised by Judge Bolitho, as well as additional issues.

Judge Harvey recommended that the Committee delay full discussion of the issue raised in the letter until it receives the MJAG comprehensive recommendation. He had seen a draft of it, and it is similar to the request that this Committee considered five years ago from Judge Barksdale. The Committee considered Judge Barksdale's suggestion and decided not to send it to a subcommittee, in part because there was concern that the issues just didn't come up that frequently. Judge Barksdale is working with the MJAG to make it clear that the concerns that she raised are concerns of magistrate judges more broadly. They are making efforts to collect information and data to address the question whether these sorts of situations arise with sufficient frequency to gear up the rules amendment machinery. Judge Barksdale expected to have a proposal including that data in the next few months. MJAG hopes to persuade this Committee that the issues are of concern to many magistrate judges, and the confusion Rule 40 causes comes up with sufficient frequency that it merits our further consideration.

Judge Dever and Professor Beale thanked Judge Harvey for the additional work that he had done. He contacted many people and asked his law clerk for additional research, resulting in a nice packet of material. Professor Beale expressed her gratitude in this case and in the many other cases in which Committee members have done a tremendous service developing information. For example, Ms. Recker had identified and recruited several specialists in different areas to talk to the Rule 17 Subcommittee.

Professor Beale explained that the fact that the Committee has received a similar proposal before does not necessarily determine what we should do when it receives a new proposal. We are always trying to decide if a rules suggestion is just a one off. If one judge says, "I didn't know quite what to do on this issue," and we cannot determine whether anybody else has had the same problem, that is not a good enough reason to gear up the rulemaking process. But if things continue to bubble around and we see more cases, even if the issue is being correctly resolved, we may wish to reconsider taking an issue up. The magistrate judges with whom Judge Harvey was in contact generally agreed Judge Bolitho had resolved the issue correctly, but they also said that the Rule is not clear and that figuring out the proper procedure and standard was more difficult than it should be. If many courts must resolve those issues, that might be sufficient to warrant taking the issues up, even though the courts are muddling along to the correct answers. We will have more information at the November meeting and perhaps more sponsors other than one or two judges who think that we that we ought to do something. There is respect for every judge that sends in a suggestion. But the Committee does not have the resources to gear up the rules process to revise every rule that could be tweaked to be a little clearer.

Judge Dever concluded that we anticipate a proposal from the MJAG, which will incorporate part of what Judge Bolitho has said. We will also have a Reporter's memo addressing the history. We will want to understand whether we have already addressed either the same issue, or something slightly different, and whether there is a bigger problem than we thought. We will also consider the details any proposal submitted by MJAG. Hearing no disagreement with Judge Harvey's suggestion, Judge Dever said the Committee would follow his advice. Judge Dever wrapped up discussion of this issue with renewed thanks to Judge Harvey for his terrific work on the last minute request for more information.

**Unified Bar Admission**

Judge Dever then recognized Professor Struve to provide an oral report on the proposal for unified bar admission.

Professor Struve explained that she was speaking as one of two reporters (along with Professor Andrew Bradt) to the Standing Committee's Unified Bar Joint Subcommittee that is calling itself the Attorney Admissions Joint Subcommittee. The Joint Subcommittee is chaired by Judge Oetken, and it includes Judge Birotte and Ms. Recker from the Criminal Rules Committee as well as members from the Bankruptcy and Civil Rules Committees. The Joint Subcommittee is in the information-gathering stage. The proposal that touched off the formation of the Joint Subcommittee grew out of the view that the variations in the bar admission requirements among the 94 federal districts were both burdensome and not justified. For example, several districts require an applicant to be admitted to the bar of the state where the court is located. This poses a particular barrier to entry for those who seeking admission to a District Court bar in California, Florida, and Delaware, because those states do not allow experienced practitioners to waive into the state bar. Instead, they must take the state's bar exam. This is very time consuming and expensive for lawyers with a national practice who are seeking to practice in a districts around the country. Although pro hoc vice admission is an option, the availability of pro hoc vice admission varies across the districts, and it can be expensive, with fees as high as $500.00. The original proposal suggested creating a national federal District Court bar, but the Joint Subcommittee lacked enthusiasm for this and the other ambitious suggestions, and the proposal garnered no support when it was reported to the Standing Committee in January.

The Joint Subcommittee is considering some possible pared-back proposals. One might be a national rule that would prohibit district courts from having local rules that require admission to the bar of that state as a condition of admission to the district court. This option was presented to other rules committees at their spring meetings. Some judges on the Civil Rules Committee expressed strong views that this would be a bad idea. Five members of the Standing Committee, who agreed that there is an issue here that should be addressed, offered some additional important questions for us to look into. One member pointed out, for instance, that military spouses who are lawyers need to practice in various districts as they move around the country, and they find these fees and other impediments to be particularly burdensome. So, Professor Struve commented, there is support for continuing, but also a recognition that there are federalism issues at play, as well as issues about the quality of practice before the District Court, about protecting clients and ensuring that the district courts have the tools they need in order to maintain disciplinary standards. The Joint Subcommittee has been discussing how districts handle the question of discipline of those admitted to practice before their court.

Professor Struve said that one current rule – Appellate Rule 46 – is arguably analogous, though practice in the courts of appeals is considerably simpler than practice before the district courts. Rule 46 is much more permissive and open to admission of those from other jurisdictions. The Joint Subcommittee would investigate further the experience in the circuits, with the help of Ms. Dwyer, the Ninth Circuit clerk, and Dr. Reagan from the FJC.

Professor Coquillette explained some of the relevant history. When he was reporter, at the urging of the Department of Justice and Deputy Attorney General Jamie Gorelick, the Rules Committees tried to establish uniform rules of attorney conduct in all the federal courts. The idea was that state rules govern when you're in the state court, but in the federal courts there would be uniform standards at least as to key rules of interest to the Department, which practiced in all the states. He characterized the project as the charge of the Light Brigade in Rulemaking. Every local bar association in the country was against the proposal. He also commented that the requirement of retaining local counsel either by rule or by practice at $500.00 is a real financial barrier that the Committee should consider.

Judge Dever thanked Professors Struve and Coquillette, commenting that this was important history and the Committee was fortunate to have Professor Coquillette's wisdom on the history of that project and also on professional responsibility questions more generally.

Professor Struve added that even as to the more modest proposals, there is a question about whether they fit comfortably within the rulemaking authority under the Rules Enabling Act. Mr. Hawari had assisted with research on 28 U.S.C. § 1654, which says in all courts of the United States, the parties may plead and conduct their own cases personally or by counsel as by the rules as such courts, respectively, are permitted to manage and conduct causes therein. And so we're pondering the question of that statute and its relation to the question of local control over attorney admission.

Mr. Wroblewski asked Professor Struve how the U.S. Supreme Court handles disbarments. They allow anybody who is a member of any bar for three years to be a member of the Supreme Court bar. Does the Supreme Court have rules about disbarring or dealing with attorneys who have discipline problems?

Professor Struve responded that's a great thing to look at. These analogies to the other levels of courts are very useful. Her other comment on the question of rulemaking authority was to note that Appellate Rule 46 had been adopted.

Professor Coquillette recommended a leading case *In re Ruffalo*,[2] which held that if the lawyer involved is also a member of the federal bar, the federal judge is not required to follow the discipline of the state court. In *Ruffalo*, the trial judge did not do so, and his ruling was upheld by the Supreme Court. Federal judges have their own authority and control over bar discipline.

**FJC Research Projects**

Judge Dever turned to the FJC research project report at page 142 of the agenda book and recognized Dr. Tim Reagan.

Dr. Reagan explained the FJC does empirical research for various Judicial Conference committees, including the Rules Committees, and it had decided to resume reporting to the Rules Committees so that all the members will have a good sense of the FJC's skills and the kinds of

[2] In re Ruffalo, 390 U.S. 544 (1968).

products it produces. Dr. Reagan is the liaison to the Standing Committee and Laurel Hooper is the liaison to this Committee from the Research Division. Members of the Research Division attend Rules Committee, subcommittee, and working group meetings so that they can get a good foundation for our research. The FJC's goal is to give the Committee a good information foundation for its policymaking. What it brings to the table is their labor, methodological expertise, and objectivity. They enjoy working for the committees.

Professor Beale asked for more information about the complex criminal litigation website. Dr. Reagan responded that several years ago the FJC started developing curated websites on special topics, sometimes called special topic websites. A website on complex criminal litigation is in development. Ms. Hooper was working on that, and she regretted not being able to attend the meeting. He agreed to provide more information as the website develops.

Professor King asked if there has been any progress on determining whether the results of the remote public access to court proceedings research for CACM can be shared with the Rule 53 Subcommittee. Dr. Reagan said he would look into that.

Hearing no other questions for Dr. Reagan, Judge Dever thanked him for his report and for all the work that he and the FJC staff do on behalf of the committees as part of the rule making process.

**Concluding Remarks**

Judge Dever announced the next meeting would be November 7, 2024, at a place to be determined (which will not be Washington, D.C.). He thanked Mr. Byron, Ms. Bruff, Ms. Cox, Ms. Johnson, and the entire team at the AO for all of their great work in getting the meeting organized and supporting it. He recognized that takes a lot of work.

Since it was the last time they would all be together as a group, he thanked Ms. Recker and Ms. Robinson (noting Judge Garcia had been unable to attend this, his last meeting), and asked if either of them wanted to say anything.

Ms. Recker noted she had been coming to Rules Committee meetings for ten years, first as an observer and then the last six as a member. She said it had been an incredible experience, and she had learned a great deal. She had seen the benefits of the rulemaking process play out in her own practice, especially with respect to Rule 16 as it relates to experts. In her personal experience, the rule change immeasurably improved the quality of evidence presented at trial. As for Rule 62, she hoped never to encounter that rule again, because it would mean a national catastrophe. Work on that rule had been a defining experience for her during the pandemic, and she was very grateful for having had the opportunity to serve.

Ms. Robinson said it had been an incredible privilege to serve on this Committee and watch the process in which these rules that are so important to the criminal practice of law are developed, implemented, and changed. She called it a unique opportunity. She had enjoyed the ability to share her experience with others who use the rules every day, but seldom get involved the Rules Enabling Act process. Ms. Robinson said she had attempted to spread the word of how practitioners can get involved and have input in the rules process. Noting she could not

acknowledge everyone in the room, she said she'd been very impressed with the leadership of Judges Kethledge and Dever, as well as the intellect and the work put in by Professor Beale and Professor King. She emphasized the thought and the time and the effort that goes into making these important rules that affect every defendant who might come before a court. It is, she said, so important. She was thankful for the experience.

After thanking everyone again, Judge Dever adjourned the meeting.

