COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 27, 2020

Introduction

The Advisory Committee on Civil Rules met by videoconference on April 1, 2020. The meeting was originally noticed for an in-person meeting in West Palm Beach, Florida, but was re-noticed in the Federal Register for a remote meeting, with the opportunity for public access. Draft minutes of the meeting are attached to this report.

Part I of this report presents three action items.

Part IA recommends approval for adoption of amendments to Rule 7.1 that were published for comment last August.

Part IB recommends approval for publication of two

proposals. The first is a set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The second is an amendment of Rule 12(a)(4) that would extend the time to respond when an action is brought against a federal officer or employee in an individual capacity.

Part II of this report presents several information items.

Part IIA describes the work of four subcommittees. The MDL Subcommittee continues to explore possible appeal rules and other rules for MDL proceedings. A joint subcommittee with the Advisory Committee on Appellate Rules is exploring possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. Another joint subcommittee continues to consider the time when the last day for electronic filing ends. And a new subcommittee is working on the direction in the CARES Act that the Judicial Conference consider rules amendments that would address the effects of a declaration of a national emergency.

Part IIB describes three continuing projects that are being carried forward for further work. A potential ambiguity in Rule 4(c)(3) may affect the procedure for ordering a United States marshal to serve process in an in forma pauperis or seaman case. Rule 12(a) seems to recognize that a statute may alter the time to respond under Rule 12(a)(1), but not to recognize statutes that would alter the time set by Rule 12(a)(2) or (3). And a proposal has been made to amend Rule 17(d) to require that a public officer who sues or is sued in an official capacity be named only by title, not name.

Part IIC describes three proposals that have been removed from the agenda. One proposal addresses the role of the judge in settlements. A second would require expedited action on proceedings to enforce subpoenas. And the third would make more precise the ways in which Rule 7(b) invokes Rule 10 caption requirements.

I. Action Items

A. For Final Approval: Amendment to Rule 7.1

Two distinct proposals to amend Rule 7.1(a) were published in August 2019. Further consideration of the proposal in light of the public comments demonstrated the wisdom of making a conforming amendment of Rule 7.1(b). Rule 7.1(a)(1) and the conforming Rule 7.1(b) amendment are discussed first. The more complicated questions raised by Rule 7.1(a)(2) are discussed next. The proposed rule text, marked to show changes since

publication by double underlining, is:

Rule 7.1. Disclosure Statements

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

(~~1~~A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(~~2~~B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* ~~Unless the court orders otherwise, a party~~ ~~I~~ In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names—and identifies the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) at the time the action is filed in or removed to federal court; or

(B) at another time that may be relevant to determining the court's jurisdiction.

* * * * *

(b) TIME TO FILE: SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement with * * *."

Rule 7.1(a)(1)

The proposal to amend Rule 7.1(a)(1) published in August 2019 reads:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to

intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:
~~(1)~~ (A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
~~(2)~~ (B) states that there is no such corporation.

This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). It drew three public comments. Two approved the proposal. The third suggested that the categories of parties that must file disclosure statements should be expanded for both parties and intervenors, a subject that has been considered periodically by the advisory committees without yet leading to any proposals for amending the parallel rules.

The Advisory Committee recommends approval for adoption of the Rule 7.1(a)(1) amendment.

Rule 7.1(b)

Discussion of public comments on the time to make diversity party disclosures under proposed Rule 7.1(a)(2) led the Advisory Committee to recognize that the time provisions in Rule 7.1(b) should be amended to conform to the new provision for intervenor disclosures in Rule 7.1(a)(1):

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:
(1) file the disclosure statement * * *.

This is a technical amendment to conform to adoption of amended rule 7.1(a)(1) and can be approved for adoption without publication.

Rule 7.1(a)(2)

Rule 7.1(a)(2) is a new disclosure provision designed to establish a secure basis for determining whether there is complete diversity to establish jurisdiction under 28 U.S.C. § 1332(a). The Advisory Committee recommends that it be approved for adoption with changes suggested by the public comments.

The core of the diversity jurisdiction disclosure lies in the requirement that every party or intervenor, including the plaintiff, name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or

intervenor. The proposed rule text has been modified to identify more accurately the time that is relevant to determining the citizenships that control diversity jurisdiction.

The citizenship of a natural person for diversity purposes is readily established in most cases, although somewhat quirky concepts of domicile may at times obscure the question. Section 1332(c)(1) codifies familiar rules for determining the citizenship of a corporation without looking to the citizenships of its owners.

Noncorporate entities, on the other hand, commonly take on the citizenships of all their owners. The rules are well settled for many entities. The rule seems to be well settled as well for limited liability companies. The citizenship of every owner is attributed to the LLC. If an owner is itself an LLC, that LLC takes on the citizenships of all of its owners. The chain of attribution reaches higher still through every owner whose citizenship is attributed to an entity closer along the chain of owners that connects to the party LLC. The great shift of many business enterprises to the LLC form means that the diversity question arises in an increasing number of actions filed in, or removed to, federal court.

The challenges presented by the need to trace attributed ownership are a function of factors beyond the mere proliferation of LLCs. Many LLCs are not eager to identify their owners——the negative comments on the published rule included those that insisted that disclosure is an unwarranted invasion of the owners' privacy. Beyond that, the more elaborate LLC ownership structures may make it difficult, and at times impossible, for an LLC to identify all of the individuals and entities whose citizenships are attributed to it, let alone determine what those citizenships are. But if it is difficult for an LLC party to identify all of its attributed citizenships, it is more difficult for the other parties, whose only likely source of information is the LLC party itself.

As difficult as it may be to determine attributed citizenships in some cases, the imperative of ensuring complete diversity requires a determination of all of the citizenships attributed to every party. Some courts require disclosure now, by local rule, standard terms in a scheduling order, or more ad hoc means. And there are cases in which inadvertence, indifference, or perhaps strategic calculation have led to a belated realization that there is no diversity jurisdiction, wasting extensive pretrial proceedings or even a completed trial.

Disclosure by every party when an action first arrives in federal court, or at a later time that may displace the relevance of the time of filing the complaint or notice of removal, is a natural way to safeguard complete diversity. Most of the public comments approve the proposal, often suggesting that it will impose only negligible burdens in most cases.

The public comments indirectly illuminated the need to develop further the rule text that identifies the time that controls the existence of complete diversity. Many of the comments supporting the proposal suggested that defendants frequently remove actions from state court without giving adequate thought to the actual existence of complete diversity. Some of these comments feared that the published rule text, which called for disclosing citizenships attributed to a party "at the time the action is filed," did not speak clearly to the need to distinguish between citizenship at the time a complaint is filed in federal court and citizenship at the time a complaint is filed in state court, to be followed by removal. Removal, for example, may become possible only after a diversity-destroying party is dropped from the action in state court.

At least one comment suggested a specific addition to the rule text to call for disclosure "at the time the action is filed in federal court." The Advisory Committee's discussion of this proposal emphasized the rules that require complete diversity at some other time, notwithstanding the general proposition that jurisdiction is determined at the time an action is filed. One example is changes in the parties after an action is filed. Other and more complex examples may arise in determining removal jurisdiction. Disclosure should aim at the direct and attributed citizenships of each party at the time identified by the complete-diversity rules. The time at which the court makes the determination is not relevant, although the purpose of requiring disclosure is to facilitate determination as early as possible.

These observations led to revising the rule text to read:

> at the time the action is filed in or removed to federal court, or at such other time as may be relevant to determining the court's jurisdiction

This rule text was reviewed by the Style Consultants after the Advisory Committee meeting. Their suggested revisions were accepted by the Committee by post-meeting submission. This part of the rule text proposed for adoption reads:

(A) at the time the action is filed in or removed to federal court; or
(B) at another time that may be relevant to determining the court's jurisdiction.

A problem remains when a party's disclosure statement, perhaps illuminated by responses to follow-up discovery, shows that the party cannot identify all of the citizenships that may be attributed to it. The committee note observes that the disclosure rule does not address this problem. Renewed committee discussion rejected a suggestion that the committee note should be revised to suggest that a party could ask the court to order that no more than reasonable inquiry is required. The rule cannot reduce the informational burdens required by the doctrines of subject-matter jurisdiction. Nor does it seem wise to attempt to answer the questions that will arise when the party asserting jurisdiction is unable to pry complete information from another party who has far better access to information about its owners, members, or others whose citizenships are attributed to it.

Some public comments opposed adoption of the diversity disclosure proposal. Two of them came from bar groups that have provided helpful advice on many occasions in the past, the American College of Trial Lawyers and the City Bar of New York. Each suggested that a better answer to the dilemma of determining the citizenship of LLCs would be for Congress or the Supreme Court to treat them as corporations. In addition, they suggested that some LLCs may experience great difficulty in determining all attributed citizenships, making it better to rely on targeted discovery in the few cases that present genuine puzzles about citizenship. They also observed that the LLC form is often adopted to protect the privacy of the owners, a point supplemented by other comments suggesting that privacy is particularly important for "non-citizen" owners. An added concern was that expansive diversity disclosures may include so much information that they distract attention from the information that is important in considering judicial recusal, the original purpose of Rule 7.1.

The proposed disclosure rule is recommended for adoption. It is not a perfect answer to the puzzles created by the requirement of complete diversity. But it will go a long way toward eliminating inadvertent exercise of federal jurisdiction in cases that should be decided by state courts, and——at least as important——toward protecting against tardy revelations of diversity-destroying citizenships that lay waste to substantial investments in federal litigation.

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names——and identifies the citizenship of——every individual or entity whose citizenship is attributed to that party or intervenor:

(A) at the time the action is filed in or removed to federal court; or

(B) at another time that may be relevant to determining the court's jurisdiction.

(b) TIME TO FILE: SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement with * * *."

Committee Note

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1(a)(1) to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court, or at another time that may be relevant to determining the court's jurisdiction. Two examples of attributed citizenship are provided by

§ 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar——such as partnerships and limited partnerships——and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure

to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor at the time the action is filed in or removed to federal court, or at another time that may be relevant to determining the court's jurisdiction. In most actions diversity will be determined by the citizenships that exist at the time the action is initially filed in federal court, or at the time the action is removed to federal court from a state court. But in some circumstances diversity must be determined by looking to the citizenships that exist at some other time. Changes of parties are one example. More complicated examples may arise from the rules that determine diversity jurisdiction for actions removed from a state court.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provision in Rule 7.1(a)(1) that extends the disclosure obligation to intervenors.

Changes Since Publication

Rule 7.1(a)(2) was changed in these ways: (1) intervenors are required to file a diversity disclosure statement; and (2) the time of the citizenships and attributed citizenships that must be disclosed is expanded from the time the action is filed to focus not only on the time the action is filed in or removed to federal court but also another time as may be relevant to determining the court's jurisdiction.

Rule 7.1(b) governing the time for disclosure is amended without publication to reflect the amendment of Rule 7.1(a)(1) that requires disclosure by an intervenor.

A summary of the public comments is attached as an appendix to this report.

B. For Publication

1. Supplemental Rules for Social Security Review

Introduction

The Advisory Committee recommends publication for comment of a new set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The broad nature of this

project is familiar from discussion in earlier Standing Committee meetings. The particular concerns that arise from rules that address a specific substantive area, captured in the "transsubstantivity" label, were discussed at the January 2020 meeting. The proposal is strongly supported by the Administrative Conference of the United States (the Administrative Conference) and the Social Security Administration (the SSA). Groups representing claimants' representatives have offered modest opposition. The Department of Justice opposes publication; without expressing doubts about the value of the proposed procedures——indeed, having propounded a model local rule that closely reflects early drafts of these procedures——the Department of Justice is of the view that the potential gains are not great enough to overcome the presumption for transsubstantivity.

The details of the proposed Supplemental Rules are described below. It suffices for introduction to note that the rules reflect the character of the § 405(g) actions they cover. These actions seek review on a closed administrative record governed by the familiar substantial evidence standard. They are every bit as much appellate in character as administrative review proceedings that go directly to a court of appeals without beginning on what may be a detour to, but often is final disposition in, a district court.

