

**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 for the information of the Judicial Conference:

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NOTICE
**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

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, 2023. 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 H. 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, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Allison Bruff, Rules Committee Staff Counsel; Christopher I. Pryby, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and

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Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice.

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 suggestions to allow expanded access to electronic filing by pro se litigants and an update on a suggestion to change the presumptive deadline for electronic filing.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 13, 2022. The Advisory Committee discussed possible amendments to Rule 29 (Brief of an Amicus Curiae), Rule 39 (Costs), and Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).

The Advisory Committee has been considering potential amendments to Rule 29 for several years and received helpful feedback from the Standing Committee regarding the need for and scope of any potential additional requirements for disclosures by amici curiae, including disclosure requirements related to ownership, control, or funding by the parties or non-parties. In addition, the Advisory Committee is considering possible amendments to Rule 39 in the light of *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), regarding the allocation of costs on appeal, specifically related to supersedeas bonds. The Advisory Committee is also considering possible amendments to Form 4 in response to a suggestion highlighting issues with the current

form, and has consulted clerks and senior staff attorneys in the circuits to determine the most relevant information on the form.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Official Form 410 (Proof of Claim) with a recommendation that it be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Official Form 410 (Proof of Claim)

The proposed amendment eliminates the language on the proof-of-claim form that restricts use of a uniform claim identifier (“UCI”) to electronic payments in chapter 13, and thereby allows the UCI to be used in cases filed under all chapters of the Bankruptcy Code and for all payments whether or not electronic. Use of the UCI is entirely voluntary on the part of the creditor. The amended language allows a creditor to list a UCI on the proof-of-claim form in any case.

Information Items

The Advisory Committee met on September 15, 2022. In addition to the recommendation discussed above, the Advisory Committee continued consideration of proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor’s Principal Residence in a Chapter 13 Case) and related forms. A version of the amended rule published for comment in 2021 received a number of comments on proposed provisions designed to enhance the likelihood that chapter 13 debtors will emerge from bankruptcy current on their home mortgages. In light of the comments, the Advisory Committee is considering changes that would likely require republication in August 2023.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 12, 2022. The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) regarding privilege logs with a recommendation that they be published for public comment in August 2023. The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order. During the Standing Committee meeting, members expressed differing views concerning the length of and level of detail in the committee notes that would accompany the proposed amendments. The Advisory Committee was asked to reexamine the notes in light of that discussion, and to present the proposed amendments to the Standing Committee at its June 2023 meeting.

In addition, the Advisory Committee continues to consider a potential new rule concerning judicial management of multidistrict litigation proceedings. The MDL subcommittee has developed a sketch for a new Rule 16.1 directed to MDL proceedings. The new rule would prompt a meet-and-confer session among counsel before the initial case management conference with the transferee court. In two alternatives, the sketch of the rule provides various topics for discussion by counsel. The Advisory Committee continues to discuss the possibility of proposing a new Rule 16.1.

The Advisory Committee also discussed potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 55 (Default; Default Judgment) regarding the directive that in some circumstances the clerk “must” enter a default or a default judgment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 27, 2022. The Advisory Committee removed from its agenda a suggestion regarding Rule 49.1 (Privacy Protection For Filings Made with the Court) and considered a suggestion to amend Rule 17 (Subpoena).

The Advisory Committee considered a suggestion to amend Rule 49.1 by adding the phrase “subject to any applicable right of public access” before Rule 49.1(d)’s authorization permitting the court to order that filings be made under seal. This change had been proposed to address certain language in an earlier committee note that included a reference to the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the Committee on Court Administration and Case Management (CACM). As quoted in the committee note, the CACM guidance provides that certain documents—including “financial affidavits filed in seeking representation pursuant to the Criminal Justice Act”—“shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access.” Several reasons factored into the Advisory Committee’s decision not to pursue the proposed amendment. One was the concern that the amendment would be perceived as taking a position on an issue of substantive law (that is, whether such financial affidavits are judicial documents subject to disclosure under the First Amendment or a common law right of access). Another was the

observation that such an amendment would not remove the earlier committee note’s reference to the CACM guidance.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17. The Advisory Committee formed a subcommittee to study the issue and, to gather more information about Rule 17 in practice, invited a number of experienced attorneys to participate in its fall meeting. The participants included defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. The participants spoke about their experience with Rule 17 subpoena practice, and answered questions regarding the standards for securing third-party subpoenas and the role of judicial oversight in the process.

FEDERAL RULES OF EVIDENCE

Information Items

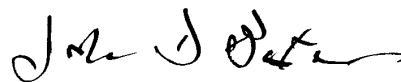
The Advisory Committee on Evidence Rules met on October 28, 2022. In connection with the meeting, the Advisory Committee held panel discussions on two suggestions concerning Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence). The first panel discussion related to a possible new Rule 611(e) regarding the practice of allowing jurors to pose questions for witnesses. The Advisory Committee will continue its research into juror questions, including how often the practice is used in federal courts and potential safeguards for the practice. The second panel discussion related to proposed new Rule 611(d) regarding illustrative aids, which was published for public comment in August 2022. Proposed Rule 611(d) would state the permitted uses of illustrative aids and would set procedures for their use. Finally, the Advisory Committee provided updates on other rules published for public comment, including Rule 613(b) (Witness’s Prior Statement) regarding prior inconsistent statements, Rule 801(d)(2) (Definitions That Apply to This Article; Exclusions from Hearsay) related to hearsay statements by predecessors in interest, Rule 804(b)(3) (Exceptions to the Rule Against Hearsay—When the

Declarant Is Unavailable as a Witness) regarding the corroborating circumstances requirement, and Rule 1006 (Summaries to Prove Content) regarding summaries of voluminous records.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations to the Executive Committee regarding the prioritization of goals and strategies in the 2020 *Strategic Plan for the Federal Judiciary (Plan)* to determine which strategies and goals from the *Plan* should receive priority attention over the next two years. The Committee's views were communicated to Chief Judge L. Scott Coogler, the judiciary planning coordinator, by letter dated January 10, 2023.

Respectfully submitted,



John D. Bates, Chair

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