# TAB 8

# TAB 8A

## Legislation That Directly or Effectively Amends the Federal Rules
## 118th Congress
## (January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Closing Bankruptcy Loopholes for Child Predators Act of 2024** | **H.R. 8077**<br>*Sponsor:*<br>Ross (D-NC)<br><br>*Cosponsor:*<br>Tenney (R-NY) | BK 2004, 9018 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr8077/BILLS-118hr8077ih.pdf<br><br>**Summary:**<br>Would directly amend BK 2004 and 9018 to provide additional procedures in cases related to the alleged sexual abuse of a child. | • 04/18/2024: H.R. 8077 introduced in House; referred to Judiciary Committee |
| **Bankruptcy Threshold Adjustment Extension Act** | **S. 4150**<br>*Sponsor:*<br>Durbin (D-IL)<br><br>*Cosponsors:*<br>5 bipartisan cosponsors | BK 1020; BK Forms 101 & 201 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/s4150/BILLS-118s4150is.pdf<br><br>**Summary:**<br>Would extend the CARES Act definition of debtor in Section 1182(1) with its $7.5m subchapter V debt limit for a further two years. | • 04/17/2024: S. 4150 introduced in Senate; referred to Judiciary Committee |
| **Bankruptcy Venue Reform Act**<br><br>**SHOP Act** | **H.R. 1017**<br>*Sponsor:*<br>Lofgren (D-CA)<br><br>*Cosponsors:*<br>7 Democratic & 2 Republican cosponsors<br><br>**S. 4095**<br>*Sponsor:*<br>McConnell (R-KY)<br><br>*Cosponsors:*<br>Cotton (R-AR)<br>Tillis (R-NC) | BK | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf<br>https://www.congress.gov/118/bills/s4095/BILLS-118s4095is.pdf<br><br>**Summary:**<br>Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel. | • 04/10/2024: S. 4095 introduced in Senate; referred to Judiciary Committee<br>• 02/14/2023: H.R. 1017 introduced in House; referred to Judiciary Committee |

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **A bill to provide remote access to court proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland** | **H.R. 6714**<br>*Sponsor:*<br>Van Drew (R-NJ)<br><br>*Cosponsors:*<br>Nadler (D-NY)<br>Smith (R-NJ)<br><br>**S. 3250**<br>*Sponsor:*<br>Cornyn (R-TX)<br><br>*Cosponsor:*<br>Gillibrand (D-NY) | CR 53 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/plaws/publ37/PLAW-118publ37.pdf<br><br>**Summary:**<br>Provides remote access to criminal proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland notwithstanding any provision of the Federal Rules of Criminal Procedure or other law or rule to the contrary. | • 1/26/2024: S. 3250 signed by President; became Public Law No. 118-37<br>• 1/18/2024: House passed S. 3250<br>• 12/11/2023: H.R. 6714 introduced; referred to Judiciary Committee<br>• 12/11/2023: S. 3250 received in the House and held at the desk<br>• 12/06/2023: S. 3250 passed in the Senate with an amendment by unanimous consent<br>• 12/06/2023: Senate Judiciary Committee discharged by Unanimous Consent<br>• 11/08/2023: S. 3250 introduced in Senate; referred to Judiciary Committee |
| **National Guard and Reservists Debt Relief Extension Act of 2023** | **H.R. 3315**<br>*Sponsor:*<br>Cohen (D-TN)<br><br>*Cosponsors:*<br>Cline (R-VA)<br>Dean (D-PA)<br>Burchett (R-TN)<br><br>**S. 3328**<br>*Sponsor:*<br>Durbin (D-IL)<br><br>*Cosponsors:*<br>8 bipartisan cosponsors | Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp. | **Most Recent Bill Text:**<br>https://www.congress.gov/118/plaws/publ24/PLAW-118publ24.pdf<br><br>**Summary:**<br>Extends the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023. | • 12/19/2023: H.R. 3315 signed by President; became Public Law No 118-24.<br>• 12/14/2023: H.R. 3315 passed Senate without amendment by Unanimous Consent<br>• 12/11/2023: H.R. 3315 passed in the House<br>• 11/29/2023: H.R. 3315 reported by the House Judiciary Committee<br>• 11/15/2023: S. 3328 introduced; referred to Judiciary Committee<br>• 05/15/2023: H.R. 3315 introduced in House; referred to Judiciary Committee |

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Supreme Court Ethics, Recusal, and Transparency Act of 2023** | **H.R. 926**<br>*Sponsor:*<br>Johnson (D-GA)<br><br>*Cosponsors:*<br>136 Democratic cosponsors<br><br>**S. 359**<br>*Sponsor:*<br>Whitehouse (D-RI)<br><br>*Cosponsors:*<br>43 Democratic or Democratic-caucusing cosponsors | AP, BK, CV, CR | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf<br>https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf<br><br>**Summary:**<br>Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process—<br>(a) codes of conduct for justices and judges;<br>(b) rules of procedure requiring certain disclosures by parties and amici; and<br>(c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge. | • 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders<br>• 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee<br>• 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee<br>• 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee |
| **Government Surveillance Transparency Act of 2023** | **H.R. 5331**<br>*Sponsor:*<br>Lieu (D-CA)<br><br>*Cosponsor:*<br>Davidson (R-OH) | CR 41 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf<br><br>**Summary:**<br>Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization.<br><br>Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS. | • 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee |
| **Protecting Our Democracy Act** | **H.R. 5048**<br>*Sponsor:*<br>Schiff (D-CA)<br><br>*Cosponsors:*<br>160 Democratic cosponsors | CR 6; CV | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf<br><br>**Summary:**<br>Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena.<br><br>Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President. | • 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees |

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Back the Blue Act of 2023** | **H.R. 355**<br>*Sponsor:*<br>Bacon (R-NE)<br><br>*Cosponsors:*<br>19 Republican cosponsors<br><br>**H.R. 3079**<br>*Sponsor:*<br>Bacon (R-NE)<br><br>*Cosponsors:*<br>21 Republican cosponsors<br><br>**S. 1569**<br>*Sponsor:*<br>Cornyn (R-TX)<br><br>*Cosponsors:*<br>41 Republican cosponsors | § 2254<br>Rule 11 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf<br>https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf<br>https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf<br><br>**Summary:**<br>Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." | • 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee<br>• 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee<br>• 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee |
| **Restoring Artistic Protection (RAP) Act of 2023** | **H.R. 2952**<br>*Sponsor:*<br>Johnson (D-GA)<br><br>*Cosponsors:*<br>33 Democratic cosponsors | EV | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf<br><br>**Summary:**<br>Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant. | • 04/27/2023: Introduced in House; referred to Judiciary Committee |
| **Sunshine in the Courtroom Act of 2023** | **S. 833**<br>*Sponsor:*<br>Grassley (R-IA)<br><br>*Cosponsors:*<br>Klobuchar (D-MN)<br>Durbin (D-IL)<br>Blumenthal (D-CT)<br>Markey (D-MA)<br>Cornyn (R-TX) | CR 53 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf<br><br>**Summary:**<br>Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines. | • 03/16/2023: Introduced in Senate; referred to Judiciary Committee |

## Legislation Requiring Only Technical or Conforming Changes
## 118th Congress
## (January 3, 2023–January 3, 2025)

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Election Day Holiday Act of 2024**<br><br>**Election Day Act**<br><br>**Freedom to Vote Act** | **H.R. 7329**<br>*Sponsor:*<br>Eshoo (D-CA)<br><br>**H.R. 6267**<br>*Sponsor:*<br>Fitzpatrick (R-PA)<br><br>**H.R. 11**<br>*Sponsor:*<br>Sarbanes (D-MD)<br><br>**S.1; S. 2344**<br>*Sponsor:*<br>Klobuchar (D-MN)<br><br>Each bill has several Democratic or Democratic-caucusing cosponsors. | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf<br>https://www.congress.gov/118/bills/hr6267/BILLS-118hr6267ih.pdf<br>https://www.congress.gov/118/bills/hr11/BILLS-118hr11ih.pdf<br>https://www.congress.gov/118/bills/s1/BILLS-118s1is.pdf<br>https://www.congress.gov/118/bills/s2344/BILLS-118s2344is.pdf<br><br>**Summary:**<br>Would make Election Day a federal holiday. | • 02/13/2024: H.R. 7329 introduced in House<br>• 11/07/2023: H.R. 6267 introduced in House<br>• 07/25/2023: S. 1 introduced in Senate<br>• 07/18/2023: S. 2344 introduced in Senate<br>• 07/18/2023: H.R. 11 introduced in House<br>• Among others, house bills referred to Oversight & Accountability Committee; senate bills referred to Committee on Rules & Administration |
| **Indigenous Peoples' Day Act** | **H.R. 5822**<br>*Sponsor:*<br>Torres (D-AL)<br><br>*Cosponsors:*<br>86 Democratic cosponsors<br><br>**S. 2970**<br>*Sponsor:*<br>Heinrich (D-NM)<br><br>*Cosponsors:*<br>13 Democratic or Democratic-caucusing cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf<br>https://www.congress.gov/118/bills/s2970/BILLS-118s2970is.pdf<br><br>**Summary:**<br>Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday. | • 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee<br>• 09/28/2023: S. 2970 introduced in Senate; referred to Judiciary Committee |
| **Patriot Day Act** | **H.R. 5366**<br>*Sponsor:*<br>Fitzpatrick (R-PA)<br><br>*Cosponsors:*<br>Gottheimer (D-NJ)<br>Malliotakis (R-NY) | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5366/BILLS-118hr5366ih.pdf<br><br>**Summary:**<br>Would make Patriot Day a federal holiday. | • 09/08/2023: Introduced in House; referred to Oversight & Accountability Committee |

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Diwali Day Act** | **H.R. 3336**<br>*Sponsor:*<br>Meng (D-NY)<br><br>*Cosponsors:*<br>15 Democratic & 1 Republican cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf<br><br>**Summary:**<br>Would make Diwali (a/k/a Deepavali) a federal holiday. | • 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **September 11 Day of Remembrance Act** | **H.R. 2382**<br>*Sponsor:*<br>Lawler (R-NY)<br><br>*Cosponsors:*<br>4 Democratic & 2 Republican cosponsors<br><br>**S. 1472**<br>*Sponsor:*<br>Blackburn (R-TN)<br><br>*Cosponsor:*<br>Wicker (R-MS) | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf<br>https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf<br><br>**Summary:**<br>Would make September 11 Day of Remembrance a federal holiday. | • 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee<br>• 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee |
| **Workers' Memorial Day** | **H.R. 3022**<br>*Sponsor:*<br>Norcross (D-NJ)<br><br>*Cosponsors:*<br>11 Democratic cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf<br><br>**Summary:**<br>Would make Workers' Memorial Day a federal holiday. | • 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **St. Patrick's Day Act** | **H.R. 1625**<br>*Sponsor:*<br>Fitzpatrick (R-PA)<br><br>*Cosponsor:*<br>Lawler (R-NY) | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf<br><br>**Summary:**<br>Would make St. Patrick's Day a federal holiday. | • 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **Lunar New Year Day Act** | **H.R. 430**<br>*Sponsor:*<br>Meng (D-NY)<br><br>*Cosponsors:*<br>58 Democratic cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf<br><br>**Summary:**<br>Would make Lunar New Year Day a federal holiday. | • 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **Rosa Parks Day Act** | **H.R. 308**<br>*Sponsor:*<br>Sewell (D-AL)<br><br>*Cosponsors:*<br>115 Democratic cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf<br><br>**Summary:**<br>Would make Rosa Parks Day a federal holiday. | • 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee |

# TAB 8B

**Judiciary Strategic Planning**

**Issue**

The Committee is asked to provide input on the proposed process for the 2025 review and update of the *Strategic Plan for the Federal Judiciary*.

**Background**

Strategic planning is among the oversight and policy advisory functions of Judicial Conference committees. The Executive Committee facilitates and coordinates planning efforts and designates a planning coordinator. Judge L. Scott Coogler, a member of the Executive Committee, currently serves as the judiciary planning coordinator.

The *Strategic Plan for the Federal Judiciary*, first approved by the Judicial Conference in September 2010 and updated every five years, identifies strategies and goals to address judiciary trends, issues, challenges, and opportunities (JCUS-SEP 2010, pp. 5-6; JCUS-SEP 2015, pp. 5-6; JCUS-SEP 2020, pp. 13-14).

The Judicial Conference approach to strategic planning calls for Judicial Conference committees to integrate the *Strategic Plan* into their planning and policy development activities (JCUS-SEP 2010, pp. 5-6). The primary means for integration has been the alignment of committee strategic initiatives (such as projects, studies, or other committee efforts) with the *Strategic Plan*'s strategies and goals.