This project was not self-generated within the Enabling Act committee structure. It began with an elaborate study of disparate district court practices and outcomes by Professors Jonah Gelbach and David Marcus for the Administrative Conference. The Administrative Conference sent a recommendation to the Judicial Conference urging that special rules be adopted for § 405(g) review actions. The recommendation was framed in general terms that did not specify whether the rules might be framed as Civil Rules, Supplemental Rules to the Civil Rules, or some other kind of rules. The project was delegated to the Advisory Committee to consider possible additions to the Civil Rules.

A subcommittee was formed. It first brought the project on for discussion at the Advisory Committee's November 2017 meeting. The work has been pursued steadily since then. The subcommittee held two meetings that included representatives of the SSA, the Administrative Conference, the American Association for Justice, and the National Organization of Social Security Claimants Representatives. Representatives of most of those groups engaged in some of the subcommittee's conference calls. District judges and magistrate judges were involved in the formal meetings. At least some of the judges expressed frustration over their perception that the Civil Rules do not work well for § 405(g) cases and either force adoption of local practices that do work

or, for some, require adherence to unsuitable practices. Such resistance as plaintiffs' representatives have offered seems to be based on the comfort of adhering to known procedures that they have mastered, as well as the fear that some judges will be displeased by displacement of their own preferred practices and will react by providing less efficient review. No reasons have been expressed to doubt the efficacy of the practices embodied in the supplemental rules.

The subcommittee and the Advisory Committee repeatedly considered an alternative project that would attempt to draft uniform procedures for all administrative review actions that begin in a district court. A broader set of rules might offer several advantages. The first would be to establish procedures good for more than social security review actions. Another advantage would be to allay the concerns that arise around any proposal to create a substance-specific rule of procedure, concerns that are familiar from earlier meetings and that will be summarized below.

All-agency review rules, however, present serious challenges. The realm of administrative agencies is broad, and includes very different entities that act in very different ways on very different subjects. Indeed it could prove difficult to define limits that distinguish purely executive acts from "agency" acts. Some of the review actions that come to the district courts involve little if anything more than review on a paper administrative record. But others call for some use of the pretrial and even trial procedures that are used for actions brought to the court for initial disposition on the merits. An integrated set of rules for all of these actions would be complicated and might easily fail in practice.

Powerful reasons can be advanced for framing rules that address only social security review proceedings. A central reason is that almost all of them are pure appeals on a closed administrative record, whether it be the original record or a record as supplemented or completed on remand to the Social Security Administration. This uniform characteristic supports uniform review procedures. A related reason is that there are a great many social security review actions. A common estimate is that 17,000 to 18,000 are brought to the district courts every year, accounting for 7% to 8% of the civil docket. They receive substantial judicial attention——it may not be an exaggeration to suggest that a district court often lavishes more time on an individual claimant's case than it received in the agency hearing and appeal.

One last note of introduction. The draft Supplemental Rules are modest, indeed rather spare. The drafting process began by simplifying a long and intricate draft provided by the SSA, and proceeded by pruning off and paring down what remained. Clarity has been promoted by reverting to the supplemental rules format adopted for the first several drafts, abandoning the more compact effort to squeeze all provisions into a single new Civil Rule. These rules are so clear that they should be readily accessible to most pro se claimants. At the same time they establish an approach that will enable lawyers and courts to manage these appeals in a way that best realizes the aspirations of Civil Rule 1.

The Supplemental Rules

Rule 1. Review of Social Security Decisions Under 42 U.S.C. § 405(g)

(a) APPLICABILITY OF THESE RULES. These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim.

(b) FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules of Civil Procedure also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules.

Rule 2. Complaint

(a) COMMENCING ACTION. An action for review under these rules is commenced by filing a complaint with the court.

(b) CONTENTS.

(1) The complaint must state:

(A) that the action is brought under § 405(g), identifying the final decision to be reviewed;

(B) the name, the county of residence, and the last four digits of the social security number of the person for whom benefits are claimed;

(C) the name and last four digits of the social security number of the person on whose wage record benefits are claimed; and

(D) the type of benefits claimed.

(2) The complaint may include a short and plain statement of the grounds for relief.

Rule 3. Service

The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district [where the action is filed]. [If the complaint was not filed electronically, the court must notify the plaintiff of the transmission.] The plaintiff need not serve a summons and complaint under Civil Rule 4.

Rule 4. Answer; Motions; Time

(a) SERVING THE ANSWER. An answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 3.

(b) THE ANSWER. An answer may be limited to a certified copy of the administrative record, and to any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply.

(c) MOTIONS UNDER CIVIL RULE 12. A motion under Civil Rule 12 must be made within 60 days after notice of the action is given under Rule 3.

(d) TIME TO ANSWER AFTER A MOTION UNDER RULE 4(c). Unless the court sets a different time, serving a motion under Rule 4(c) alters the time to answer as provided by Civil Rule 12(a)(4).

Rule 5. Presenting the Action for Decision

The action is presented for decision by the parties' briefs. A brief must support assertions of fact by citations to particular parts of the record.

Rule 6. Plaintiff's Brief

The plaintiff must file and serve on the Commissioner a brief for the requested relief within 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 4(c), whichever is later.

Rule 7. Commissioner's Brief

The Commissioner must file a brief and serve it on the plaintiff within 30 days after service of the plaintiff's brief.

Rule 8. Reply Brief

The plaintiff may file a reply brief and serve it on the Commissioner within 14 days after service of the Commissioner's brief.

Committee Note

Actions to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g) have been governed by the Civil Rules. These Supplemental Rules, however, establish a simplified procedure that recognizes the essentially appellate character of actions that seek only review of an individual's claims on a single administrative record. These rules apply only to final decisions actually made by the Commissioner of Social Security. They do not apply to actions against another agency under a statute that adopts § 405(g) by considering the head of the other agency to be the Commissioner. There is not enough experience with such actions to determine whether they should be brought into the simplified procedures contemplated by these rules. But a court can employ these procedures on its own if they seem useful, apart from the Rule 3 provision for service on the Commissioner.

Some actions may plead a claim for review under § 405(g) but also join more than one plaintiff, or add a defendant or a claim for relief beyond review on the administrative record. Such actions fall outside these Supplemental Rules and are governed by the Civil Rules alone.

The Civil Rules continue to apply to actions for review under § 405(g) except to the extent that the Civil Rules are inconsistent with these Supplemental Rules. Supplemental Rules 2, 3, 4, and 5 are the core of the provisions that are inconsistent with, and supersede, the corresponding rules on pleading, service, and presenting the action for decision.

These Supplemental Rules establish a uniform procedure for pleading and serving the complaint; for answering and making motions under Rule 12; and for presenting the action for decision by briefs. These procedures reflect the ways in which a civil action under § 405(g) resembles an appeal or a petition for review of administrative action filed directly in a court of appeals.

Supplemental Rule 2 adopts the procedure of Civil Rule 3, which directs that a civil action be commenced by filing a complaint with the court. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal.

Simplified pleading is often desirable. Jurisdiction is pleaded under Rule 2(b)(1)(A) by identifying the action as one brought under § 405(g). The elements of the claim for review are adequately pleaded under Rule 2(b)(1)(B), (C), and (D). Failure to plead all the matters described in Rule 2(b)(1)(B), (C), and (D), moreover, should be cured by leave to amend, not dismissal. Rule 2(b)(2), however, permits a plaintiff who wishes to plead more than Rule 2(b)(1) requires to do so.

Rule 3 provides a means for giving notice of the action that supersedes Civil Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices for service, so long as it provides a means of electronic access to the complaint. Notice to the Commissioner is sent to the appropriate regional office. The plaintiff need not serve a summons and complaint under Civil Rule 4.

Rule 4's provisions for the answer build from this part of § 405(g): "As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are made." In addition to filing the record, the Commissioner must plead any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the Commissioner may wish to address in the pleadings.

The time to answer or to file a motion under Civil Rule 12 is set at 60 days after notice of the action is given under Rule 3. If a timely motion is made under Civil Rule 12, the time to answer is governed by Civil Rule 12(a)(4) unless the court sets a different time.

Rule 5 states the procedure for presenting for decision on the merits a § 405(g) review action that is governed by the Supplemental Rules. Like an appeal, the briefs present the action for decision on the merits. This procedure displaces summary judgment or such devices as a joint statement of facts as the means of review on the administrative record. Rule 5 also displaces local rules or practices that are inconsistent with the simplified procedure established by these Supplemental Rules for treating the action as one for review on the administrative record.

> All briefs are similar to appellate briefs, citing to the parts of the administrative record that support an assertion that the final decision is not supported by substantial evidence or is contrary to law.
>
> Rules 6, 7, and 8 set the times for serving and filing the briefs: 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 4(b) for the plaintiff's brief, 30 days after service of the plaintiff's brief for the Commissioner's brief, and 14 days after service of the Commissioner's brief for a reply brief. The court may revise these times when appropriate.
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> * * * * *

Rule 5 establishes the functional core of the Supplemental Rules. The case is presented for decision through the briefs. That is how an appeal is effectively presented. The other seven rules establish the procedures that establish the foundation for the briefs and set the times for serving and filing the briefs.

Rule 1 defines the cases that come within the Supplemental Rules and the relationship between the Supplemental Rules and the Civil Rules for those cases.

Rule 1(a) defines the scope of the Supplemental Rules. It limits them to the actions that present only a claim for benefits for a single individual, or perhaps plural claimants who rely on a single individual's wage record and circumstances. Such actions comprise an overwhelming majority of all § 405(g) review actions. Other actions, those that involve more claimants, more defendants, or claims in addition to the § 405(g) review claim, are governed by the Civil Rules alone.

Rule 1(b) supplements Rule 1(a) by recognizing that the Civil Rules "also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules." A great many of the Civil Rules remain relevant, even necessary, beginning with Rule 1. They are essential to orderly management of the action. Other of the Civil Rules will be relevant only in unusual circumstances. In rare cases, discovery may be appropriate to explore such matters as claims of improper ex parte contacts with an administrative law judge, other improprieties, or the completeness of the materials filed as the administrative record. Still other rules, such as the jury trial rules, are irrelevant. And as observed in the committee note, the procedure for review and decision on the briefs supersedes Rule 56 summary-judgment practice.

Pleading is simplified by Rules 2 and 4.

Rule 2 contemplates a complaint that is designed to do no more than identify the plaintiff, including the last 4 digits of the social security number that the SSA needs to ensure proper identification of the administrative record. The plaintiff remains free to add "a short and plain statement of the grounds for relief," but may omit any such statement. The Commissioner as defendant is required by Rule 4 to answer by filing the administrative record and pleading any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply, freeing the Commissioner from any obligation to respond to allegations in the complaint, but the Commissioner may respond to the allegations. Claimants, more likely those represented by counsel, may find it useful to plead more than Rule 2 requires as a means of educating the Commissioner about issues that may persuade the Commissioner to seek a voluntary remand. Voluntary remands are a common occurrence, and pleading may expedite the Commissioner's decision whether to ask for a remand.

Rule 3 supersedes the Civil Rule 4 provisions for service of the summons and complaint by directing that the court must notify the Commissioner by transmitting a Notice of Electronic Filing. This procedure has been adopted in some districts, and wins strong support from plaintiffs' representatives, the SSA, and court clerks. It has been universally popular from the moment it was introduced. The proposed rule text includes in brackets a sentence directing the court to notify the plaintiff of the transmission if the complaint was not filed electronically. Initial information indicates that the CM/ECF system cannot be manipulated in a way that will automatically generate a notice that can be delivered by non-electronic means. The brackets indicate a hope for comments that will address the level of the burden imposed on the clerk's office by requiring notice outside the CM/ECF system and the importance of providing this notice to the plaintiff.

