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 39 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.