**Discussion**

*Update to the Strategic Plan*

In addition to integrating the *Strategic Plan* into committee planning and policy development activities, the Judicial Conference approach to strategic planning calls for a review of the *Strategic Plan* every five years (JCUS-SEP 2010, p. 6). After incorporating committee feedback as appropriate, a proposed process for the *Strategic Plan* 2025 review and update will be presented to the Executive Committee.

A proposed process for the 2025 review and update addresses the anticipated scope and audience of the *Strategic Plan*, the outreach and research efforts to be undertaken in support of its development, and the participants in the planning process. It also calls for the formation of an ad hoc advisory group of judges and other judiciary representatives to develop an updated *Strategic Plan* for consideration by the Judicial Conference.

Judge Coogler has requested that each committee provide any ideas and suggestions regarding the proposed process to updating the *Strategic Plan* to him no later than June 28, 2024.

**Recommendation:** That the Committee discuss and provide to the judiciary planning coordinator any ideas or suggestions regarding the proposed process for the 2025 *Strategic Plan* review and update.

# TAB 8C

# 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

**PREPARED FOR THE**
**U.S. SENATE AND HOUSE OF REPRESENTATIVES**

**JUDICIAL CONFERENCE OF THE UNITED STATES**

**June 2024**

# 2024 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, 116 Stat. 2914, § 205(c)(3)(A)(i). The privacy rules – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007.

Subject to specified exemptions, the privacy rules require that filers redact from documents filed with the court (1) all but the last four digits of an individual's social-security number or taxpayer-identification number (these numbers are collectively referred to here as the SSN); (2) the month and day of an individual's birth; (3) all but the initial letters of a known minor's name; (4) all but the last four digits of a financial-account number; and (5) in criminal cases, all but the city and state of an individual's home address. In recognition of the pervasive presence of sensitive personal information in filings in actions for benefits under the Social Security Act, and in proceedings relating to an order of removal, to relief from removal, or to immigration benefits or detention, the privacy rules exempt filings in those matters from the redaction requirement but also limit remote electronic access to those filings.

Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." This report covers the period from June 2022 to June 2024.

The report proceeds in four parts. Part I discusses potential rule amendments (i) under consideration by the rules committees at the time of the 2022 Report, or (ii) added to the rules committee dockets since the 2022 Report was completed. Part II discusses ongoing implementation efforts by the Administrative Office of the United States Courts (the AO), the Federal Judicial Center (the FJC), and others to protect privacy in court filings and opinions. Part III discusses research undertaken by the FJC to assess adherence to the privacy rules. Part IV concludes with a summary and an overview of anticipated next steps.

## I. Potential Privacy-Related Rules Amendments Under Consideration by the Rules Committees Since June 2022.

This section addresses topics under consideration by the rules committees at the time of the 2022 Report or added to the committees' agendas since that report was completed. Part I.A. discusses potential amendments to Criminal Rule 49.1. Part I.B. discusses ongoing deliberations concerning applications to proceed in forma pauperis, or without prepayment of fees, in appeals. Part I.C. notes proposals to adopt a Civil Rule addressing the sealing of court filings. Part I.D. discusses proposals to require the full redaction of SSNs in court filings and to restrict the dissemination of an individual's full SSN to creditors in bankruptcy cases, and Part I.E. discusses two new suggestions proposing changes to the civil rules to address privacy and cybersecurity risks in civil litigation.

### A. Potential Amendments to Criminal Rule 49.1

At the time of the 2022 Report, the Criminal Rules Committee was evaluating whether any change to Criminal Rule 49.1 is needed to address a reference – in the 2007 committee note to that Rule – to the March 2004 "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" from the Committee on Court Administration and Case Management (CACM). The Committee's consideration of a change was prompted by a public suggestion questioning whether the guidance, as outlined in the note, is consistent with caselaw concerning rights of public access to information contained in criminal defendants' CJA applications. Since the 2022 Report was issued, the Committee concluded that an amendment to Criminal Rule 49.1 would not change the note's reference to the CACM Committee's March 2004 guidance and that an amendment is otherwise not warranted.

In March 2024, the U.S. Department of Justice submitted a suggestion to the Criminal Rules Committee proposing an amendment to Rule 49.1 to require that all publicly available court filings refer to minors by pseudonyms rather than by their initials. The Committee's work on this matter is at an early stage. A new Rule 49.1 Subcommittee has been formed to study this proposal. If the Criminal Rules Committee concludes that an amendment to Criminal Rule 49.1 is warranted, the other advisory committees would then consider whether parallel amendments to the other privacy rules would be appropriate.

### B. Potential Amendments Concerning Applications to Proceed In Forma Pauperis (IFP)

The Appellate Rules Committee has been considering suggestions to revise Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). The basic suggestion is that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status. At its April 2024 meeting, the Appellate Rules Committee recommended for publication and public comment proposed amendments to Form 4 that would reduce the amount of personal financial detail the form requires. If publication goes forward as recommended, and the proposed amendments receive subsequent approvals in the ordinary course, a revised version of the form could go into effect as early as December 1, 2026.

### C. Proposals to Adopt a Rule on Sealing of Court Filings

The Civil Rules Committee has before it proposals to adopt a rule setting standards and procedures governing the sealing of court filings. The Committee has referred these proposals to its Discovery Subcommittee for initial evaluation. The subcommittee has recently started an information-gathering effort to identify logistical issues that might arise if some of the proposed measures in the suggestions for sealing standards were to be adopted.

## D. Proposals for Further Restrictions on the Use of SSNs

Since the 2022 Report, the rules committees have received a suggestion to require full redaction of SSNs in court filings, and the Bankruptcy Rules Committee has received suggestions to eliminate the debtor's partially redacted SSN and address information on some of the notices filed on the court docket and to stop sending the debtor's full SSN to creditors in a bankruptcy case.

### *D.1 Suggestion from Senator Ron Wyden*

As noted in the 2022 Report, in 2015-2016, the Appellate, Bankruptcy, Civil, and Criminal, Rules Committees considered suggested amendments to the privacy rules that would require redaction of an individual's entire SSN in court filings. In evaluating the proposal, participants noted that the rules committees had considered full redaction of such numbers when formulating the privacy rules, but had concluded that the last four digits were needed in bankruptcy proceedings to confirm debtor identity. Given the E-Government Act's requirement to promulgate rules that are uniform "to the extent practicable" in protecting privacy and security issues,[1] the Appellate, Civil, and Criminal Rules Committees followed the lead of the Bankruptcy Rules Committee in requiring redaction of all but the last four digits of an individual's SSN. Based on continued agreement with that analysis, the advisory committees decided not to propose amendments to the privacy rules at that time.

In an August 4, 2022, letter concerning a draft of the 2022 Report, Senator Ron Wyden suggested that the rules committees reconsider a proposal to redact the entire SSN from court filings. The Bankruptcy Rules Committee took the lead in considering Senator Wyden's suggestion at its spring 2023 meeting.

By way of background, in the 1990s, the judiciary considered privacy concerns related to the increasing ease of access to electronic public records through the internet. The CACM Committee – with input from other Judicial Conference Committees, particularly the Bankruptcy Rules Committee, as well as the public – recommended a privacy policy governing the electronic availability of case file information, which reflected a careful balance between public access and individual privacy. The Judicial Conference adopted this policy in 2001 (JCUS-SEP/OCT 2001, pp. 48-50). Among other things, the policy required the modification or partial redaction of SSNs in civil case files and directed the Bankruptcy Rules Committee to amend the rules as necessary to allow a court to collect a debtor's full SSN but display only the last four digits. Under this policy, several amendments to the bankruptcy rules and forms were implemented in 2003 to limit disclosure of a party's SSN or other personally identifiable information. The bankruptcy petition forms, and Official Form 416A, Caption (Full), were modified to include only the last four digits of a debtor's SSN in order "to afford greater privacy to the individual debtor, whose bankruptcy case records may be available on the Internet." *See* 2003 committee notes to Official Bankruptcy Forms 101, 105, and 416A. Rule 1005 was similarly amended to require only the last four digits of the debtor's SSN in the caption of a petition. At the same time, Rule 2002(a)(1) was amended

[1] E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii).

to require that the debtor's full SSN be included in the official form providing notice of the bankruptcy case that is sent to creditors under 11 U.S.C. § 341 or § 1104(b), but that the filed version of the form include only the last four digits of the SSN. As explained in the committee note (2003) to Rule 2002:

> This will enable creditors and other parties in interest who are in possession of the debtor's social security number to verify the debtor's identity and proceed accordingly. The filed Official Form 9, however, will not include the debtor's full social security number. This will prevent the full social security number from becoming a part of the court's file in the case, and the number will not be included in the court's electronic records. Creditors who already have the debtor's social security number will be able to verify the existence of a case under the debtor's social security number, but any person searching the electronic case files without the number will not be able to acquire the debtor's social security number.

All versions of Official Form 9 (now Official Forms 309A-309I) were amended accordingly to include only the last four digits of the debtor's SSN in the official copy included in the case file.

The Bankruptcy Rules Committee's spring 2023 minutes reflect that in considering Senator Wyden's suggestion, members noted that two statutory provisions preclude a rule change that would require the full redaction of SSNs in all filings. Section 110(c) of the Bankruptcy Code requires bankruptcy petition preparers to include their full SSN on any bankruptcy filing they have prepared for filing in the case. And § 342(c) requires that the last four digits of the debtor's SSN be included on notices "required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court." Outside those statutory constraints, however, the Committee is considering related suggestions that would remove the debtor's partially redacted SSN on some notices sent under Rule 2002, and it is evaluating the need for the partially redacted SSN on some bankruptcy forms where it is currently required. Those proposals are discussed in Part D.2 below.

A working group composed of the rules committees' reporters is also in the beginning stages of considering whether, despite the E-Government Act preference for uniform privacy rules, the rules committees should reconsider fully redacting SSNs from filings in civil and criminal cases irrespective of the need for full or partially redacted SSNs in some bankruptcy filings. (The appellate privacy rule incorporates the privacy rule of the type of case – bankruptcy, civil, or criminal – that is being appealed.) At the spring 2024 meetings of the advisory committees, the working group provided a sketch for a possible amendment to require the full redaction of SSNs in court filings but recommended that such an amendment to the Civil and Criminal Rules should not be taken up in isolation but should be part of a more comprehensive review of the privacy rules. The working group will continue to work with the advisory committees to identify areas of common concern and to assist in coordination of proposed changes.

### *D.2 Suggestions That Would Remove Redacted SSNs From Some Bankruptcy Notices and Forms.*

Bankruptcy Rule 1005 requires that the caption of the petition contain the name of the court, title of the case, and docket number. It further requires that the title of the case include the debtor's name, employer identification number, last four digits of the debtor's SSN, and all other names used by the debtor within eight years before filing the petition. Bankruptcy Rule 2002(n) requires that the caption of every notice given under Rule 2002 comply with Rule 1005.

In 2023, the Bankruptcy Rules Committee received a suggestion from a group of bankruptcy clerks from the Eighth Circuit suggesting that Rule 2002(n) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The AO's Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the clerks' suggestion.

The bankruptcy clerks state that the caption requirements "are substantial and can add a significant amount of length, and therefore cost, to a Rule 2002 notice." They also note that, despite the requirements of Rule 2002(n), there is a long-standing practice of bankruptcy clerks in their circuit to provide the Rule 1005 caption requirements only on the Notice of Bankruptcy Case. Thereafter, the clerk's office uses a shorter caption that "generally follows Official Form 416B" which requires only the debtor's name, and the bankruptcy case and chapter numbers. If the suggestion is adopted, most notices under Rule 2002 would no longer include a field for the debtor's partially redacted SSN. A subcommittee of the Bankruptcy Rules Committee, with the help of the FJC, has surveyed bankruptcy clerks about the desirability of including all the information required by Rule 1005 in routine notices under Rule 2002.