Rule 4 is rounded out by subdivisions that address motion practice. These provisions serve primarily as reminders of Civil Rules provisions that would apply under Rule 1(b), in part to form a single compact package but more importantly to guide pro se plaintiffs.

As noted earlier, Rules 5 through 8 form a package that establishes the practice of presenting § 405(g) actions as appeals to be decided on the briefs and administrative record. The package is divided among separate rules to guide pro se plaintiffs as readily as can be managed.

The rule text is ready for public comment. The rule text has been reviewed by the Style Consultants and the Advisory Committee has approved the changes made in response to their comments. The prolonged process that generated these rules has included more contributions, from a wider variety of perspectives, than often emerge from public comments on rules that have no obvious constituencies. The process also revealed a number of engaged constituencies. Publication of the rules for comment in the full course of the rules committee process will provide an invaluable test. The subcommittee and full committee deliberations have come as far as can be without publication for comment, but public comments inevitably point out opportunities for improvement in both style and substance.

Substance-Specific Rules

Publication for comment also will test the wisdom of adopting any rules specific to the substantive task of § 405(g) review. The reasons for caution are familiar from earlier meetings, but can be summarized to pave the way for further discussion.

The reasons for caution in approaching substance-specific rules begin with the text of the Rules Enabling Act. Section 2072(a) authorizes "general" rules of practice and procedure and rules of evidence. Subsection (b) admonishes that "[s]uch rules shall not abridge, enlarge or modify any substantive right." Caution, however, is not the same as prohibition. The powerful tradition that Enabling Act rules generally should be transsubstantive is not unyielding. Familiar examples of substance-specific provisions in the Civil Rules are noted below. Other examples may be drawn from the Evidence Rules as well as from the Appellate Rules, authorized in the same sentence as the Civil Rules.

Familiar examples of Civil Rules and adjunct sets of rules that address specific subjects include both broad and narrow provisions. Broad examples include the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (Rule G was adopted in response to strong urging by the Department of Justice); the Rules for § 2254 Cases and the Rules for § 2255 Proceedings (the § 2254 Rules may be seen as hybrid because of the civil character of habeas corpus); and Civil Rule 71.1 for proceedings to condemn real and personal property by eminent domain. An earlier example was provided by the Copyright Rules that were framed around the 1909 Copyright Act and repealed through the Enabling Act process after enactment of the 1976 Copyright Act, surviving only in Civil Rule 65(f), which applies Rule 65 to copyright impoundment proceedings. Civil Rule 5.2 is

an example of a narrow provision that limits remote access to court files in social security and immigration proceedings. Even the familiar Civil Rule 9(b) provisions for pleading fraud and mistake with particularity are sometimes offered as substance-specific, although at least the fraud provision applies across a wide swath of fraud statutes as well as common-law fraud.

These examples suggest that transsubstantivity is best addressed by asking whether a particular proposal for procedures that apply only to a specific subject matter promises gains sufficient to overcome the grounds for caution. The inquiry might be expressed as a rebuttable presumption, applied by weighing the values advanced by a particular proposal against the general grounds for resisting substance-specific rules.

One of the chief concerns is that good substance-specific rules can be framed only by reaching a clear understanding of the substantive law and the real-world character of litigation to enforce that law. The long-drawn process that framed the proposed Supplemental Rules included several missteps that were corrected with the advice of expert social security litigators. The simplification of the rules that resulted may have erased all such mistakes. Public comment will provide an essential check, and a means of correcting any substance-related mistakes that may remain.

Another concern is that substance-specific rules may be tainted by special interests. The careful process of generating these rules, and the clear simplicity of the final proposal, provide strong reassurances on this score. The Administrative Conference has no apparent special interest. The SSA has its own interests, but one of them is acting in the public interest. To the extent that the rules make review actions more efficient, the benefits will flow to all parties and the courts as well.

Even rules that do not favor one side or another may be viewed with suspicion by one side or all sides. Perceptions are important. Care must be taken in advancing rules that in fact are neutral but that are clouded by suspicions of favoritism.

Concerns such as these focus on the fear that substance-specific rules may prove inferior in application to applying the general rules. They have played a relatively minor role in considering rules for social security review actions. As noted above, some representatives of the claimants' bar have suggested that new rules would disrupt proceedings before judges that have become comfortable with their own practices, whatever they may be. And some perceive that rules advocated by the SSA must benefit the SSA, even if only from a workload or resource

perspective. But the practical value of the proposed supplemental rules has not been seriously questioned. Only publication for comment will test their value further.

Concern about making yet another departure from transsubstantivity has largely displaced questions about the quality of the proposed rules. The Department of Justice explained its dissenting vote from the committee recommendation that the rules be published for comment by invoking this concern. The fear is that adopting any new substance-specific rules will serve as an invitation to private interest groups to press for other substance-specific rules that promote private advantage. Even public entities that seek to promote their own views of the public interest may be encouraged to make unwise proposals. At best, the Rules Committees will need to devote limited resources to fending off these proposals. At worst, the barrier may be breached for unworthy procedures.

Experience with proposals designed to advance particular interests is not wanting. Often the proposals are framed in transsubstantive terms. At other times they take on a more particular, and occasionally clear, substance-specific focus. Proponents may take their proposals to Congress after failing in the Rules Committees, or may choose to go directly to Congress. Resisting legislative proposals is a sensitive and burdensome responsibility. Unwavering adherence to a strong presumption against substance-specific rules may make resistance more effective.

Balancing the value of particular proposed rules against the general concerns expressed as transsubstantivity is an important and at times difficult task. The social security review rules present an instance that can fairly be described as weighing the value of good and nationally uniform procedures against the generic concerns about substance-specific rules. The Department of Justice itself has propounded a model local rule for social security review actions and supported it for adoption by district courts. The model rule closely resembles earlier committee drafts. The Department's doubts about the proposed rules reflect its view that the presumption against substance-specific rules should not be rebutted simply because better procedures can be crafted for a particular category of adjudication. On this view, substance-specific local rules do not impair the transsubstantivity approach that should be preserved in national rules.

The Advisory Committee believes that the proposed Supplemental Rules will advance adjudication of § 405(g) appeal actions in important ways, sufficient to overcome the

transsubstantivity presumption. That proposition deserves to be tested by publication for comment.

2. Rule 12(a)(4): Time to Respond When Official Sued as Individual

The Advisory Committee recommends publication for comment of a proposal made by the Department of Justice to amend Rule 12(a)(4). Rule 12(a)(4) sets at 14 days the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or postponed its disposition until trial. The Department of Justice suggests that the time should be set at 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States:

> (4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
>
> (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or * * *

This proposal is a logical extension of the concerns that led to the adoption of Rule 12(a)(3) in 2000 and of Appellate Rule 4(a)(1)(B)(iv) in 2011. Rule 12(a)(3) sets the time to respond in such actions at 60 days, and Rule 4(a)(1)(B)(iv) sets the time to appeal at 60 days. The Department of Justice often provides representation for officers and employees sued in these individual-capacity actions. The Department needs more time than most litigants, in part in deciding whether to provide representation and in part in providing the representation. These needs may arise when the Rule 12 motion is made, and perhaps even denied or postponed, before the Department has become involved.

The need for more than the usual 14-day period to respond is enhanced in the 12(a)(4) setting by at least one further concern. An official or employee sued in an individual capacity often may invoke an official-immunity defense. The collateral-order doctrine establishes appeal jurisdiction over denial of a motion to dismiss based on qualified or absolute immunity, free from the distinctions that complicate appeals from denials of summary judgment. If the Department is already representing the employee

it needs time to decide whether a collateral-order appeal is sensible, including the time needed for authorization of the appeal by the Solicitor General. And if it has not yet undertaken to provide representation, the need for time is still greater, and the officer or employee may face the need to decide whether to appeal within the 14-day period now provided.

If a case should present an unusual need for a faster response, the court retains authority to set a different time.

Proposed 12(a)(4) Amendment

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: * * *

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or * * *

Committee Note

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days to serve a responsive pleading after the court denies a motion under Rule 12 or postpones its disposition until trial. The United States often represents the officer or employee in such actions. The same reasons that support

the 60-day time to answer in Rule 12(a)(3) apply when the answer is required after denial or deferral of a Rule 12 motion. In addition, denial of the motion may support a collateral-order appeal when the motion raises an official immunity defense. Appellate Rule 4(a)(1)(B)(iv) sets the appeal time at 60 days in these cases, and includes "all instances in which the United States represents that person [sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf] when the judgment or order is entered or files the appeal for that person." The additional time is needed for the Solicitor General to decide whether to file an appeal and avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.

II. Information Items

A. Subcommittee Work

1. MDL Subcommittee

Since the Standing Committee's last meeting, the MDL Subcommittee has continued to explore and gather information about the issues it has been considering, though the COVID-19 crisis delayed some work. It has held conference calls on Jan. 10, 2020, and March 10, 2020.

This work is ongoing. As reported at the last Standing Committee meeting, the subcommittee concluded that third party litigation funding, though seemingly of growing importance, was not peculiarly important in MDL litigation. Accordingly, the Advisory Committee is continuing to monitor developments on this topic, and to compile information about it. The Rules Law Clerk is doing research as well. It remains unclear whether any rulemaking will result, however.

This report updates the Standing Committee on the three areas that remain on the MDL Subcommittee's "front burner." Recently, the subcommittee's main focus has been on the third topic discussed below——a possible role for the court in settlement review in connection with supervision of leadership counsel. On the first topic——the new idea of an initial "census" of claims——it is awaiting developments in ongoing MDL proceedings in which such novel efforts are being attempted. Regarding the second topic——expanded interlocutory review of orders in MDL proceedings——it has tentatively concluded that there is no promising way to limit a rule authorizing such review to certain

MDLs or to certain types of orders, and is therefore attempting to gather information about how any such rule might affect other MDL proceedings.

(1) Early Vetting, PFS and DFS Requirements, and an initial "census" of claims: Often, JPML centralization of litigation is followed by the filing of a large number of new claims. It appears to the subcommittee that there has been a significant shift in the positions of attorneys about how best to address this issue as subcommittee discussions have also evolved. That evolution continues.

One reaction early reported to the subcommittee was the development of orders for "plaintiff fact sheets" (PFS). At the subcommittee's request, the Federal Judicial Center (the FJC) researched the use of PFS orders, and found that they were already used very frequently in larger MDL proceedings, and used in virtually all of the "mega" MDL proceedings with more than 1,000 cases. In most of those "mega" proceedings, defendant fact sheets (DFS) were also required, often calling for defendants to provide information to the plaintiffs without the need for formal discovery.

One view of PFS and DFS practice is that it is an effective way to "jump start" discovery in larger MDLs. Another view of this practice is that it enables early screening out of unsupportable claims. Although to some extent plaintiffs' counsel and defense counsel agreed that methods of determining whether there were unsupportable claims might be desirable, there was resistance to rules requiring plaintiffs to provide discovery before they were allowed to take discovery. And the point was also made that, even if some proportion of the claims were not supportable, the rest should be allowed to go forward without undue delay.

The FJC research also showed that PFS and DFS requirements, while often having similarities from one MDL proceeding to another, were almost always tailored to the specific MDL proceeding before the court. And that tailoring often took considerable time to complete. Beyond that, some viewed the PFS and DFS requirements in some MDL proceedings as excessive and overly demanding. These concerns made the prospect of drafting a rule for all or certain MDL proceedings exceedingly challenging.

That challenge was compounded by the recurrent point made by experienced MDL transferee judges that they needed flexibility in designing appropriate procedures for the cases before them. One size would not likely fit all, the subcommittee was repeatedly told.

As these discussions proceeded, the views of the participants seemed to evolve. It might even be that the subcommittee's attention served as a small catalyst to this evolution. In any event, eventually the focus shifted somewhat. In place of reliance on PFS/DFS practice, the more promising idea came to be known as a "census," an effort to gain some basic details on the claims presented——e.g., evidence of exposure to the product at issue——so as to permit an initial assessment of the dimensions and challenges of the litigation. This need not be a substitute for a PFS, but rather a beginning for an information exchange that might later include a PFS and a DFS. It might also provide the court with information that could be valuable in selection of leadership counsel.