In addition, in connection with Senator Wyden's suggestion, the subcommittee, with the help of the FJC, has begun to survey debtor attorneys, chapter 7, 12, and 13 trustees, creditor attorneys, various tax authorities and representatives of the National Association of Attorneys General about whether bankruptcy forms that currently require inclusion of the debtor's redacted SSN must or should continue to do so.

### *D.3 Suggestion 23-BK-A to Restrict Dissemination of the Debtor's Full SSN*

A staff attorney for a chapter 13 trustee, suggested that Bankruptcy Rule 2002(a)(1) be amended to stop sending the debtor's full SSN to creditors. Similar suggestions were received in 2011 and 2015. In considering the earlier suggestions, although Committee members recognized the importance of protecting debtors from improper disclosure of their full SSN, they also recognized that creditors such as the IRS rely on the full SSN to ensure that they are seeking payment from the correct debtor or to determine whether a debtor from whom they are seeking payment has filed for bankruptcy protection. A subcommittee reviewing the suggestion noted that some creditors continue to use the full SSN to ensure accurate debtor identification. The subcommittee therefore recommended no changes. The Bankruptcy Rules Committee discussed the recommendation at its spring 2023 meeting and decided to take no action on the suggestion.

### E. Proposals to Amend the Civil Rules to Further Protect Privacy Rights and Prevent Cybersecurity Problems

In September 2023, the Lawyers for Civil Justice (LCJ) submitted a suggestion for the comprehensive examination of the Civil Rules and to implement a framework for the court and parties to protect privacy rights and prevent cybersecurity problems at various stages of civil litigation, including discovery. LCJ identified a number of Civil Rules for potential amendments to better protect parties and non-parties from disclosure of personal and confidential information. In November 2023, a private attorney wrote to the rules committees in support of LCJ's proposal. His submission encouraged the Civil Rules Committee to address comprehensively the privacy and cybersecurity risks in civil litigation. The Committee is in the early stages of considering these suggestions.

## II. Ongoing Implementation Efforts to Protect Privacy in Court Filings and Opinions

As mentioned above, the privacy rules require that the filer redact certain personal identifiers from court filings. Additionally, due to the pervasive presence of sensitive personal information in Social Security and immigration cases, the privacy rules exempt filings in those matters from the redaction requirement but also limit remote electronic access to those filings. The opinions in these cases, however, are widely available to the public via PACER and other legal research databases that are easily searchable. The CACM Committee and the AO have recently engaged in a number of outreach and educational efforts to protect personal information.

In May 2023, the CACM Committee sent a memorandum to the courts sharing suggested practices to protect personal information in court filings and opinions. With regard to court filings, the memorandum urged the courts to continue or to consider initiating outreach efforts to litigants and members of the bar to ensure they are aware of redaction obligations and the need to minimize the appearance of private identifiers in certain court filings.[2]

The May 2023 memorandum also reminded the courts about a possible concern regarding sensitive personal information in Social Security and immigration opinions and a suggested practice of using only the first name and last initial of any non-government parties in the opinions.[3] Since this suggested practice was first shared with the courts in 2018, many courts have redacted party names in their opinions. In addition, some districts have adopted a local rule or internal

[2] Specifically, similar to a memorandum sent to courts by the CACM Committee in November 2011, the memorandum emphasized that courts should ensure they are aware of (1) filers' redaction obligations under the privacy rules; (2) measures to minimize the appearance of private identifiers in court filings; (3) the obligation to secure a court order before redacting information beyond that specifically identified in the privacy rules; and (4) the obligation to redact private identifiers from transcripts of proceedings.

[3] This suggested practice was developed following extensive consultation with stakeholders inside and outside the judiciary as a way to balance the need to provide public access to Social Security and immigration opinions while protecting personal information. The CACM Committee first shared this suggested practice in a May 2018 memorandum to the courts.

operating procedure addressing the practice. Finally, the May 2023 memorandum reminded courts about a software change implemented by the AO in 2020 that masks information such as case and party names in extracts of Social Security and immigration opinions provided to the Government Printing Office and the GovInfo database for publication.

Beyond sharing suggested practices directly with the courts, the CACM Committee recently requested that the AO and FJC explore other ways to increase awareness about ways to protect privacy in court filings and opinions. The AO recently updated several sections of the judiciary's internal and public websites to include updated information regarding privacy rule requirements and suggested practices. Furthermore, the FJC is exploring ways to increase references to these suggested practices in its educational materials and trainings for new judges, court unit executives, and law clerks, and it will explore developing a model webpage that courts can include on their local websites to increase awareness among the bar and the public.

Additionally, the current case management system continues to notify filers via a prominent banner titled "Redaction Agreement" that appears immediately after a filer logs in to remind them of the redaction requirements in the Appellate, Bankruptcy, Civil, and Criminal Rules, and that the requirements apply to all documents, including attachments. To proceed, the filer is required to check a box acknowledging that they have read the notice and understand their obligation to comply with the redaction requirements. Thereafter, before a filer electronically submits a document to the court, the system presents a reminder asking "have you redacted?"

Finally, the CACM Committee has urged the AO to implement features in the modernized case management system to automate and facilitate a litigant's review of court filings for compliance with the redaction requirements in the Appellate, Bankruptcy, Civil, and Criminal Rules. The CACM Committee will continue to explore other possible ways to protect private information in court filings and opinions.

## III. Federal Judicial Center Research on Unredacted Personal Information

As noted in prior reports on the adequacy of the privacy rules, the FJC has undertaken several studies of compliance with the redaction requirements. The FJC in 2010 conducted a survey of federal court filings to ascertain how often unredacted SSNs appeared in those filings.[4] In 2015, the FJC reported the results of its follow-up study on the same topic.[5] The follow-up study searched 3,900,841 documents filed during a one-month period in late 2013 and found that 5,437 (or less than 0.14 percent of the documents) included one or more unredacted SSNs. This is a greater percentage than was found in the 2010 study; but the 2015 study explained that the difference was due to an improvement in search methodology. In the 2015 study, the researchers

[4] See Memorandum from George Cort & Joe Cecil, Research Division, FJC, to the Privacy Subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure, Social Security Numbers in Federal Court Documents (April 5, 2010).

[5] See Joe S. Cecil et al., Unredacted Social Security Numbers in Federal Court PACER Documents (FJC 2015).

reprocessed the documents using optical character recognition (OCR), which enabled them to identify SSNs in documents that were originally filed in non-text-searchable format. The researchers noted that, because OCR had not been used for the 2010 study, that study had failed to reflect the full incidence of unredacted SSNs. They observed that a comparison of the two studies' findings, taking into account the difference in methodologies, "suggests that the federal courts have made progress in recent years in reducing the incidence of unredacted Social Security numbers in federal court documents, especially in bankruptcy court documents."[6]

In January 2023, the CACM Committee asked the FJC to update its 2015 study of court filings for adherence to the privacy rules. The FJC's updated study, completed in May 2024 and attached as Exhibit 1, used an expanded sampling procedure, more advanced methodology, and context-specific exemption coding, which limit the ability to make direct comparisons to the 2010 and 2015 studies.

For the updated study, the FJC downloaded and analyzed all documents (4,674,242) filed in the district courts (2,017,908), bankruptcy courts (2,518,202) (including proof of claim filings), and appeals courts (138,132) on 37 randomly selected days in calendar year 2022. The FJC searched these documents for possible instances of unredacted SSNs, and identified 22,391 unredacted SSNs belonging to approximately 8,300 individuals. Of the nearly 4.7 million documents analyzed, just 4,525 (0.10%) contained one or more unredacted SSNs.[7] Moreover, within the set of unredacted SSNs, approximately 22% appear to be exempt from the redaction requirement and an additional 6% belong to pro se parties who waived the privacy protections by filing their own SSN in an unsealed document. The FJC analysis also indicates that a large percentage of the unredacted SSNs occurred in a relatively small number of documents. For example, 45% of the unredacted SSNs (10,042) were found in 17 documents, with just two documents in the same case accounting for nearly 6,200 unredacted SSNs.[8]

In future studies, the FJC intends to report on instances of unredacted private information beyond social-security numbers in court filings. For instance, the FJC will identify documents with unredacted birth dates, minor names, financial account numbers, and (in criminal cases) details of an individual's home address. The FJC also intends to analyze Social Security and immigration opinions for the presence of full names of non-government parties. The FJC will collaborate with the AO to assist with future reports to Congress on the adequacy of the privacy rules.

[6] *Id*. at 11.

[7] The breakdown of unredacted SSNs by court was as follows: district court: 0.12%, bankruptcy court: 0.07%, court of appeals: 0.17%.

[8] In this example, a civil case, a party filed a single document containing 3,099 SSNs twice, using a "redaction" method that is easily circumvented.

## IV. Conclusion

In the two years since the Judicial Conference's 2022 Report to Congress on the adequacy of the privacy rules, the rules committees have considered several proposed rule changes that include privacy-related issues. As described in Part I, the Bankruptcy, Civil, and Criminal Rules Committees are reconsidering the need for the last four digits of SSNs in court filings, and they are also considering whether the privacy rules need to remain uniform with respect to the level of redactions applied to SSNs. One suggestion noted in the 2022 Report, proposed amendments to Appellate Form 4, is now on track to be published for comment in 2024, while several more recent privacy-related suggestions are in the beginning stages of consideration. Part II describes ongoing implementation efforts to protect privacy in court filings and opinions. Among other things, the CACM Committee sent a memorandum to the courts in May 2023 sharing suggested practices to protect privacy and encouraging continued outreach and educational efforts. The memorandum also reminded courts about the possible inclusion of sensitive information in Social Security and immigration opinions and reminded courts of a software fix implemented in 2020 that can mask certain information in extracts of Social Security and immigration opinions. Part II also reports that the CACM Committee has asked the AO and FJC to explore other ways to increase awareness of the need to protect privacy in court filings and opinions, leading to updates in the judiciary's internal and external websites, and efforts by the FJC to address privacy issues in educational materials for new judges. Part III, in turn, discusses the FJC's 2024 update of its studies in 2010 and 2015 concerning the prevalence of unredacted SSNs in court filings. With respect to SSNs, the FJC's 2024 study reveals that non-compliance with the existing privacy rules remains very low. Upcoming FJC studies addressing other aspects of the privacy rules will be considered by the rules committees and the CACM Committee in the coming years and will be addressed in future privacy reports.

# Unredacted Social Security Numbers in Federal Court PACER Documents

*Prepared for the*

*Judicial Conference of the United States Committee on Court Administration and Case Management*

Kristin A. Garri, Roy Germano, Jason A. Cantone, Jana Laks

Federal Judicial Center

April 2024

**Acknowledgements**. The authors would like to thank George Cort for his assistance in identifying and downloading the court documents, Alexis Allegra for her assistance in processing the documents, and Marvin Astrada, Bersaveh Belay, Vashty Gobinpersad, Abigail Herzfeld, Marie Leary, Angelia Levy, Rebecca Petroff, Cheena Pongase, and Chelsea Queen for their assistance in coding.

## Contents

## Summary

In 2024, at the request of the Judicial Conference Committee on Court Administration and Case Management (CACM), the Federal Judicial Center (Center) completed a study of unredacted social security numbers and individual taxpayer identification numbers, collectively referred to here as "SSNs," in federal court documents available in the Public Access to Court Electronic Records (PACER) service. This study was based on all publicly available PACER documents filed on 37 randomly selected days in 2022. It included a total of 4,681,055 documents filed in the federal district, bankruptcy, and appeals courts and in bankruptcy proof of claim registers.

Across all court types, 22,391 unredacted SSNs belonging to approximately 8,300 individuals were identified in these documents. Of the nearly 4.7 million documents analyzed, 4,525 (0.10%) contained at least one unredacted SSN (district court: 0.12%, bankruptcy court: 0.07%, court of appeals: 0.17%). These documents were filed in 3,901 docket entries[1] from 3,521 cases. A large number of unredacted SSNs were found in a relatively small number of documents: 45% in 17 documents.

Seventy-two percent of the unredacted SSNs identified in this study appear to be noncompliant with the privacy rules, while 22% appear to be exempt from the redaction requirement and 6% belong to pro se parties who waived the privacy protections by filing their own SSN in an unsealed document.

## Background

In response to the E-Government Act of 2002,[2] the Judicial Conference of the United States (Judicial Conference) adopted rules effective on December 1, 2007, intended to protect private information in case filings, including those that are publicly available via electronic public access. The "privacy rules"—Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1—require redaction of specified information in filings made with the courts (see Appendix A). These rules are based on previously developed judiciary policy that also addresses other privacy concerns.[3] CACM, in conjunction with the Judicial Conference Committee on the Rules of Practice and Procedure (Standing Committee), regularly considers privacy concerns, including possible amendments to the federal rules and Judicial Conference privacy policies.

In 2009, the Executive Committee of the Judicial Conference directed the Standing Committee to report on the operation of the privacy rules. The Standing Committee's Privacy Subcommittee considered the findings of a 2010 empirical study by the Center on

[1] Some PACER docket entries contain multiple filings, with each being an individual downloadable PDF.
[2] Pub. L. 107-347, § 205(c) (3) (requiring the federal judiciary to formulate rules "to protect privacy and security concerns relating to electronic filing of documents").
[3] Guide to Judiciary Policy, vol. 10, ch. 3. § 310.20 (b): https://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-10-public-access-and-records/ch-3-privacy

unredacted social security numbers, [4] conducted a miniconference at the Fordham School of Law, and reviewed surveys of judges, clerks of court, and assistant U.S. attorneys regarding their experiences with the operation of the privacy rules. While the Privacy Subcommittee found no general issues regarding the operation of the privacy rules, it recommended that "[t]o ensure continued effective implementation, every other year the [Center] should undertake a random review of court filings for unredacted personal identifier information."[5] In 2015, the Center again undertook an empirical review of court filings for unredacted SSNs at the request of the Privacy Subcommittee.[6]

At its December 2022 meeting, CACM discussed concerns recently raised by Congress and reported in the media that some publicly available court filings, including published opinions in Social Security and immigration cases, include unredacted personal information in violation of the privacy rules. Following the meeting, CACM requested that the Center update the 2015 Center study.

CACM specifically requested that the study estimate (a) the rate of compliance with privacy rules regarding unredacted social security numbers in court filings and (b) the prevalence of personally identifiable information (PII) in Social Security and immigration opinions. CACM indicated an interest in identifying the prevalence of additional types of unredacted PII covered under the privacy rules, including all but the last four digits of a taxpayer identification number; the month and day of an individual's birth; all but the initial letters of a known minor's name; all but the last four digits of a financial account number; and, in criminal cases, all but the city and state of an individual's home address. Finally, CACM requested an analysis of the types of court filings and court filers most often associated with unredacted PII. The Center is taking an iterative approach to this research.

CACM requested an interim report from the Center to inform the Judicial Conference's next congressionally required report on the adequacy of the privacy rules being prepared by the Standing Committee staff, in collaboration with CACM staff. As requested, this interim report includes an analysis of unredacted SSNs in federal appellate, district, and bankruptcy courts (including proof of claims registers).[7]

---

[4] *Social Security Numbers in Federal Court Documents* (2010) is available here: https://www.fjc.gov/content/social-security-numbers-federal-court-documents

[5] Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (March 2011): https://www.uscourts.gov/sites/default/files/fr_import/ST03-2011.pdf

[6] *Unredacted Social Security Numbers in Federal Court PACER Documents* (2015) is available here: https://www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents

[7] A proof of claim is a written statement or form (Bankruptcy Form 410) used by the creditor to indicate the amount of the debt owed by the debtor to the creditor on the date of the bankruptcy filing. Proof of claim filings may contain attachments that include documents to show that the debt exists, that a lien secures the debt, or both, as well as any documents that show perfection of any security interest or any assignments or transfers of the debt. The proof of claim register is where claims are filed on the docket of a bankruptcy case. https://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0

## Prior Federal Judicial Center Research

In 2010 and 2015, the Center examined whether unredacted social security numbers appeared in federal district and bankruptcy court records available through PACER. The 2010 study used Perl, a programming language, to search for a social security number pattern (i.e., 123-45-6789) in almost 10 million PACER documents filed across all district courts and 98% of bankruptcy courts in November and December 2009. Researchers visually reviewed more than 3,200 documents flagged by Perl and confirmed that 2,899 included one or more unredacted social security numbers. Seventeen percent of those documents appeared to qualify for an exemption from the redaction requirement.

The 2010 study was limited in several ways. First, static-image PDFs were not converted into machine-readable text, and, as a result, an unknown number of documents were not searched. Second, researchers examined only the specific document containing the SSN and not the role of the document in the full context of the case to determine whether an exemption applied. Finally, researchers were unable to identify whether unredacted SSNs belong to and were filed by pro se parties and thus qualified for a waiver.

For the 2015 study, researchers downloaded almost 4 million individual PACER documents filed in November 2013. Each document then underwent optical character recognition (OCR) review to convert static PDF documents into machine-readable text. Some documents (including all documents from one bankruptcy court) were excluded from further analysis because they could not be converted. Researchers used Adobe Acrobat to detect social security number patterns within the included documents, as well as text strings that included "SSN" or "social security." Researchers then visually examined about 17,000 documents to determine if the output identified by Adobe Acrobat searches were indeed social security numbers. This review identified 16,811 instances of unredacted SSNs filed by 5,031 individuals in 5,437 documents.

The 2015 study was also limited in its analysis of exemptions and waivers, as researchers again examined only the specific document containing the SSN and not the role of the document in the full context of the case or the party that filed it.

Compared to the 2010 study, the 2015 study found a higher percentage of documents with unredacted social security numbers (0.14% compared to 0.03% in 2010). However, the report concluded that the use of more powerful search techniques, rather than a change in filing practices, accounted for the apparent increase.

## Present Study

This study is based on all publicly available PACER documents filed on 37 randomly selected days in 2022.[8] Center researchers downloaded a total of 4,681,055 publicly

[8] Because there is not a comprehensive list of all documents filed in all courts, researchers could not randomly select documents directly. Instead, a subset of dates in 2022 were randomly selected, and all documents filed on those dates were analyzed. See Appendix B, Methodology.

available PACER documents filed on these days in the federal district, bankruptcy, and appeals courts and in bankruptcy proof of claim registers. They then used Python, a programming language, to render the downloaded PDF files readable and searchable. Of the PDFs that were downloaded, 4,674,242 (99.9%) were successfully converted into searchable text files. Researchers then used Python to identify and extract nine-digit numbers from the text files. This approach yielded about 4.4 million potential SSNs.[9]

A team of researchers then examined more than 120,000 of the nine-digit numbers in context to identify common ways in which SSNs appeared in court documents. The context patterns identified by the research team were then used to write an algorithm in R, another programming language, designed to predict which of the 4.4 million numbers were SSNs. The algorithm labeled over 50,000 of these numbers as likely or possible SSNs, which a team of researchers then manually reviewed to determine which were unredacted.

In the final step, the research team manually inspected the context of the unredacted SSNs to determine whether they were exempt from the redaction requirement at the time they were downloaded. If an SSN was identified as exempt, researchers noted which of the following reasons applied:

[9] In addition to SSNs, two specific types of taxpayer identification numbers are of particular interest in the context of the study, as they are covered by the privacy rules: individual taxpayer identification numbers (ITIN) and adoption taxpayer identification numbers (ATIN). An ITIN is a tax processing number issued by the Internal Revenue Service (IRS) to individuals who are required to have a U.S. taxpayer identification number but who do not have and are not eligible to obtain an SSN. An ATIN is a number issued by the IRS as a temporary taxpayer identification number for the child in a domestic adoption where the adopting taxpayers do not have or are unable to obtain the child's SSN. Very few ITINs and no ATINs were found by the Center.

**Figure 1. Exemptions From the Redaction Requirement**

- Record of a state court proceeding
- Pro se party filing in a habeas corpus proceeding under 28 U.S.C. §§ 2241, 2254, or 2255
- Criminal charging document/affidavit
- Criminal arrest/search warrant
- Criminal investigation or other document prepared prior to filing of criminal charge
- Non-attorney bankruptcy petition preparer (e.g., Bankruptcy Form 119)
- Filing in appeal of Railroad Retirement Board benefits decision
- Filing in civil social security case (i.e., action for benefits under the Social Security Act)
- Record of administrative agency proceeding (except in bankruptcy cases if record filed with proof of claim)
- Immigration case (i.e., action relating to immigration removal, relief from removal, benefits, or detention)
- Record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed
- Documents filed under seal

An SSN is exempt from the redaction requirement if it appears in the record of an administrative agency proceeding, a state court proceeding, or a court or tribunal, if that record was not subject to the redaction requirement when originally filed. Additionally, an SSN is exempt if it is filed under seal. In criminal cases, SSNs are also exempt from the redaction requirement if filed as part of a charging document and an affidavit filed in support of any charging document; in an arrest or search warrant; or in a court filing that is related to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case. In civil cases, SSNs are also exempt from the redaction requirement if they appear in an immigration action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention; an action for benefits under the Social Security Act; or a pro se filing in a habeas corpus proceeding under 28 U.S.C. §§ 2241, 2254, or 2255. In bankruptcy cases, non-attorney bankruptcy petition preparers are exempt from redacting their own SSNs. In appeals cases, SSNs are exempt if they appear in appeals of Railroad Retirement Board benefits decisions.

For those SSNs not qualifying for an exemption from the redaction requirement, researchers determined if the numbers belonged to pro se parties who filed their own SSN.

Under the privacy rules, pro se parties waive the privacy protections when they file their own SSN without redaction and not under seal.

For the complete Federal Rules of Procedure Protecting Individual Privacy, including the relevant sections on exemptions from the redaction requirement, see Appendix A. For a more detailed description of the study's methodology, see Appendix B.

## Findings

### Overview

Table 1 provides an overview of key findings. It shows that of the nearly 4.7 million documents analyzed across all court types, 4,525 (0.10%) contain at least one unredacted SSN (district court: 0.12%, bankruptcy court: 0.07%, court of appeals: 0.17%). These documents were filed in 3,901 docket entries from 3,521 cases. An estimated 22,391 SSNs belonging to approximately 8,300 individuals were identified in total. Seventy-two percent of the unredacted SSNs appear to be noncompliant with the privacy rules, while 22% appear to be exempt from the redaction requirement, and 6% belong to pro se parties who waived the privacy protections.

**Table 1. Unredacted Social Security Numbers in PACER Documents on 37 Randomly Selected Days in Calendar Year 2022**

| | District Courts* | Bankruptcy Courts** | Appeals Courts | Total All Courts |
|---|---|---|---|---|
| **Documents analyzed** | 2,017,908 | 2,518,202 | 138,132 | 4,674,242 |
| *Documents containing unredacted SSNs* | 2,451 (0.12%) | 1,840 (0.07%) | 234 (0.17%) | 4,525 (0.10%) |
| **Number of unredacted SSNs identified** | 15,935 | 5,615 | 841 | 22,391 |
| *SSNs noncompliant with privacy rules* | 11,877 (75%) | 4,024 (72%) | 322 (38%) | 16,223 (72%) |
| *SSNs exempt from redaction requirement* | 3,205 (20%) | 1,361 (24%) | 349 (41%) | 4,915 (22%) |
| *SSNs with privacy protections waived* | 853 (5%) | 230 (4%) | 170 (20%) | 1,253 (6%) |

* *Includes filings from cases on the civil, criminal, and miscellaneous dockets*
** *Includes proof of claim filings*

A large number of SSNs were found in a relatively small number of documents. Forty-five percent (10,042) of all the unredacted SSNs identified in this study appear in 17 documents. Fifty-one percent (8,052) of unredacted SSNs found in district court filings appear in ten documents from civil cases. A single document filed in a district court case on the miscellaneous docket was found to contain 733 unredacted SSNs. Nineteen percent

(1,072) of unredacted SSNs found in bankruptcy court filings appeared in just three documents.