This census idea has been the focus of work since mid-2019. As of this writing, something of the sort is ongoing or under consideration in at least four major MDL proceedings:

In re Juul (Judge Orrick, N.D. CA.): In October 2019, Judge Orrick directed counsel involved in the MDL proceeding *In re Juul Labs, Inc., Marketing, Sales Practices, and Product Liability Litigation* (MDL 2913) to develop a plan to "generat[e] an initial census in this litigation," with the assistance of Prof. Jaime Dodge of Emory Law School, who has organized several events attended by representatives of the MDL Subcommittee. The census requirements applied to all counsel who sought appointment to leadership positions. It appears that relatively complete responses were submitted in December 2019, after which the judge appointed leadership counsel. Disclosures from defendants were due during January. The census method can provide plaintiff-side counsel with a uniform set of questions to ask prospective clients. The census requirements under Judge Orrick's order apply not only to cases on file but also any other clients with whom aspiring leadership counsel had entered into retention agreements. Discussions are under way on the next steps in the litigation, which may involve plaintiff profile sheets or a PFS. The census in this case was not primarily designed as a vetting device, but it is possible that having in hand a list of the sorts of information the court expects from claimants may prompt some counsel to be more focused in evaluating potential claims than would otherwise occur.

In re 3M (Judge Rodgers, N.D. FL): The claims relate to alleged hearing damages related to earplugs that were largely distributed by the military. After appointment of leadership counsel, the judge had counsel design an initial census. But that undertaking involved obtaining military records, an effort that added a layer of complexity to the

census. In addition, the due date for census responses was different depending on whether the case had been formally filed or was entered into an "administrative docket" the judge had created. As a general matter, the census was completed in December 2019.

In re Zantac (Judge Rosenberg, S.D. FL) (Judge Rosenberg is a member of the MDL Subcommittee): This litigation involves a product designed for treatment of heartburn. The MDL includes class claims and individual personal injury claims, and some may go back decades. The litigation is in the early stages of organization. The court ordered an initial census including all filed claims and any unfiled claims represented by an applicant for a leadership position. There have been 63 applicants for leadership positions, and the court has received initial census forms regarding more than 800 filed claims and more than 40,000 unfiled claims. Leadership counsel are to be appointed in May, and a "census plus" form will be due 60 days after that.

In re Allergan (Judge Martinotti, D.N.J.): This litigation involves medical implant devices alleged to cause a very specific harmful medical condition in some users. Initial phases of the litigation have focused on selection of leadership counsel. It is possible, but not certain, that a census will be used once leadership counsel are appointed. In this litigation, it may be that records of implants and development of the signature medical consequence would be suitable subjects for a census. Judge Martinotti had extensive experience with complex litigation while on the New Jersey state court before appointment to the federal bench.

The above four MDL proceedings are the only ones of which the subcommittee is presently aware that may produce information about census techniques. But there may be additional proceedings trying out this technique during 2020.

For the present, the subcommittee is monitoring these developments. Depending on the results of these efforts, it may emerge that a census technique is often desirable. But it may be that a rule amendment addressing that technique would be less flexible and useful than a manual or judicial education effort. Whatever the ultimate outcome, it does seem that ongoing attention from the subcommittee has contributed to the evolution of innovative responses to these problems.

(2) Interlocutory Review of Orders in MDL Proceedings: If the positions of the parties have moved closer together in regard

to the census idea described above, no similar confluence has occurred with regard to facilitating interlocutory review of rulings by MDL transferee judges.

The proponents of rules facilitating interlocutory review in MDL proceedings have urged that orders in those cases may have much greater importance than orders in ordinary civil actions. In particular, when orders effectively apply in a multitude of individual cases the importance of interlocutory review increases appreciably. Moreover, proponents of expanded review cited several recurrent critical issues——preemption and *Daubert* decisions on admissibility of expert testimony, for example——that could resolve most or all cases in the MDL. As to these sorts of "cross-cutting" issues, they contended, there was inequality of treatment: a victory by defendants would often result in a final judgment that would permit plaintiffs to appeal, while a victory by plaintiffs would not permit defendants to take an immediate appeal because the litigation would continue.

Opponents of rule-based expansion of interlocutory review in MDL proceedings emphasized that there are already multiple routes to appellate review, particularly under 28 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). For recent examples of interlocutory review sought or obtained in MDL proceedings, *see In re National Opiate Litig.*, 956 F.3d 838(6th Cir., Apr. 15, 2020)(granting writ of mandamus on defendants' petition); *In re General Motors LLC Ignition Switch Litig.*,___ F. Supp.3d ___, 2019 WL 6827277 (S.D.N.Y., Dec. 12, 2019) (certifying issue for appeal under § 1292(b) on plaintiffs' motion); *In re Blue Cross Blue Shield Antitrust Litig.*, 2018 WL 3326850 (N.D. Ala., June 12, 2018) (certifying issue for appeal under § 1292(b) on defendants' motion). Expanding review would lead to a broad increase in appeals and produce major delays without any significant benefit, particularly when the order is ultimately affirmed after extended proceedings in the court of appeals. And, of course, the "inequality" of treatment complained of is a feature of our system for all civil cases, not just MDLs.

One concern the subcommittee had about whether § 1292(b) might not be suited to MDL proceedings was that it authorizes a district court to certify an order for immediate appeal only on finding that (i) there is a "controlling question of law" as to which (ii) "there is substantial ground for difference of opinion" and (iii) that immediate review would "materially advance the ultimate termination of the litigation." But research by the Rules Law Clerk indicated that judges asked to certify orders in MDL proceedings do not suggest that the statutory standards constrain their ability to grant certification if appropriate, although they scrupulously examine each factor and

frequently comment on their circuit's receptivity to § 1292(b) appeals. No case shows that a district judge has denied certification because of inflexibility of the statutory criteria.

In sum, the research to date seems to support the following conclusions:

1. There are not many § 1292(b) certifications in MDL proceedings.

2. The reversal rate when review is granted is relatively low (about the same as in civil cases generally).

3. A substantial time (nearly two years) on average passes before the court of appeals rules.[1]

4. The courts of appeals (and district courts) appear to acknowledge that there may be stronger reasons for allowing interlocutory review because MDL proceedings are involved.

The subcommittee continues to work on these issues, with its current focus on a number of issues:

Scope - all MDLs or only some of them: Various ways of distinguishing among MDL proceedings and creating a special avenue of appeal only in some of them have been raised. These include case type (e.g., "personal injury"), dimensions of the MDL proceeding (100 claims or cases, or 500 claims or cases, or 1,000 claims or cases) or perhaps other criteria. Applying some of these criteria seemed likely to be difficult. At least equally important, however, was a sense that it is very difficult to draw a principled line between MDL proceedings eligible for broadened interlocutory review and those that are not. Instead, if a rule is to be considered seriously, it may be best to focus

[1] Prof. Steven Sachs, a member of the Appellate Rules Advisory Committee, has made an intriguing suggestion that a rule might provide that the district judge could indicate in a § 1292(b) certification that immediate review would "materially advance the ultimate termination of the litigation" (in the statute's words) only if the court of appeals handled the case on an "expedited" basis. This might support a rule that leaves it entirely up to the court of appeals' discretion whether to expedite review or limits the court of appeals' discretion to granting review only if there will be expedited review. Such limitations might unduly intrude into the court of appeals' management of its docket. The MDL Subcommittee has begun to consider this idea.

on a rule that applies to all MDLs and leaves the decision whether to authorize an appeal in a given proceeding to the judicial officers involved.

Scope - type of order: A different, or additional, method of creating only a narrow additional avenue for interlocutory review would be to limit the rule to certain types of orders. Examples suggested include admissibility decisions under the *Daubert* standard, preemption decisions, and perhaps some jurisdictional decisions. As noted below, the subcommittee has reached an initial consensus that it would be important to include a method for the district court to express views on whether immediate review would be helpful. Given that, it may be counterproductive to permit the district court to recommend immediate review only with regard to orders of certain specified types. In addition, the application of such a standard might itself invite litigation.

Scope - "Cross-cutting orders": A related idea is that review should focus on orders that could significantly affect large numbers of cases. Some orders (perhaps preemption in some instances) could be cross-cutting because they would effectively resolve many or perhaps most of the pending cases. Whether specific types of orders (e.g., preemption) are more likely to satisfy such a standard is uncertain. But it does seem that few endorse expanded immediate review for orders of whatever sort that apply to only one or two of the cases in an MDL. Perhaps transferee judges would customarily defer consideration of such single-case matters and instead concentrate on the cross-cutting issues in the proceeding. But putting this idea into a rule might prove quite difficult.

Role of district court: Some proponents of expanded interlocutory review regard the district court "veto" under § 1292(b) as an unfortunate obstacle in some cases, perhaps leaving some defendants "trapped" in the district court facing hundreds or thousands of cases. So the proponents of expanding review urge the Rule 23(f) model, with the decision whether to accept an immediate appeal left entirely up to the court of appeals. But it can be said that the issues involved in Rule 23(f) petitions for review (whether the court properly applied Rule 23 certification standards) involve a much narrower band of legal questions than those that might arise regarding all pretrial orders in MDL proceedings. The difficulty discussed above in relation to limiting the scope of any rule to only some types of orders underscores this point.

After discussion, the subcommittee's initial consensus is that a rule should call for an expression up front from the district judge on whether immediate review would be helpful. It is difficult to understand, for example, how the court of appeals could make a decision whether to accept a petition for immediate review without receiving such a report. Accordingly, it seems better to contemplate making such a recommendation part of the architecture of any rule, if one is to be devised, than to depend on an invitation from the court of appeals.

"Expedited" review: One matter that may bear substantially on the desirability of immediate review is the amount of time that review will take. It may be that receiving an answer from the court of appeals in six months would make immediate appeal a good deal more promising than getting an answer in two or three years. (In this connection, the question of a stay during appellate review might become important.)

Although the duration of prospective appellate review may be of great importance to a district judge asked to express an opinion about the desirability of such review, it is difficult to see how this factor could be fit into a rule as a criterion. For one thing, there may be considerable variety in what different courts of appeals would consider "expedited" treatment. The Speedy Trial Act actually includes time limits expressed in specified numbers of days; at present, there is no enthusiasm in the subcommittee for a rule of that sort, whether in the Appellate Rules or the Civil Rules. And any emphasis on "expedited" treatment necessarily raises the question "expedited in comparison to what"? Surely there are some matters pending before courts of appeals that all would agree are more urgent than review of one or another order in an MDL proceeding.

Standard for granting review: Section 1292(b) articulates standards for granting review. Rule 23(f), relying entirely on the discretion of the court of appeals, does not articulate any standards. Most or all courts of appeals have, however, developed and announced standards for handling Rule 23(f) petitions. Some concerns had arisen about whether the § 1292(b) standards were really suited to MDL proceedings. Should review be limited to a "controlling question of law" as to which there is "substantial ground for difference of opinion"? Particularly in light of the promulgation of Fed. R. Evid. 702, it might be said that *Daubert* issues might never fit such a standard. Though there may be a fierce debate about how the Rule 702 standard

should be applied to proposed expert testimony, that does not seem to be a substantial difference of opinion about the standard itself.

It is not clear, however, that the arguably strict statutory terms have actually constricted district judge decisions whether to certify questions for immediate review. As research by the Rules Law Clerk showed, many courts regard MDL proceedings as presenting good reasons for a more expansive attitude toward the § 1292(b) standards. There is little or no indication in reported decisions from district judges in MDL proceedings that the statutory standards have prevented them from certifying for review when they felt it was appropriate. But it may be that other MDL transferee judges take a more literal view of the statute's standards and do feel they cannot certify for immediate review even though they think it would be desirable.