In one civil case, a single document containing 3,099 SSNs was filed twice. The party who filed the document attempted to redact the SSNs by covering them with a black box. The SSNs can be made visible, however, simply by selecting and deleting the box or by highlighting the page and copying and pasting the text behind it into a word processor. These 6,198 improperly redacted SSNs account for 28% of the SSNs identified in this study. An additional 1,471 improperly redacted SSNs were found in 443 other documents. The vast majority (1,100) appear in proof of claim registers. Of the 7,669 improperly redacted SSNs identified, 6,327 were in district court filings, 1,341 were in bankruptcy court filings, and 1 was in an appeals court filing.

**District Courts**

The majority of unredacted SSNs identified in this study—15,935 out of 22,391—were found in district court documents. Of the roughly 2 million district court documents analyzed, 2,451 (0.12%) contain unredacted SSNs. Of the unredacted SSNs found in district court documents, 75% appear to be noncompliant with the privacy rules. Twenty percent are exempt from the redaction requirement, and the remaining 5% belong to pro se parties who waived the privacy protections.

Table 2 disaggregates the district court data by cases on the civil, criminal, and miscellaneous dockets.[10]

[10] Cases on the miscellaneous docket are actions that do not qualify as civil cases in federal court, such as uncontested bankruptcy withdrawals or actions to enforce administrative subpoenas and summons heard by a magistrate judge, and those criminal matters not reportable by the federal courts to the Administrative Office of the U.S. Courts (AO), including petty offense cases presided over by magistrate judges, class A misdemeanor cases on the Central Violations Bureau (CVB) docket, and proceedings that are unrelated to the trial or disposition of a defendant for the offense charged, such as supervised release revocation hearings and remands for resentencing.

**Table 2. Social Security Numbers in District Court Filings**

| | Civil Docket | Criminal Docket | Misc. Docket | District Total |
|---|---|---|---|---|
| **Documents analyzed** | 1,429,939 | 484,203 | 103,766 | 2,017,908 |
| *Documents containing unredacted SSNs* | 1,993 (0.14%) | 341 (0.07%) | 117 (0.11%) | 2,451 (0.12%) |
| **Number of unredacted SSNs identified** | 14,029 | 888 | 1,018 | 15,935 |
| *SSNs noncompliant with privacy rules* | 10,601 (76%) | 465 (52%) | 811 (80%) | 11,877 (75%) |
| *SSNs exempt from redaction requirement* | 2,624 (19%) | 401 (45%) | 180 (18%) | 3,205 (20%) |
| *SSNs with privacy protections waived* | 804 (6%) | 22 (3%) | 27 (3%) | 853 (5%) |

Seventy-one percent of district court documents analyzed were from civil cases. Of about 1.4 million civil case documents analyzed, 1,993 (0.14%) contain one or more unredacted SSNs. Nearly 90% (14,029) of the unredacted SSNs identified in district court documents and 63% of all unredacted SSNs across court types appear in civil cases. Of those, 76% appear to be noncompliant with the privacy rules, while 19% are exempt from the redaction requirement, and 6% belong to pro se parties who waived the privacy protections.

Twenty-four percent of district court documents analyzed were from criminal cases. Out of about 500,000 criminal documents analyzed, 341 (0.07%) contain unredacted SSNs. Of the 888 unredacted SSNs identified, 52% appear to be noncompliant with the privacy rules, 45% are exempt from the redaction requirement, and 3% belong to pro se parties who waived the privacy protections.

Five percent of district court documents analyzed were from miscellaneous filings. Out of about 100,000 documents, 117 (0.11%) contain unredacted SSNs. Of the 1,018 unredacted SSNs in miscellaneous filings, 80% appear to be noncompliant with the privacy rules. Eighteen percent of SSNs in miscellaneous filings are exempt from the redaction requirement, and 3% belong to pro se parties who waived the privacy protections.

As described above, there are many reasons why an SSN might be exempt from the redaction requirement, and researchers found that multiple reasons for exemption apply to some SSNs. The reasons for exemption vary depending on whether the SSN appears in a civil case or criminal case.

**Table 3. Reasons for Exemptions in Civil Cases**

| Reason for Exemption | Number of Associated SSNs* |
|---|---|
| Record of state court proceeding | 1,688 |
| Record of an administrative proceeding | 758 |
| Action for benefits under Social Security Act | 739 |
| Pro se habeas corpus petition | 268 |
| Documents filed under seal | 1 |
| Court or tribunal record not initially subject to redaction requirement | 1 |
| Action relating to immigration removal, relief from removal, benefits, or detention | 0 |

* *Note: Some SSNs are exempt from redaction for more than one reason.*

Table 3 presents the reasons why SSNs are exempt from redaction in civil cases and the number of SSNs associated with each reason. The most common reason for exemption in civil cases is that the SSN appears in state court records. This reason applies to 1,688 of the SSNs found in the civil documents. The next most common reasons are that the SSN appears in the record of an administrative agency proceeding or in a Social Security appeal. These reasons apply, respectively, to 758 and 739 of the SSNs identified in the civil documents, and they often overlap because Social Security appeals tend to include records from Social Security Administration proceedings. A sizable number of the SSNs (268) are also exempt because they appear in pro se habeas corpus petitions. Finally, one SSN appears in a civil document that was filed under seal, and another appears in a court record not initially subject to the redaction requirement.

**Table 4. Reasons for Exemptions in Criminal Cases**

| Reason for Exemption | Number of Associated SSNs* |
|---|---|
| Documents filed under seal | 185 |
| Record of state court proceeding | 95 |
| Criminal investigation or other document prepared prior to filing of criminal charge | 77 |
| Criminal charging document/affidavit | 63 |
| Criminal arrest/search warrant | 37 |
| Record of an administrative proceeding | 0 |
| Court or tribunal record filed not initially subject to redaction requirement | 0 |

* *Note: Some SSNs are exempt from redaction for multiple reasons*

Table 4 presents the reasons why SSNs are exempt from redaction in criminal cases and the number of SSNs associated with each reason. The most common reason for exemption in criminal cases is that the SSN appears in a document filed under seal. This reason applies to 185 of the SSNs found in the criminal documents. Other reasons for exemption apply to SSNs appearing in state court records (95 SSNs), criminal investigations (77 SSNs), criminal charging documents or affidavits (63 SSNs), and arrest warrants or search warrants (37 SSNs).

**Table 5. Reasons for Exemptions in Miscellaneous Cases**

| Reason for Exemption | Number of Associated SSNs* |
|---|---|
| Action for benefits under Social Security Act | 85 |
| Record of an administrative proceeding | 81 |
| Criminal charging document/affidavit | 34 |
| Criminal arrest/search warrant | 31 |
| Criminal investigation or other document prepared prior to filing of criminal charge | 14 |
| Pro se habeas corpus petition | 11 |
| Record of state court proceeding | 6 |
| Documents filed under seal | 0 |
| Action relating to immigration removal, relief from removal, benefits, or detention | 0 |
| Court or tribunal record not initially subject to redaction requirement | 0 |
| Appeal of a Railroad Retirement Board benefits decision | 0 |

* *Note: Some SSNs are exempt from redaction for multiple reasons.*

As shown in Table 5, the most common reason for exemption in documents on the miscellaneous docket is that the SSN appears in a Social Security appeal (85 SSNs). Eighty-one of these SSNs are also exempt because they appear in the records of administrative agency proceedings. Other SSNs are exempt because they appear in criminal charging documents or affidavits (34 SSNs), arrest warrants or search warrants (31 SSNs), criminal investigations (14 SSNs), pro se habeas corpus petitions (11 SSNs), and the records of state court proceedings (6 SSNs).

### Bankruptcy Courts

Relative to the district courts, a smaller percentage of bankruptcy court documents contain unredacted SSNs. Of about 2.5 million bankruptcy court documents analyzed, 1,839 (0.07%) contain unredacted SSNs. Of the 5,615 unredacted SSNs identified in bankruptcy court documents, 72% appear to be noncompliant with the privacy rules, while 24% are exempt from the redaction requirement, and 4% belong to pro se parties who waived the privacy protections.

Table 6 disaggregates the bankruptcy court data by proof of claim filings and all other bankruptcy court filings.

**Table 6. Social Security Numbers in Bankruptcy Court Filings**

| | Proof of Claim Filings | All Other Bankruptcy Filings | Bankruptcy Total |
|---|---|---|---|
| **Documents analyzed** | 428,142 | 2,090,060 | 2,518,202 |
| *Documents containing unredacted SSNs* | 809 (0.19%) | 1,031 (0.05%) | 1,840 (0.07%) |
| **Number of unredacted SSNs identified** | 1,782 | 3,833 | 5,615 |
| *SSNs noncompliant with privacy rules* | 1,743 (98%) | 2,281 (60%) | 4,024 (72%) |
| *SSNs exempt from redaction requirement* | 16 (1%) | 1,345 (35%) | 1,361 (24%) |
| *SSNs with privacy protections waived* | 23 (1%) | 207 (5%) | 230 (4%) |

Table 6 shows that unredacted SSNs are more prevalent in proof of claim filings than other types of bankruptcy court documents. Specifically, 0.19% of documents filed in proof of claim registers contain unredacted SSNs compared to 0.05% of all other bankruptcy documents. Moreover, 98% of the 1,782 unredacted SSNs that appear in proof of claim filings appear to be noncompliant with the privacy rules.

Of the 3,833 unredacted SSNs identified in all other bankruptcy court filings, 60% appear to be noncompliant with the privacy rules, while 35% are exempt from the redaction requirement, and 5% belong to pro se parties who waived the privacy protections.

Across all bankruptcy documents analyzed, 54 of the 4,024 unredacted SSNs that are noncompliant with the privacy rules appear in Bankruptcy Form 121 (two of which appear in proof of claim registers). Debtors use this form to list any SSNs and individual taxpayer identification numbers (ITINs) they have used. Form 121 requires full, unredacted SSNs and ITINs and instructs debtors not to file the form as part of the public case file. It also assures debtors that the court will not make the form publicly available.

**Table 7. Reasons for Exemptions in Bankruptcy Cases**

| Reason for Exemption | Number of Associated SSNs | |
|---|---|---|
| | Proof of Claim Filings | All Other Filings |
| Record of state court proceeding | 16 | 965 |
| Non-attorney bankruptcy preparer | 0 | 368 |
| Record of an administrative proceeding | 0 | 11 |
| Court or tribunal record not initially subject to redaction requirement | 0 | 1 |
| Documents filed under seal | 0 | 0 |

Table 7 shows the reasons SSNs are exempt from redaction in bankruptcy cases and the number of SSNs associated with each reason. Sixteen SSNs in the proof of claim filings and 965 SSNs in other bankruptcy documents are exempt because they appear in the records of state court proceedings. Moreover, 368 SSNs are exempt because they belong to non-attorney bankruptcy petition preparers (i.e., filed in Form 119 or Form B2800/2800). Eleven exempt SSNs in bankruptcy documents appear in the context of administrative agency proceedings, and one appears in a document that was filed before the privacy rules went into effect in 2007.

### Courts of Appeals

The courts of appeals have the highest percentage of documents with unredacted SSNs. Of 138,132 appeals court documents analyzed, 234 (0.17%) contain unredacted SSNs. A relatively small proportion of the 841 unredacted SSNs in appeals court documents (38%), however, appear to be noncompliant with the privacy rules. This is due both to a relatively high proportion of exempt SSNs in the appeals courts (41%) and a relatively high proportion of pro se parties who waived the privacy protections by filing documents that included their own SSNs (20%).

**Table 8. Reasons for Exemptions in Court of Appeals Cases**

| Reason for Exemption | Number of Associated SSNs* |
|---|---|
| Record of state court proceeding | 134 |
| Record of an administrative proceeding | 112 |
| Pro se habeas corpus petition | 98 |
| Action for benefits under Social Security Act | 23 |
| Criminal investigation or other document prepared prior to filing of criminal charge | 5 |
| Criminal charging document/affidavit | 4 |
| Criminal arrest/search warrant | 2 |
| Documents filed under seal | 0 |
| Non-attorney bankruptcy preparer | 0 |
| Action relating to immigration removal, relief from removal, benefits, or detention | 0 |
| Court or tribunal record not initially subject to redaction requirement | 0 |
| Appeal of a Railroad Retirement Board benefits decision | 0 |

* *Note: Some SSNs are exempt from redaction for multiple reasons.*

Table 8 presents reasons why SSNs are exempt from redaction in appeals court cases and the number of SSNs associated with each reason. The most common reasons, appearing in state court and administrative proceeding records, apply to 134 SSNs and 112 SSNs, respectively. Less common exemption reasons include SSNs which appear in pro se habeas corpus petitions (98 SSNs), Social Security appeals (23 SSNs), criminal investigations (5 SSNs), criminal charging documents or affidavits (4 SSNs), and arrest warrants or search warrants (2 SSNs).

## Comparisons to the 2010 and 2015 Studies

This study reports information similar to what is reported in the 2010 and 2015 Center studies. However, this study's more advanced methodology limits the ability to make direct comparisons between the counts presented in this study and those presented previously, as detailed below.

**Additional Court and Filing Types.** This study analyzed documents filed in courts of appeals and proof of claim registers, in addition to all district and bankruptcy courts. The prior studies were based on district and bankruptcy court filings only, and both studies omitted every document from at least one bankruptcy court.

**Sampling Procedures.** The sampling procedures in this study were different from those used previously. Prior studies were based on analyses of documents filed in the months of November and December, whereas this study is based on a sample of documents filed on 37 randomly selected days throughout the year.

**OCR Methods.** This study excluded a smaller proportion of documents from the analysis, likely due to improved optical character recognition. The 2015 study was unable to convert 27,424 PDFs from district and bankruptcy cases into searchable text, plus all documents from an entire bankruptcy court. This study, in contrast, was unable to convert 358 PDFs from district and bankruptcy cases and 6,456 PDFs from appellate cases.

**Search Algorithms.** The algorithms used to search for SSNs in this study were more precise. The 2010 study searched only for strings that correspond to the typical SSN format of 123-45-6789. The 2015 study searched for strings appearing in the typical SSN format and nine-digit numbers appearing near the words "Social Security" and "SSN." This study searched for these patterns and many others, as detailed in Appendix B.

**Exemptions.** Researchers in the current study manually inspected each of the 22,391 unredacted SSNs in the context of the documents in which they appear. The objective was to determine whether each SSN was exempt from redaction, if it belonged to a pro se party who waived privacy protections, or if it did not comply with the privacy rules. In many instances, researchers consulted docket sheets in PACER to determine who filed the documents and the role of the documents in the context of the proceeding. The 2010 and 2015 studies, in contrast, did not examine each SSN individually or the context in which documents containing SSNs appeared in a proceeding.[11]

## Limitations of the Current Study

Compared to previous studies, the more advanced technologies and rigorous methods of this study likely produced a more precise estimate of the actual prevalence of unredacted social security numbers. Nevertheless, some limitations remain.

**OCR errors.** The OCR tools used in this study are more reliable than those used in 2015, but they are not error free. Even when a document can be converted to searchable text, modern OCR tools sometimes misread or garble the text, especially

[11] The 2010 study labeled entire documents, and all SSNs in them, as either exempt or not exempt. The researchers of the current study found, however, that a small number of documents (especially those with multiple exhibits) contained some exempt SSNs and some non-exempt SSNs. The 2015 study labeled "the first instance" of an SSN as either exempt or not rather than inspecting each instance in which an SSN appeared. In the current study, researchers determined that a small number of SSNs appearing across multiple documents were sometimes exempt from the redaction requirement and sometimes not exempt.

in handwritten and low-resolution documents. It was therefore inevitable that some valid SSNs were not flagged during the initial search for nine-digit number strings.

**Ambiguous numbers.** It was not always clear whether a nine-digit number was in fact a valid SSN. Researchers used context and other clues to make subjective judgments in ambiguous cases. Additionally, some SSNs had been redacted by filers, but the redaction was done poorly and the SSN could still be identified. In those instances, SSNs were counted as unredacted. Other research teams might resolve these ambiguous cases differently.

**Interpretations of the rules.** The task of determining whether SSNs are exempt from redaction involves subjective interpretations of the privacy rules. As discussed in Appendix B, researchers interpreted the exemption provisions broadly and generally coded unredacted SSNs as exempt if it was believed that a filing party could have reasonably understood the rules to allow for such an exemption.

**Other potential errors.** Researchers manually inspected tens of thousands of nine-digit numbers to determine which were valid SSNs. Some human error is to be expected.

# Appendix A: Federal Rules of Procedure Protecting Individual Privacy

## Federal Rule of Civil Procedure Rule 5.2—Privacy Protection for Filings Made with the Court

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§2241, 2254, or 2255.

(c) LIMITATIONS ON REMOTE ACCESS TO ELECTRONIC FILES; SOCIAL-SECURITY APPEALS AND IMMIGRATION CASES. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) PROTECTIVE ORDERS. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) OPTION FOR FILING A REFERENCE LIST. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) WAIVER OF PROTECTION OF IDENTIFIERS. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

**Federal Rule of Criminal Procedure Rule 49.1—Privacy Protection for Filings Made with the Court**

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) IMMIGRATION CASES. A filing in an action brought under 28 U.S.C. §2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) PROTECTIVE ORDERS. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) OPTION FOR FILING A REFERENCE LIST. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) WAIVER OF PROTECTION OF IDENTIFIERS. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

**Federal Rule of Bankruptcy Procedure Rule 9037—Privacy Protection for Filings Made with the Court**

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding unless filed with a proof of claim;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by subdivision (c) of this rule; and

(6) a filing that is subject to §110 of the Code.

(c) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(d) PROTECTIVE ORDERS. For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(e) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL. An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) OPTION FOR FILING A REFERENCE LIST. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and

specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) WAIVER OF PROTECTION OF IDENTIFIERS. An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

(h) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT

(1) *Content of the Motion; Service*. Unless the court orders otherwise, if an entity seeks to redact from a previously filed document information that is protected under subdivision (a), the entity must:

(A) file a motion to redact identifying the proposed redactions;

(B) attach to the motion the proposed redacted document;

(C) include in the motion the docket or proof-of-claim number of the previously filed document; and

(D) serve the motion and attachment on the debtor, debtor's attorney, trustee (if any), United States trustee, filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

(2) *Restricting Public Access to the Unredacted Document; Docketing the Redacted Document*. The court must promptly restrict public access to the motion and the unredacted document pending its ruling on the motion. If the court grants it, the court must docket the redacted document. The restrictions on public access to the motion and unredacted document remain in effect until a further court order. If the court denies it, the restrictions must be lifted, unless the court orders otherwise.

**Federal Rule of Appellate Procedure Rule 25(a)(5)—Filing and Service**

(a) FILING.

(5) *Privacy Protection.* An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote electronic access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

## Appendix B: Methodology

### Sample

This study is based on an analysis of all documents filed in the federal district, bankruptcy, and appeals courts on 37 randomly selected days in calendar year 2022.[12] Because there is not a comprehensive list of all documents filed in all courts, we could not randomly select documents directly. Instead, we randomly selected a subset of dates in 2022 and analyzed all documents filed on those dates. We set the number of dates to 37, or about 10% of the total number of days in 2022.

Approximately 97% of district and bankruptcy court documents and 99% of appellate briefs are filed on non-holiday weekdays.[13] In an effort to mirror that distribution, we randomly selected 36 dates from a list of all non-holiday weekdays and one date from a list of all weekends and federal holidays. Document filings furthermore tend to be evenly distributed across quarters.[14] Correspondingly, we randomly selected nine weekday dates from each quarter.

Using these procedures, we randomly selected the following dates in calendar year 2022:

| Q1 | Q2 | Q3 | Q4 |
|---|---|---|---|
| January 18 | April 2* | July 18 | October 18 |
| January 25 | April 15 | July 25 | October 25 |
| February 4 | April 22 | August 4 | November 4 |
| February 8 | May 4 | August 8 | November 8 |
| February 11 | May 6 | August 11 | November 14 |
| March 14 | May 11 | September 9 | December 14 |
| March 15 | June 9 | September 12 | December 15 |
| March 21 | June 10 | September 16 | December 21 |
| March 30 | June 16 | September 27 | December 27 |
| | June 28 | | |

*Weekend day

### Dataset

To construct our dataset, we first downloaded PDFs of the 4,681,055 documents filed in the federal district, bankruptcy, and appeals courts on the 37 dates in our sample. For the purposes of this study, we considered a document to be the entire contents of a single PDF filed with the court.[15] We then used the Python library PyPDF to convert the PDFs into

[12] In contrast, the 2010 and 2015 Center studies were based on nonprobability samples. The 2010 study examined all documents filed in district and bankruptcy courts in November and December of 2009. The 2015 study examined all documents filed in district and bankruptcy courts in November 2013.
[13] Tim Reagan, et al., "Electronic Filing Times in Federal Courts," Federal Judicial Center, April 25, 2022, https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts.
[14] Ibid.
[15] Some PACER docket entries contain multiple filings, with each being an individual downloadable PDF.

searchable text files. PDFs that could not be converted using PyPDF were converted using the Tesseract OCR engine in Python. Of the 4,681,055 PDFs we downloaded, 4,674,242 (99.9%) were successfully converted into searchable text files. The vast majority (95%, 6,456) of PDFs that could not be converted were documents from appellate cases.

Next, we ran a Python script that extracted nine-digit numbers from the text files, along with the 200 characters that preceded and followed the numbers. We also extracted information about each document and case, including the court name, division, docket number, docket entry, and docket sequence numbers. We used this information to create 292 spreadsheets: one for each of the 94 district courts; one for each of the 89 unconsolidated bankruptcy courts, as well as individual spreadsheets for bankruptcy filings in the Eastern and Western Districts of Arkansas (which share a bankruptcy court but docket cases separately) and for the three territorial courts;[16] one for each of the 12 regional courts of appeals; and one for each of the 89 unconsolidated bankruptcy courts with proof of claim registers, as well as one each for the proof of claim registers in the Eastern and Western Districts of Arkansas and the territorial court in Guam.[17]

Each row of these spreadsheets represented either an instance of a nine-digit number found in the documents or a single entry for a document in which no nine-digit numbers had been found. The full dataset contained 30.2 million rows. We discovered that about 21.6 million of these rows were related to a particular type of nine-digit number that appeared regularly in 3M Products Liability Litigation (MDL No. 2885) cases filed in the Northern District of Florida. This number was not a valid SSN, so these rows were omitted. We also found that 4.2 million rows represented documents with no identified nine-digit numbers. The remaining 4.4 million rows included nine-digit numbers that we analyzed further to determine if they were valid SSNs.

**Search Algorithm Development and Validation**

We developed a search algorithm in the R programming language to help us identify which of the 4.4 million nine-digit numbers were mostly likely to be valid SSNs.

To begin, a team of researchers manually inspected documents that contained 123,911 identified numbers (rows) across 27 district court datasets and labeled them as valid or invalid SSNs. We observed that valid SSNs tended to appear in predictable contexts or formats. We used these patterns to write an algorithm that predicted whether a row was likely a tax identification number (TIN), possibly a TIN, or likely not a valid TIN.