It may be, thus, that a standard focusing only on whether review would be helpful to the district court, and leaving out the "controlling question of law" and "substantial ground for difference of opinion" criteria would be a helpful change. The other standard in § 1292(b)——"materially advance the ultimate termination of the litigation"——also seems somewhat off the mark for proceedings in which the transferee judge is authorized only to complete "pretrial proceedings" and cannot, without consent, hold a trial of an action transferred pursuant to § 1407 due to the Supreme Court's *Lexecon* decision. Perhaps a standard better focused on the MDL situation——such as "materially [advance] {facilitate} [expedite] the pretrial proceedings before the district court" would be the proper focus.

Retaining district court veto: If revising the § 1292(b) standards would provide important benefits, it might be sensible to retain the district court veto that is in the statute. Particularly if a rule modified the standard and prompted the district court to express its view that an appeal would not be desirable, it seems unlikely that a court of appeals would often grant review nonetheless. So the actual difference between a rule directing only that the transferee court should articulate its views on the desirability of immediate review and a rule requiring district court certification as a prerequisite for immediate review might be very small. And if that's true, it is not clear why the additional effort and delay of having the court of appeals review the matter to decide whether to go ahead over the objections of the district court would be warranted.

As part of its effort to obtain guidance about these interlocutory appeal issues, the subcommittee hoped to receive insights from practitioners experienced with MDL proceedings other than "mass tort" cases during an event scheduled to occur on April 14. But that event could not go forward due to the COVID-19 crisis. An online event of this sort is scheduled for June 19. Pending the results of that discussion, these topics remain on the agenda.

(3) Settlement Review, Appointment of Leadership Counsel, Attorney's Fees, and Common Benefit Funds: This may be the toughest area the MDL Subcommittee faces. The subcommittee has begun focusing on this set of issues during the Spring, and explored these issues during the Advisory Committee meeting in April. It invites insights from Standing Committee members. In general, the idea would be to develop for at least some MDL proceedings some judicial supervision regarding settlement like that provided in Rule 23 for class actions.

The class action settlement review procedures were recently revised by amendments that became effective on Dec. 1, 2018, which fortified and clarified the courts' approach to determining whether to approve a proposed settlement. Earlier, in 2003 Rule 23(e) was expanded beyond a simple requirement for court approval of class-action settlements or dismissals, and Rules 23(g) and (h) were also added to guide the court in appointing class counsel and awarding attorney's fees and costs to class counsel. Together, these additions to Rule 23 provide a framework for courts to follow that was not included in the original 1966 revision of Rule 23.

In class actions, a judicial role approving settlements flows from the binding effect Rule 23 prescribes for a class-action judgment. Absent a court order certifying the class, there would be no binding effect. After the rule was extensively amended in 1966, settlement became normal for resolution of class actions, and certification solely for purposes of settlement also became common. Courts began to see themselves as having a "fiduciary" role to protect the interests of the unnamed (and otherwise effectively unrepresented) members of the class certified by the court.

Part of that responsibility connects with Rule 23(g) on appointment of class counsel, which requires class counsel to pursue the best interests of the class as a whole, even if not favored by the designated class representatives. The court may approve a settlement opposed by class members who have not opted out. The objectors may then appeal to overturn that approval; otherwise they are bound despite their dissent. Now, under

amended Rule 23(e), there are specific directions for counsel and the court to follow in the approval process.

MDL proceedings are different. True, sometimes class certification is a method for resolving an MDL, therefore invoking the provisions of Rule 23. But otherwise all of the claimants ordinarily have their own lawyers. Section 1407 only authorizes transfer of pending cases, so claimants must first file a case to be included. ("Direct filing" in the transferee court has become fairly widespread, but that still requires a filing, usually by a lawyer.) As a consequence, there is no direct analogue to the appointment of class counsel to represent unnamed class members (who may not be aware they are part of the class, much less that the lawyer selected by the court is "their" lawyer). The transferee court cannot command any claimant to accept a settlement accepted by other claimants, whether or not the court regards the proposed settlement as fair and reasonable or even generous. And the transferee court's authority is limited, under the statute, to "pretrial" activities, so it cannot hold a trial unless that authority comes from something beyond a JPML transfer order.

Notwithstanding these structural differences between class actions and MDL proceedings, one could also say that the actual evolution of MDL proceedings over recent decades——perhaps particularly "mass tort" MDL proceedings——has somewhat paralleled the emergence since the 1960s of settlement as the common outcome of class actions. Whether or not this outcome was foreseen in the 1960s when the transfer statute was adopted, it seems to be the norm today.

This evolution has involved substantial court participation. Almost invariably in MDL proceedings involving a substantial number of individual actions, the transferee court appoints "lead counsel" or "liaison counsel" and directs that other lawyers be supervised by these court-appointed lawyers. The *Manual for Complex Litigation* (4th ed. 2004) contains extensive directives about this activity:

> § 10.22. Coordination in Multiparty Litigation——Lead/Liaison Counsel and Committees
> § 10.221. Organizational Structures
> § 10.222. Powers and Responsibilities
> § 10.223. Compensation

So sometimes——again perhaps particularly in "mass tort" MDLs——the actual evolution and management of the litigation may resemble a class action. Though claimants have their own lawyers (sometimes called IRPAs——individually represented plaintiffs'

attorneys), they may have a limited role in managing the course of the MDL. A court order may forbid the IRPAs to initiate discovery, file motions, etc., unless they obtain the approval of the attorneys appointed by the court as leadership counsel. In class actions, a court order appointing "interim counsel" under Rule 23(g) even before class certification may have a similar consequence of limiting settlement negotiation (potentially later presented to the court for approval under Rule 23(e)), which might be likened to the role of the court in appointing counsel to represent one side or the other in MDL proceedings.

At the same time, it may appear that at least some IRPAs have gotten something of a "free ride" because leadership counsel have done extensive work and incurred large costs for liability discovery and preparation of expert presentations. The *Manual for Complex Litigation* § 14.215 (4th ed. 2004)provides: "Early in the litigation, the court should define designated counsel's functions, determine the method of compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions."

One method of doing what the *Manual* directs is to set up a common benefit fund and direct that in the event of individual settlements a portion of the settlement proceeds (usually from the IRPA's attorney's fee share) be deposited into the fund for future disposition by order of the transferee court. And in light of the "free rider" concern, the court may also place limits on the percentage of the recovery that non-leadership counsel may charge their clients, sometimes reducing what their contracts with their clients provide.

The predominance of leadership counsel can carry over into settlement. One possibility is that individual claimants will reach individual settlements with one or more defendants. But sometimes MDL proceedings produce aggregate settlements. Defendants frequently are not willing to fund such aggregate settlements unless they offer something like "global peace." That outcome can be guaranteed by court rule in class actions, because preclusion is a consequence of judicial approval of the classwide settlement, but there is no comparable rule for MDL proceedings.

Nonetheless, various provisions of proposed settlements may exert considerable pressure on IRPAs to persuade their clients to accept the overall settlement. On occasion, transferee courts may also be involved in the discussions or negotiations that lead to agreement to such overall settlements. For some transferee judges, achieving such settlements may appear to be a significant objective of the centralized proceedings. At the same time, some

have wondered whether the growth of "mass" MDL practice is in part due to a desire to avoid the greater judicial authority over and scrutiny of class actions and the settlement process under Rule 23.

The absence of clear authority or constraint for such judicial activity in MDL proceedings has produced much uneasiness among academics. One illustration is Prof. Burch's recent book *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* (Cambridge U. Press, 2019), which provides a wealth of information about recent MDL mass tort litigations. In brief, Prof. Burch urges that it would be desirable if something like Rules 23(e), 23(g), and 23(h) applied in these aggregate litigations. In somewhat the same vein, Prof. Mullenix has written that "[t]he non-class aggregate settlement, precisely because it is accomplished apart from Rule 23 requirements and constraints, represents a paradigm-shifting means for resolving complex litigation." Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 Rev. Lit. 129, 135 (2018). Her recommendation: "[B]etter authority for MDL judicial power might be accomplished through amendment of the MDL statute or thorough authority conferred by a liberal construction of the All Writs Act." *Id.* at 183.

Achieving a similar goal via a rule amendment might be possible by focusing on the court's authority to appoint and supervise leadership counsel. That could at least invoke criteria like those in Rule 23(g) and (h) on selection and compensation of such attorneys. It might also regard oversight of settlement activities as a feature of such judicial supervision. However, it would not likely include specific requirements for settlement approval like those in Rule 23(e).

But it is not clear that judges who have been handling these issues feel a need for either rules-based authority or further direction on how to wield authority already widely recognized. Research has found that judges do not express a need for greater or clarified authority in this area. And the subcommittee has not, to date, been presented with arguments from experienced counsel in favor of proceeding along this line. All participants——transferee judges, plaintiffs' counsel and defendants' counsel——seem to prefer avoiding a rule amendment that would require greater judicial involvement in MDL settlements.[2]

[2] One more recent development deserves mention. On Sept. 11, 2019, Judge Polster used Rule 23 to certify a "negotiation class" to negotiate a settlement on behalf of local governmental entities with

For the present, the subcommittee has begun discussing this subject. This very preliminary discussion has identified a number of issues that could be presented if serious work on possible rule proposals occurs. These issues include the following:

Scope: Appointment of leadership counsel and consolidation of cases long antedate the passage of the Multidistrict Litigation Act in 1968. As with the PFS/census topic and the possible additional interlocutory appeal provisions, a question on this topic would be whether it applies only to some MDLs, to all MDLs, or also to other cases consolidated under Rule 42. The *Manual for Complex Litigation (Fourth)* has pertinent provisions, and has been applied to litigation not subject to an MDL transfer order. Its predecessor, the Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960), antedated Chief Justice Warren's appointment of an ad hoc committee of judges to coordinate the handling of the outburst of Electrical Equipment antitrust cases, which proved successful and led to the enactment of § 1407.

Standards for appointment to leadership positions: Section 10.224 of the *Manual for Complex Litigation (Fourth)* contains a list of considerations for a judge appointing leadership counsel. Rule 23(g) has a set of criteria for appointment of class counsel. Though similar, these provisions are not identical. Any rule could opt for one or another of those models, or offer a third template. When an MDL includes putative class actions, it would seem that Rule 23(g) is a reasonable starting place, however.

Interim lead counsel: Rule 23(g) explicitly authorizes appointment of interim class counsel. The goal is that the person or persons so appointed would be subject to the requirements of Rule 23(b)(4) that counsel act in the best interests of the class as a whole, not only those with whom counsel has a retainer agreement. In some MDL proceedings, an initial census or other activity may precede the formal appointment of leadership counsel. Whether such interim leadership counsel can negotiate a proposed global settlement (as interim class counsel can negotiate before certification about a pre-certification classwide settlement) could raise issues not pertinent in class

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claims involved in the Opioids MDL. *See In re National Prescription Opiate Litigation*, 2019 WL 4307851 (N.D. Ohio, Sept. 11, 2019). On Nov. 8, 2019, the Sixth Circuit granted a petition under Rule 23(f) to review Judge Polster's certification order. *See In re National Opiate Litigation*, 6th Cir. Nos. 19-305 and 19-306.

actions. It may be that the more appropriate assignment of such interim counsel should be——as seems to be true of the MDL proceedings where this has occurred——to provide effective management of such tasks as an initial census of claims.

Duties of leadership counsel: Appointment orders in MDL proceedings sometimes specify in considerable detail what leadership counsel are (and perhaps are not) authorized to do. Such orders may also restrict the actions of other counsel. Significant concerns have arisen about whether leadership counsel owe a duty of loyalty, etc., to claimants who have retained other lawyers (the IRPAs). Some suggest that detailed specification of duties of leadership counsel from the outset would facilitate avoiding "ethical" problems later on. The subcommittee has heard that some recent appointment orders productively address these issues.

It seems true that the ordinary rules of professional responsibility do not easily fit such situations. Regarding class actions, at least, Restatement (Third) of the Law Governing Lawyers § 128 recognized that a different approach to attorney loyalty had been taken in class actions. It may be that similar issues inhere in the role of leadership counsel in MDL proceedings. Both the wisdom of rules addressing these issues, and the scope of such rules (on topics ordinarily thought to be governed by state rules of professional conduct) are under discussion. Given that most (or all) claimants involved in an MDL actually have their own lawyers (not ordinarily true of most unnamed class members), it may be that rule provisions ought not seek to regulate these matters.

Common benefit funds: Leadership counsel are obliged to do extra work and incur extra expenses. In many MDLs, judges have directed the creation of "common benefit funds" to compensate leadership counsel for undertaking these extra duties. A frequent source of the funds for such compensation is a share of the attorney fees generated by settlements, whether "global" or individual. In some instances, MDL transferee courts have sought thus to "tax" even the settlements achieved in state-court cases not formally before the federal judge. From the judicial perspective, it may appear that the IRPAs are getting a "free ride," and that they should contribute a portion of their fees to pay for that ride.

Capping fees: Somewhat in keeping with the "free ride" idea, judges have sometimes imposed caps on fees due to IRPAs at a

lower level than what is specified in the retainer agreements these lawyers have with their clients. The rules of professional responsibility direct that counsel not charge "unreasonable" fees, and sometimes authorize judges to determine that a fee exceeds that level. It is not clear whether this "capping" activity is as common as orders creating common benefit funds. Whether a rule should address, or try to regulate, this topic is uncertain.

Judicial settlement review: As some courts put it, the court's role under Rule 23(e) is a "fiduciary" one, designed to protect unnamed class members against being bound by a bad deal. But ordinarily in an MDL each claimant has his or her own lawyer. There is no enthusiasm for a rule that interferes with individual settlements, or calls for judicial review of them (although those settlements may result in a required payment into a common benefit fund, as noted above).

So it may seem that a rule for judicial review of settlement provisions in MDL proceedings is not appropriate. But it does happen that "global" settlements negotiated by leadership counsel are offered to claimants, with very strong inducements to them or their lawyers to accept the agreed-upon terms. In such instances, it may seem that sometimes the difference from actual class action settlements is fairly modest. Indeed, in some instances there may be class actions included in the MDL, and they may become a vehicle for effecting settlement.

As noted above, it appears that some leadership appointment orders include negotiating a "global" settlement as among the authorities conferred on leadership counsel. Even if that is not so, it may be that leadership counsel actually do pursue settlement negotiations of this sort. To the extent that judicial appointment of leadership can produce this situation, then, it may also be appropriate for the court to have something akin to a "fiduciary" role regarding the details of such a "global" settlement.

Ensuring that any MDL rules mesh with Rule 23: As noted, MDLs include class actions with some frequency. So sometimes Rules 23(e), (g) and (h) would apply. But it is certainly possible that in some MDLs there are both claims included in class actions and other claims that are not. If the MDL rules for the topics discussed above do not mesh with Rule 23, that could be a source of difficulty. Perhaps that is unavoidable; this potential dissonance presumably already exists in some MDL proceedings. But the possibility of

tensions or even conflicts between MDL rules and Rule 23 merits ongoing attention.

In March, the subcommittee had a conference call to begin discussing the foregoing issues in some detail. The focus was on whether there should be some formal statement of many practices that have been adopted——and sometimes become widespread——in managing MDL proceedings. Whether such a statement ought to be in the rules is not clear. There are alternative locations, including the *Manual for Complex Litigation (Fourth)*, the annual conference the Judicial Panel puts on for transferee judges, and the JPML's website. Perhaps it could be sufficient to expect that experienced MDL litigators will carry the issues and related practices from one proceeding to another, and experienced MDL transferee judges will communicate among themselves and with those new to the fold.

Relying on informal circulation prompted a repeated concern during the subcommittee's conference call——there is good reason to make efforts to expand and diversify the ranks of lawyers who take on leadership positions. Anything that formalizes best practices should not impede progress on this important effort. On the other hand, some formal statement might be advantageous by making these practices known more widely and more accessible to those not steeped in this realm of practice.

Another consideration is the possibility that some judges or litigators might entertain doubts about the courts' authority to do the sorts of things that have commonly been done to manage MDL proceedings. Though Rule 23 is a secure basis for judicial authority to review the terms of proposed settlements, in MDL proceedings not involving Rule 23 the judicial role is more advisory or supervisory. There may be serious questions about whether a rule can authorize a judge to "approve" or perhaps even comment on the terms of a proposed settlement in MDL proceedings. There seems scant basis for judicial authority to bind individual parties to a proposed settlement simply because they have been aggregated, sometimes unwillingly, under § 1407.

So it may be that if more formalized provisions are needed the anchor could be the court's authority to designate a leadership structure, something that has been widely recognized. The reality is that judges may prescribe specific duties for leadership counsel (and also on occasion restrict the authority of non-leadership lawyers to act for their clients). A judge's authority to appoint and prescribe responsibilities for leadership counsel might also include continuing authority to supervise the performance of the leadership lawyers, including in connection with settlement negotiation. This undertaking could

introduce further complexity in addressing the nature of possible responsibilities leadership counsel have to claimants who are not their direct clients.

In the background, then, are questions about whether the mere creation of an MDL proceeding provides authority for a federal judge to regulate matters of attorney-client contracts, ordinarily governed by state law. One thought is that establishing a leadership structure is a matter of procedure that can properly be addressed by a Civil Rule. Establishing the structure in turn requires definition of leadership roles and responsibilities, and also requires providing financial support for the added work and attendant risks and responsibilities assumed by leadership counsel. Even accepting these structural elements, however, does not automatically carry over to creating a role for the MDL court in reviewing proposed terms for settlements, particularly of individual claims. Judges have differing views on the appropriate judicial role in providing settlement advice. Even in terms of broader "global" settlements, a wary approach would be required in considering an attempt to regularize a role for judges in working toward settlements in MDL proceedings.

The subcommittee focused during its conference call in March on identifying some of these problems without attempting to suggest that the full Advisory Committee take on the task of attempting to develop new Civil Rule provisions. During the April Advisory Committee meeting, the subcommittee sought reactions from Advisory Committee members on the following questions (as reflected in the minutes of the Advisory Committee meeting):

1. Is there any need to formalize rules of practice——whether in structuring management of MDL proceedings or in working toward settlement——that are already familiar and that continue to evolve as experience accumulates?

2. Do MDL judges actually hold back from taking steps that they think would be useful because of doubts about their authority?

3. There are powerful indications that any formal rulemaking would be opposed by all sides of the MDL bar and resisted by experienced MDL judges. Is that an important concern that should call for caution? Or is it a good reason to look further into the arguments of some academics that it is important to regularize the insider practices that characterize a world free of formal rules?

4. Even apart from concerns about the reach of Enabling Act authority, would many or even all aspects of possible rules interfere improperly with attorney-client relationships?

5. Would rules in this area unwisely curtail the flexibility transferee judges need in managing MDL proceedings?

6. Would rule provisions for common-benefit fund contributions, and for limiting fees for representing individual clients, impermissibly modify substantive rights, even though courts are often enforcing such provisions without any formal authority now?

7. Would formal rules for designating members of the leadership somehow impede efforts to bring new and more diverse attorneys into these roles?

Discussion during the Advisory Committee meeting reflected different views on these questions. One common theme was the need to gather information about the large number of MDL proceedings that have not been the focus of the subcommittee's discussions so far. Gathering such information will be the focus of the subcommittee's work this spring and summer.

2. Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

The Civil and Appellate Rules Committees have established a joint subcommittee to consider the effects of the decision in *Hall v. Hall*, 138 S. Ct. 1818 (2018). The Court ruled that final disposition of all claims among all parties in what began as a separate action constitutes a final judgment for appeal purposes, even when the action has been completely consolidated with another action under Civil Rule 42(a). The Court also suggested, however, that the Rules Enabling Act committees are the place to look for an answer if this approach creates problems.

The subcommittee decided to begin its work with empirical research by the FJC. The FJC study encompasses all civil actions filed in the federal courts in 2015, 2016, and 2017. This period has the advantage that some of these actions reached final judgment before *Hall v. Hall* was decided, generating data under each of the three other approaches to post-consolidation finality that, in all, had been adopted by a substantial majority of the circuits.

The FJC work has progressed to the point of identifying all Rule 42 consolidations in actions that are not part of MDL proceedings. For these three years there are 5,953 "lead" cases, consolidated with an another 14,777 "member" cases, making a total of 20,730 originally separate actions joined in consolidations. The types of cases that most frequently appear in consolidations have been identified. Patent actions, for example, account for 16% of all cases in consolidated actions, while consumer credit cases account for 3%. The modes of disposition also have been identified. Eighty-four percent of the lead cases have been terminated--32% settled, 10% voluntary dismissals, 22% "other dismissals," 13% dismissals on motion, and 2% tried (rounded and incomplete figures).

Much work remains. With so many cases, decisions must be made about how to construct a sample for case-specific research. Different types of cases may present different appeal profiles. Bankruptcy appeals, for example, accounted for 6% of the consolidations, but often involve proceedings distinct from most civil actions and involve different rules of appeal jurisdiction. Different modes of disposition present more obvious distinctions. Settlement of one action in a consolidation, for example, is less likely to generate final-judgment appeal issues than other modes of disposition. Some categories of cases, in short, should be under-sampled, while others should be over-sampled.

The important questions remain after the sample universe is established. These questions address the dispositions that may lead to confusion as to the time to appeal and may lead to inefficient appeals that threaten to disrupt continuing proceedings in the trial court and present appellate courts with the prospect of multiple appeals that involve the same or closely related questions. How often is there a complete disposition of one originally separate action while other parts of the consolidation remain undecided? How often is an appeal taken at that point? How often is an appeal delayed, but attempted after complete disposition of the consolidated proceeding? How often is the tardiness of an appeal recognized and dismissed, or noticed and ignored, or apparently not noticed? Is there any way to measure the consequences for effective management of the litigation that remains in the district court pending a *Hall v. Hall* final-judgment appeal, or for efficient expenditure of appellate court resources?

Detailed data may reach a level of statistical confidence, and will surely be informative. But completion of the FJC study may not be able to provide firm reassurance that the rule of *Hall v. Hall* does not lead to forfeiture of appeals as untimely, timely appeals that interfere with intricately related trial-

court proceedings, and wasteful consideration of multiple related appeals. Important subcommittee work will remain once the FJC study is completed.

3. E-Filing Deadline Joint Subcommittee

The Time Project generated a uniform definition of the end of the day for electronic filing that appears in the Appellate, Bankruptcy, Civil, and Criminal Rules. The relevant Civil Rule is 6(a)(4)(A)——the day ends at midnight in the court's time zone.

A joint subcommittee is exploring a suggestion that the end of the day be set at an earlier time. A likely candidate would be parallel to the deadline for filing by other means, "when the clerk's office is scheduled to close."

The FJC has undertaken a comprehensive study of current filing practices around the country. "This is a big data project."

The subcommittee will continue its work as the FJC study progresses.

4. CARES Act Subcommittee

The CARES Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 527 (2020), includes a provision that has not been much noticed in the popular press. After establishing a set of interim measures that authorize videoconferencing and teleconferencing for various steps in a criminal prosecution, the Act provides:

> (6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

The advisory committees have taken up this direction to consider possible rule amendments. In some measure the challenges courts have encountered in addressing public health measures to contain COVID-19 may seem common to all rules. But it is too early to guess whether common approaches will emerge. Different sets of rules address different kinds of procedures and operate under different constraints. Careful study may lead to correspondingly different responses, including a conclusion that one or another present sets of rules provide sufficient

flexibility to support proper emergency measures without needing any amendments.

The Civil Rules Advisory Committee has appointed a subcommittee chaired by Judge Kent Jordan to explore these questions. The first subcommittee meeting concluded that the most important first step is to gather as much information as can be gained about the challenges that have confronted civil actions in the last several months and about responses to them. Many sources of information are being developed. Data bases gathering information about local rules and other responses in all federal courts are continually updated. A central list of frequently asked questions is regularly revised. State court experience is being considered, with the help of the National Center for State Courts. Additional research is being conducted by the Rules Committee Staff and the FJC. And the Administrative Office has posted on its website a solicitation for reports of problems encountered by bench and bar, including both problems that have been effectively resolved through flexible application of existing Civil Rules and problems that may have proved insurmountable.