The algorithm predicted that a nine-digit number was "likely" or "possibly" a TIN if any of the following conditions were met:

[16] Bankruptcy cases in the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands are heard by district court judges or visiting bankruptcy judges.
[17] The territorial courts of the Virgin Islands and the Northern Mariana Islands did not have any proof of claim filings on the dates in the sample.

- **Number appeared in a common TIN context.** A row was labeled LIKELY TIN if the number appeared within eight characters of any of the following strings (not case sensitive):

"EIN," "Employer Identification," "Employer Identification No," "Employer ID," "Employer I.D," "Employer 1D," "Employer 1.D," "Employer Identification Number," "Employer Number," "Employer ID Number," "Employee Identification Number," "Tax ID," "Tax I.D," "tax identification number," "tax identification," "tax identification no," "Tax ID#," "Tax#," "Tax ID Number," "Tax I.D. Number," "Tx ID," "Tx I.D," "TaxID," "Tax. ID," "Tax1D," "Tax 1D," "Tax 1.D," "Taxpayer ID," "Taxpayer I.D," "Taxpayer ID No," "Taxpayer ID Number," "Taxpayer I.D. Number," "Taxpayer ID#," "Taxpayer 1D," "Taxpayer 1.D," "Taxpayer Number," "Taxpayer No," "Taxpayer Identification," "Taxpayer Identification Number," "Taxpayer Identification Number (US)," "IRS," "IRS No," "IRS Number," "Internal Revenue Service," "Internal Revenue Service Number," "I.R.S," "I.R.S. Number," "I.R.S. No," "FEIN," "ITIN," "EID," "TID," "ATIN," "PTIN," "TIN," "FIN," "SSI," "S.S.I," "SSI Number," "SSI No," "S.S.I. Number," "SSI ID," "SS Number," "SS No," "S.S. No," "S.S. NUMBER," "SS#," "SS Nbr," "SSA," "SSA Number," "Social Security," "Social Security No," "Social Security Number," "social security account number," "social security acct no," "social security account no," "SSN," "SSN/SIN," "*SSN," "(SSN)," "[SSN," "SS," "'SS," "(SSN," "8.8.N," "soc. sec. no," "SOC.SEC," "soc sec," "soc. sec," "socsec," "SOC."

- **Number appeared in a common TIN format.** A row was labeled LIKELY TIN if it followed either of these formats: 123-45-6789 and 12-3456789.
- **Number appeared in a less common TIN format.** A row was labeled POSSIBLE TIN if it followed either of these formats: 123.45.6789 and 123 45 6789.
- **The same number matched a previous condition.** In the last step, the algorithm copied the number strings and then removed all punctuation and spaces from the strings so they appeared in the same format. For example, the numbers 123-45-6789, 123 45 6789, and 123456789 were all formatted to appear as 123456789. The algorithm then sorted and grouped the resulting standardized numbers. If any member of a group had previously been labeled LIKELY TIN or POSSIBLE TIN, all other members of the group were also labeled as such. For example, if the number 123456789 appeared in four rows and it was labeled LIKELY TIN in one row because it had appeared after the term "SSN#," the other three rows would be updated to reflect that they were also LIKELY TIN.

Finally, we ran multiple tests to validate the algorithm's predictions. Human coders who were assisted by the algorithm's predictions identified an estimated 99% of valid SSNs in the district court data, 99% in the bankruptcy court data, and 100% in the appeals court data. By comparison, human coders working without the assistance of the algorithm's

predictions found 92% of valid SSNs in the district court data, 97% in the bankruptcy court data, and 83% in the appeals court data. The search algorithm therefore not only made the process of identifying SSNs more efficient, it also improved accuracy.

**Manual Coding of SSNs**

The search algorithm predicted that 51,894 of the 4.4 million nine-digit numbers could be valid tax identification numbers. To make a final determination, each of those observations that had been flagged by the algorithm were double-coded by researchers who independently inspected each row. In many cases, researchers referenced the original document to view the number in context. Researchers coded observations as "SSN," "ITIN," "EIN," "TIN Unspecified," or "Not Valid." Researchers also had the option of using the code "Follow Up" for any observations they were unsure about. In most cases, the two coders assigned the same label. When the coders disagreed or when one or both coders labeled an observation "Follow Up," senior members of the research team attempted to make a final determination to the extent possible. This process identified 22,391 SSNs and ITINs.

**Manual Coding of Exemptions**

Next, for each case with an identified SSN, data from the Center's Integrated Database (IDB)[18] were linked and used to flag possible exemptions and waivers. Cases were flagged as potentially exempt if they were removals from state court, social security cases, civil immigration cases, habeas corpus cases with a pro se party, or administrative agency cases or appeals. Cases were flagged as potential waivers if they included one or more pro se parties.

All 22,391 SSNs and ITINs were then double-coded by researchers who independently inspected each row to determine whether the number was or was not exempt under the Privacy Rules. Some numbers were exempt for multiple reasons. We noted each of these reasons using the exemption codes below. Disagreements between coders were inspected and resolved by a senior member of the research team.

We interpreted the exemption provisions of the privacy rules broadly and generally counted unredacted SSNs as exempt if a filing party could have reasonably understood the rules as providing an exemption. We used an expansive understanding of the terms "official record" and "state-court proceedings" to include any document that appears to be all or part of a record of any type of proceeding from a state court. We also interpreted the criminal rules as exempting SSNs appearing in non-federal charging documents filed in criminal proceedings in federal court. Finally, we treated SSNs found in attachments to warrants and charging documents as exempt under the criminal rules.

[18] The IDB contains data on civil case and criminal defendant filings and terminations in district, bankruptcy, and appellate courts and associated case information from 1970 to the present. The Center receives regular updates of the case-related data as routinely reported by the courts to the AO. The Center then post-processes the data, consistent with the policies of the Judicial Conference governing access to these data, into a unified longitudinal database, the IDB. It is available here: https://www.fjc.gov/research/idb

Exemption Codes

*Miscellaneous*
1 = Record of a state court proceeding
14 = Documents filed under seal

*Pro se documents*
2 = Filer included own SSN (suggesting waiver of the privacy protections)

*Criminal documents (including attachments)*
5 = Criminal charging document/affidavit
6 = Criminal arrest/search warrant
7 = Criminal investigation or other document prepared prior to filing of criminal charge

*Bankruptcy documents*
8 = Non-attorney bankruptcy petition preparer (e.g., Bankruptcy Form 119)

*Appeals documents*
9 = Filing in appeal of Railroad Retirement Board benefits decision

*Civil documents*
4 = Pro se party filing in a habeas corpus proceeding under 28 U.S.C. §§ 2241, 2254, or 2255
10 = Filing in civil social security case (i.e., action for benefits under the Social Security Act)
11 = Record of an administrative agency proceeding (except in bankruptcy cases if record filed with proof of claim)
12 = Immigration case (i.e., action relating to immigration removal, relief from removal, benefits, or detention)
13 = Record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed

## Post Meeting Vote

After the June 4 meeting, the Standing Committee gave approval—by email vote held June 16-21—to publish for public comment new Rule 7043 and amended Rules 9014 and 9017. In response to comments raised during the meeting, the Advisory Committee on Bankruptcy Rules revised the committee note to Rule 9014 as shown in the following redline and clean versions.

## Bankruptcy Rule 9014 Committee Note (Redline)

Rule 9014(d) is amended to include language from Fed. R. Civ. P. 43. That rule is no longer generally applicable in a bankruptcy case, and the reference to that rule has been removed from Rule 9017. Instead, Rule 9014(d) incorporates most of the language of Fed. R. Civ. P. 43 for contested matters~~,~~ but eliminates the "compelling circumstances" standard in Fed. R. Civ. P. 43(a) for permitting remote testimony. ~~Consistent~~ Terms used in Rule 9014(d) have the same meaning as they do in Fed. R. Civ. P. 43. However, consistent with the other restyled bankruptcy rules, the phrase "good cause" used in Fed. R. Civ. P. 43 has been shortened to "cause" in Rule 9014(d)(1). No substantive change is intended.

Under new Rule 7043, all of Fed. R. Civ. P. 43—including the "compelling circumstances" standard—continues to apply to adversary proceedings. An adversary proceeding in bankruptcy is procedurally like a civil action in district court. Because assessing the credibility of witnesses is often required, there is a strong presumption that testimony will be in person.

A contested matter, however, is a motion procedure that can usually be resolved expeditiously by means of a hearing. Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice. They occur with frequency over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

The need to quickly resolve most contested matters is recognized in existing Rule 9014, by making presumptively inapplicable the disclosure requirements of Fed. R. Civ. P. 26(a)(2) and 26(a)(3) and the mandatory meeting under Fed. R. Civ. P. 26(f). Under Rule 9014, the court has the discretion to direct that one or more of the other rules in Part VII apply when a contested matter warrants heightened process. The court has similar discretion under Rule 9014(d) to deny a request to testify remotely.

Although the amendment to Rule 9014(d) removes the "compelling circumstances" requirement in Fed. R. Civ. P. 43(a), the court still must find cause to permit remote testimony and must impose appropriate safeguards. In other words, the presumption of in-person testimony in open court is retained, and remote testimony in contested matters should not be routine. In-person testimony would be particularly appropriate in disputed contested matters where it is necessary for the court to determine the witness's credibility. On the other hand, the greater flexibility to allow remote testimony in contested matters could be useful in consumer cases if the matters are straightforward and witness attendance is cost prohibitive or infeasible due to travel, job, or family obstacles.

**Bankruptcy Rule 9014 Committee Note (Clean)**

Rule 9014(d) is amended to include language from Fed. R. Civ. P. 43. That rule is no longer generally applicable in a bankruptcy case, and the reference to that rule has been removed from Rule 9017. Instead, Rule 9014(d) incorporates most of the language of Fed. R. Civ. P. 43 for contested matters but eliminates the "compelling circumstances" standard in Fed. R. Civ. P. 43(a) for permitting remote testimony. Terms used in Rule 9014(d) have the same meaning as they do in Fed. R. Civ. P. 43. However, consistent with the other restyled bankruptcy rules, the phrase "good cause" used in Fed. R. Civ. P. 43 has been shortened to "cause" in Rule 9014(d)(1). No substantive change is intended.

Under new Rule 7043, all of Fed. R. Civ. P. 43—including the "compelling circumstances" standard—continues to apply to adversary proceedings. An adversary proceeding in bankruptcy is procedurally like a civil action in district court. Because assessing the credibility of witnesses is often required, there is a strong presumption that testimony will be in person.

A contested matter, however, is a motion procedure that can usually be resolved expeditiously by means of a hearing. Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice. They occur with frequency over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

The need to quickly resolve most contested matters is recognized in existing Rule 9014, by making presumptively inapplicable the disclosure requirements of Fed. R. Civ. P. 26(a)(2) and 26(a)(3) and the mandatory meeting under Fed. R. Civ. P. 26(f). Under Rule 9014, the court has the discretion to direct that one or more of the other rules in Part VII apply when a contested matter warrants heightened process. The court has similar discretion under Rule 9014(d) to deny a request to testify remotely.

Although the amendment to Rule 9014(d) removes the "compelling circumstances" requirement in Fed. R. Civ. P. 43(a), the court still must find cause to permit remote testimony and must impose appropriate safeguards. In other words, the presumption of in-person testimony in open court is retained, and remote testimony in contested matters should not be routine. In-person testimony would be particularly appropriate in disputed contested matters where it is necessary for the court to determine the witness's credibility. On the other hand, the greater flexibility to allow remote testimony in contested matters could be useful in consumer cases if the matters are straightforward and witness attendance is cost prohibitive or infeasible due to travel, job, or family obstacles.