The subcommittee will meet again in June to begin considering the information that is being gathered. It is apparent already that there is a wealth, perhaps a surfeit, of information. Appraising it will be hard work. The goal, however, is to generate an initial sense of direction by late summer. A report will be made for consideration at the Civil Rules Committee meeting scheduled for October 16, if possible by a time that will permit an exchange of views with other advisory committees that will meet before October 16.

It would be premature to speculate about what the subcommittee may propose. It may be that, wisely administered in the spirit of Rule 1, present rules have proved equal to present challenges. No amendments may be needed. Or it may be that amendments will be recommended to improve a few specific rules that have stood in the way of effective procedures. Or it may be that a rule will be recommended to establish a more general authority to depart from ordinary rule requirements in response to emergency circumstances, however and by whomever emergency circumstances might be defined.

Much hard work lies ahead over midsummer.

B. Rules Carried Forward

1. Rule 4(c)(3): In Forma Pauperis Service by the U.S. Marshal

Rule 4(c)(3) may be ambiguous. The first sentence says that "[a]t the plaintiff's request," the court may order that service be made by a United States marshal. The second sentence says "The court must so order if the plaintiff is authorized to proceed in forma pauperis * * * or as a seaman." The question is whether "must so order" is independent of the first sentence, or whether "so order" refers back to the request by the plaintiff that focuses the first sentence. The Style Consultants think the answer is clear. The court must order service by a marshal in all cases with an i.f.p. or seaman plaintiff whether or not the plaintiff requests it. That reading seems consistent with 28 U.S.C. § 1915(d), which directs that when a plaintiff is authorized to proceed in forma pauperis, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." Some courts, however, have found the rule ambiguous.

This question has been considered at three committee meetings since it was first raised at the Standing Committee meeting in January 2019. Any ambiguity that may be perceived in the present rule text can be made clear. The question remains what a clear rule should say. The three most obvious choices would be to require service by a marshal only if the court enters an order on a "request" by the plaintiff; to require the court to enter the order without a request; or to require the marshal to make service without a court order.

Choosing the best clear rule requires practical information.

Requiring that the plaintiff request service by a marshal can be supported by solid reasons. Making service is a burden on the Marshals Service, particularly in districts that spread over large distances. Some plaintiffs may prefer to make service themselves——anecdotal information suggests that the choice to bypass the marshal is often made when an i.f.p. plaintiff is represented by counsel. One reason easily could be that counsel can arrange service more promptly.

Requiring that the court order service by a marshal in all i.f.p. cases can be supported as well. An i.f.p. plaintiff who does not have counsel may not understand the need to make a request, leading to lengthy delays or even potential failure of the action at the starting gate. The i.f.p. statute seems to impose a direct duty; a Civil Rule that conditions the duty on a

request by the plaintiff likely is valid as an orderly procedure for implementing the statutory right, whether or not the right be regarded as "substantive" within the meaning of § 2072(b), but good reasons should be found to justify even a modest procedural impediment.

Dispensing with the need for a court order, imposing an automatic duty on the marshal, might be an attractive alternative to requiring a court order even without a request by the plaintiff. An order, however, may be more than a bare formality. It provides direct notice to the marshal that i.f.p. or seaman status has been recognized by the court. And it makes sense for cases in which i.f.p. status is recognized after the plaintiff has already made service, and for cases in which the plaintiff prefers to make service.

The Advisory Committee has not yet been able to gather persuasive information to support a choice among these three simple alternatives.

Additional possible approaches could supplement any of these three choices. Rule 4(c)(3) refers to service "by a United States marshal or deputy marshal." It might prove more efficient to recognize the marshal's authority to appoint another person to act for the marshal. This authority might be inferred from the present rule text, but could be made secure by an explicit amendment. The amendment likely would leave the marshal free to appoint or not to appoint another person, recognizing that the marshal may not have funds available for this purpose even when it may be more efficient. There is little point in exploring this prospect, however, if the Marshals Service is unwilling to exercise the authority.

A more adventuresome approach would be to add a provision that allows the marshal to make service by electronic means with appropriate safeguards to ensure that the summons and complaint were in fact received. Electronic service could greatly reduce the burden of making service. The marshal would be relied upon to employ electronic service only in circumstances that promise a high probability of actual notice——it seems likely that many i.f.p. plaintiffs sue public institutions or public officers that have reliable electronic addresses the marshal can discover readily. Developing experience with this approach could yield an added benefit of information about the opportunity to make it available on a more general basis.

The Advisory Committee will make further efforts to gather information that will support resolution of these uncertainties. It hopes to reach a conclusion by the time of the October 2020

meeting. If solid information is found to support a choice among alternative possible amendments, the Committee will attempt to make the choice. If solid information remains elusive, however, that may of itself indicate that there is little pressing need to resolve the ambiguity that some perceive in Rule 4(c)(3).

2. Rule 12(a)(1), (2), and (3): Statutory Times to Respond

Rule 12(a)(2) is incomplete on its face in a way that illustrates a recurring dilemma: Should rule text be amended to correct every ambiguity or imperfection that may be identified? Or if the failure seems to have little practical consequence, is it better to avoid the burdens that constant rules changes impose on the Enabling Act process and a bench and bar confronted by the need to recognize, learn, and implement——or perhaps undermine——new rule language?

Rule 12(a) sets the time to serve a responsive pleading. Rule 12(a)(1) sets the presumptive time at 21 days, but begins with this qualification: "Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows * * *." The qualification appears only in (a)(1). Paragraph (a)(2) sets the time at 60 days when suit is brought against the United States, a United States agency, or a United States officer or employee sued only in an official capacity. Paragraph (a)(3) sets a like time of 60 days for a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

The problem is clearly presented by provisions in the Freedom of Information Act and the Sunshine Act that require a response in 30 days, not the 60 days specified by Rule 12(a)(2). The paragraph structure of Rule 12(a) makes it at best difficult to attempt to transport "unless another time is specified by * * * a federal statute" from (a)(1) to either (a)(2) or (a)(3). On its face, Rule 12(a)(2) seems to set up a supersession issue: assuming that the time to respond is not so far a substantive right that it cannot be abridged, enlarged, or modified by an Enabling Act rule, the 60-day period in (a)(2) would supersede a different period, whether longer or shorter, set by a statute enacted before adoption of this provision in (a)(2), while a later-enacted statute would supersede (a)(2). There is no reason to suppose that any such contest was or should be intended. Initial research has not uncovered any other statutes that cannot be reconciled with (a)(2), but they may exist now or be enacted in the future.

The situation is less clear as to (a)(3). Initial research has not uncovered any statute that sets a time different than 60 days to respond when suit is brought against a United States officer or employee in an individual capacity for line-of-duty acts or omissions. Here too, however, such a statute may exist or might be enacted in the future.

A clarifying amendment is readily drafted by transposing the exception for different times set by Rule 12 or by statute to become a preface to all of Rule 12(a): "Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: (1) * * *; (2) * * *; (3) * * * (4) * * *."

As easy as an amendment may seem, reasons for caution remain. There is no indication that widespread problems arise from the present rule text. The anecdote that inspired the suggestion to amend the rule recounted an incident in which a district court clerk initially refused to issue a summons calling for a response within the 30-day period set by the Freedom of Information Act but then was persuaded to do so. The Department of Justice regularly honors the 30-day period, or asks for an extension when an action combines claims that are subject to the 30-day period with other claims that are not. And an initial draft of a proposed amendment failed to account for the different times set by Rule 12(a)(4) for responding after the court denies or postpones disposition of a Rule 12 motion. Care is always required in amending rule text, and care may not always avoid mistake.

The Advisory Committee expects to conclude consideration of this question at its October 2020 meeting.

3. Rule 17(d): Naming Office in Official Capacity Cases

Rule 17(d) offers a choice: "A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added."

Sai, a regular contributor of suggestions for amendment, proposes that "must" be substituted for "may," requiring that the public officer be designated by official title in all cases. The officer's name could be used only when the officer is also sued in an individual capacity.

A major reason for the proposal is to simplify the procedure for responding when an individually named public official ceases

to hold office. Rule 25(d) provides that the action does not abate, and that the officer's successor is automatically substituted as a party. It also says that later proceedings should be in the substituted party's name and that any misnomer that does not affect the parties' substantive rights must be disregarded.

Automatic substitution looks nice, but something should happen to confirm the substitution in court records and the parties' filings. Naming the official capacity, in effect naming the office as the party, avoids the need for substitution so long as the office itself continues to exist. It also fills in the conceptual gap that may exist between departure from office of the incumbent who held office at the time of suit and a later appointment and substitution of a successor officer.

A more modest advantage of naming the official title or office would be to ease the task of following the subsequent history of a case as it wanders through what may be a series of substitutions as individuals enter and depart from public office. A single case may migrate through a series of names. But electronic court records and computerized legal data bases may effectively obviate most potential difficulties on this account.

Requiring that a public official sue or be sued only by official title or office may nonetheless generate conceptual problems that are avoided by offering the choice to name the official. An action that "designate[s]" only an official title for a party works only if the title represents an office that can be made a party.

The determination whether an office can be designated as a party may be made readily as to most United States offices that are frequently involved in litigation, whether as plaintiff or defendant. But uncertainty may remain in determining which names in the enormous array of those attached to elements of the federal government represent an "official title" in the sense that suit can be brought against the office and maintained by or against a successor. Imagine, for example, a title of "deputy assistant inspector of chicken processing facilities," named as defendant in an action for workplace harassment by others. It may be better to permit naming the incumbent alleged to have failed to stop the harassment than to worry about the existence of the office and corresponding official title.

The difficulties in determining whether an official title can be designated as a party are multiplied when the office is created by a state or a state subdivision. Federal litigants and federal courts may be poorly positioned to make distinctions

under obscure state law.

Conceptual difficulties abound when a state official is sued as defendant. Designating the official title as defendant invites arguments about the *Ex parte Young* fiction that avoids the Eleventh Amendment by positing that the suit is against the office holder, not the state. The fiction is so transparent that a court rule should be able to look through it to the reality. But an action against "Name, Attorney General of Minnesota" looks different from an action against "The Attorney General of Minnesota." A court rule should not lightly rely on the assumption that there is no real difference between suing the attorney general by name and suing the attorney general as attorney general.

Committee discussion suggested that few practical problems arise in present practice. Substitution of successor officials is managed readily, usually seamlessly.

This topic remains on the committee agenda for further consideration.

C. Items Removed from the Agenda

Introduction

The three proposals described here prompted initial discussion of the question whether the Advisory Committee should establish a consent calendar. The purpose would be to conserve committee resources by inviting members to reduce the effort devoted to determining that some agenda proposals should not advance for detailed development. No precise structure was identified. A rough sketch suggested that the committee chair and reporters would select items to be placed on the consent calendar, relying on criteria that indicate a low probability that committee resources should be invested in further consideration. The focus would be on proposals that seem doomed to fail, rather than on summary advancement of proposals that seem destined to advance. Some proposals rest on a misunderstanding of current law. Others involve specific instances of probably erroneous acts by courts that do not rise to a level of frequency or importance that justifies the work of pursuing an amendment through the full Enabling Act process and adoption into practice. Some topics prompt repeated proposals that have been studied and put aside, perhaps recently and at times persistently; the offer-of-judgment provisions in Civil Rule 68 are a leading example. Still others are simply puzzling. A proposal placed on the consent agenda would be advanced for full consideration on request by any single committee member made

at least a week before the committee meeting; later requests would defer full consideration to the next meeting.

Committee discussion did not reach a conclusion whether to institute a consent agenda. The Judicial Conference maintains a consent agenda that commonly includes proposals from the Standing Committee. The analogy is incomplete, however, because the Judicial Conference is acting on rules matters that have been carefully developed through repeated consideration by two committees and public comment. A consent calendar for an advisory committee would operate at the very beginning of the process.

Concerns were expressed that a proposal that seems ill-founded on first inspection may, after inspection by all committee members, prove worthy of further development. Careful examination should not be discouraged by an invitation for superficial review.

A further concern is that a consent calendar implies that some proposals are not treated with as much care as others. There would be an appearance that the committee does not take seriously proposals on some topics or from some sorts of proponents. It is important that diligent committee consideration be afforded all proposals, and also important that a high standard of care be perceived by all those interested in committee work, including the general public.

The hope for increased efficiency also may prove illusory. Committee members would need to devote some effort, often not inconsiderable, to searching for hidden value in proposals that at first sight do not seem worthwhile. Then the effort would have to be repeated and expanded if any member requested that a proposal be moved to the full discussion calendar. Further duplications of effort and delay would result if routine description of the consent calendar at a committee meeting led to advancement for full discussion, likely at the next regularly scheduled committee meeting.

The consent calendar question will be on the agenda for further discussion when the Advisory Committee meets in October.

1. Rule 16: Judicial Involvement in Settlement

This submission proposed three amendments of Rule 16. The central change would be to exclude trial judges from participating in settlement conferences. The committee considered a similar proposal in depth not long ago, and concluded that judges are well aware of the competing risks and need not be constrained by new rule provisions.

A second change would establish "objective" standards for sanctions for failure to prepare or participate in good faith in a Rule 16 conference. A few instances of seemingly inappropriate sanctions were described. The committee thought widespread misuse of sanctions is unlikely, and doubted that amended rule language would be effective to deter such misuse as may occur.

The third change would add "substantive and procedural safeguards" to local district ADR rules, or to the Evidence rules.

This topic was removed from the agenda.

2. Time Limits in Subpoena Enforcement Actions

The thrust of this suggestion was not entirely clear. Much of it seemed to argue for imposing strict time limits measured in days in all proceedings to enforce subpoenas of every sort. But the limits were so clearly inappropriate for trial subpoenas, discovery subpoenas, independent proceedings to enforce administrative subpoenas or equivalent demands for information that the proposal may have been intended only for the examples given——actions brought by Congress to enforce subpoenas directed to executive officials.

Committee discussion focused on congressional subpoenas. The time limits proposed did not seem sensible for these proceedings. Nor is there any apparent reason to consider more realistic limits. Courts seem to be responding to these actions by balancing the need for careful consideration of often sensitive issues against the need for prompt disposition that arises from the same sensitivities.

This topic was removed from the agenda.

3. Rules 7(b)(2) and 10

This proposal addresses issues of the fit of Rule 7(b)(2) with Rule 10. It describes the issues as "technical," and recognizes that in practice "litigants and counsel simply ignore the problematic language, if they notice it at all."

The problems described draw from the precise words used in Rules 7(b)(2) and 10(a). Rule 7(b)(2) seems direct: "The rules governing captions and other matters of form in pleadings apply to motions and other papers." Rule 10(a) directs that "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation." But how does this work? A motion is not a pleading. How, then, can it bear a

"Rule 7(a) designation"? Should a motion for summary judgment be called a complaint, an answer to a third-party complaint, or anything else in the Rule 7(a) list of all permitted pleadings? The list of paradoxes is extended across other examples.

The Advisory Committee concluded that there is little reason to work through the full Enabling Act process to address issues that even the proposal concedes do not present practical problems. Even as a matter of style, the profession recognizes that the relationship between Rule 7(b)(2) and Rule 10 "is a process of analogy, not literal reading."

This topic was removed from the agenda.

APPENDIX

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APPENDIX

Summary of Comments on Published Amendment to Rule 7.1

RULE 7.1(a)(1): INTERVENOR

0006: Richard Golden: Disclosure should be expanded beyond corporations and it does not define "publicly held." Other forms of entities may be publicly traded. The rule should require disclosure as to any entity subject to registration under the Securities [sic] Act of 1934. (The reasoning of this comment applies to disclosure by a party under the present rule, not to intervenors alone.)

0022: Frederick B. Buck for American College of Trial Lawyers: The intervenor proposal is "non-controversial and necessary for conformity with the Appellate and Bankruptcy Rules."

0029: Jim Covington for Illinois State Bar Association: This will conform Civil Rule 7.1 to Appellate Rule 26.1, and will provide information that may be relevant to the judge's decision on disqualification. There will be no undue burden.

RULE 7.1(a)(2): ATTRIBUTED CITIZENSHIP

General Support

(Several comments are identified by number and name only because they reiterate common themes in supporting the proposal.)

0013: Maria Diamond: Offers strong support. "This problem arises more frequently than might be thought." The problem has been encountered in nursing home injury cases involving LLC ownership.

0015: Tim Lange: "[I]n strong favor * * *. The Federal judiciary is regularly abused by improper removal of diversity cases." This is no inconvenience to the removing party.

0016: John H. (Jack) Hickey: "[A] positive step." The amendment "would prevent removal where it is in fact not available.

0017: Raeann Warner: Supports. "This will discourage improper removals and increase the efficiency of litigation or practice with regard to removals."

0018: Bruce Stern, American Association for Justice: "Information about the owners/members of defendant attributable-citizenship entities is often complicated and difficult for plaintiffs to ascertain before the benefit of discovery." Disclosure imposes only minimal burdens, providing information about jurisdiction earlier and protecting against delayed discovery.

0019 (duplicated as 0023): Philip L. Willman, DRI: Supports, with three suggestions to improve noted below.

0021: Bruce Braley: Recounts filing an action against an LLC, one of whose members is an LLC. The court ordered the plaintiff to identify the members of an LLC that is a member of the defendant LLC, and to identify their citizenships. If any of the members is an LLC, the same identifications must be provided. The order, entered on December 21, gives until January 19 to respond. "[P]arties have to incur substantial costs to track down the members of each individual LLC, and if that member is an LLC, each and every member of THAT LLC, and on and on and on." Disclosure will enable the parties and court to promptly identify who needs to be named and identified in the jurisdictional allegations.

0022:Frederick B. Buck for American College of Trial Lawyers: Opposes citizenship disclosure for reasons summarized with "general opposition" below.

0024: Richard Shapiro.

0025: Ian Taylor.

0026: Leland Belew: The defendant manufacturer of the ladder claims "not to really exist anywhere." Records of the state of incorporation can be out of date, and do not provide a reliable basis for determining the principal place of business. Jurisdictional discovery is ongoing. Disclosure would be better.

0028: Bill Cash: Ascertaining the citizenship of an LLC is often impossible before filing. Disclosure "makes sense."

0029: Jim Covington for Illinois State Bar Association: A plaintiff may have to plead diversity jurisdiction on information and belief. It is in the interests of the parties, the courts, and the public to determine diversity jurisdiction as early as possible.

0030: Sean Domnick: The earlier diversity can be determined, the better.

0031: Nicholas Deets.

0033: Patrick Yancey: "No more tricks and more time for treats!"

0034: Mike Stephenson.

0035: Nelson Boyle: "The proliferation of LLCs has created a problem and this is a logical solution."

0036: Stephen Marino: "The unnecessary and improperly broad exercise of diversity jurisdiction impairs the state courts' exclusive jurisdiction of non-diverse, state law based cases." Disclosure "also will protect the limited jurisdiction of federal courts."

0037: Brian Mohs: Now discovery is needed to determine diversity. Disclosure "is in everyone's interest."

0039: Ian Birk: The proposal "promot[es] the federalism balance that Congress struck in framing the diversity statute." It will avoid the waste that arises from belated realization that there is no diversity jurisdiction—waste that cannot always be cured by dismissing a diversity-destroying party. It will help when a party removes an action from state court without consulting with other parties about their citizenship. And the burden of disclosure, which "will take on a routine format," will be less than the burdens of jurisdictional discovery.

0040: Jonathan Feigenbaum: The same points as 0039, adding that some courts already require disclosure sua sponte.

0041: Frederick Berry: "Since the adoption of the Federal Insurance Office Act of 2010, 31 USC 313, and the Nonadmitted and Reinsurance Reform Act of 2010, 15 USC 8202, I have seen an explosion of nontraditional risk bearers who operate within complex business organizations * * *." The forms may be LLC, partnership, trust, corporation, or association. "Unfortunately, they often seek diversity jurisdiction when there is none."

0042: Cayce Peterson.

0043: Jessica Ibert: A plaintiff may find it difficult to determine citizenship, both because of the time required to investigate and because of the risk of reaching incorrect conclusions. The burden of disclosure is not onerous "as this is information that is easily accessible and readily available to the entity."

0044: Chris Zainey: Similar to 0043.

0045: Richard Martin: This will preclude frivolous removal. It is not always easy to parse out the citizenship of an LLC defendant.

0046: Anonymous Anonymous: Inquiry into the ownership of an LLC or other business structure can be costly, and an attorney's conclusions may be wrong. Plaintiffs, defendants, and courts will benefit from disclosure.

0047: Michael Cruise.

0048: Nicholas Verderame: "The fact that this rule change was proposed by a Federal judge demonstrates just how much these tactics clog up the Bench."

0049: Neil Nazareth: The proposal "promotes transparency and forces parties to perform due diligence internally on the front end."

0050: Crystal Rutherford.

0051: Mark Larson.

0052: Betsy Greene: "This rule is not onerous and puts little burden on the parties to provide information that frequently cannot be located anywhere else."

0053: Elizabeth Hanley: Experience in employment and personal injury cases based on state law shows that these actions are often improperly removed. Disclosure will "greatly assist in reducing the waste of resources caused by improper removal."

0054: George Tolley.

0055: Sam Cannnon: Supports, but finds an ambiguity in "at the time the action is filed," as noted below.

0056: Kyle Olive: "[I]t makes so much sense." A defendant seeking removal should be required to prove diversity.

0057: Eugene Brooks: "I've had a terrible experience in which Defendant LLC did not divulge all LLC members until trial court order went up on appeal * * *. Only then did Defendant, at Court[']s request, advise of over 40 LLC members, including additional LLCs. Lost diversity jurisdiction. Huge mess thereafter."

0058: Michael Goldberg: "The burden on counsel if any at all, is nominal.

0059: Ty Taber: "The proposed changes * * * are long overdue * * *."

0060: Ingrid M. Evans: Complex questions of citizenship often arise "when one or more party is a partnership, LLC, joint venture or other form of pass-through business entity involving a collection of individuals or businesses."

0061: Daniel Laurence: Litigants often play "hide the ball" "in efforts either to enter or exit a federal court for strategic reasons." Sometimes the strategies work, sometimes not. In the worst cases, a defendant may not seek immediate dismissal "to impose a great financial expense on another party, and/or to delay dismissal until after the limitations period has expired.:

0062: Kent Winingham.

0063: Kirk Laughlin.

0064: David Scott: This is a simple but important amendment. "Anytime a party to the case was an LLC, determining its citizenship prior to filing suit against it, was virtually impossible."

0065: P Gregory Cross: The proposal is important not only for the courts but also for the lawyers and parties. The difficulty of determining citizenship has expanded greatly since the early 1990s with the proliferation of LLCs, LLPs, and similar organizations. Lawyers uncertain whether diversity jurisdiction exists not only encounter real burdens in making the determination but also in the costs of uncertainty as to jurisdiction. They proceed cautiously in making litigation choices when they are not sure what procedures will apply, what choices of law will be made, and so on, "and

procrastination is commonplace."

0066: Lee Cope.

0067: Altom Maglio: Disclosure imposes no additional burden: "A party is aware of its own structure and citizenship." In consumer class actions against multinational corporations, "[t]he newest defense of the indefensible is jurisdictional Three-card Monte. Nope, you can't sue us []here, not there, not anywhere."

0068: Douglas E. Miller, USMJ, for Federal Magistrate Judges Association Rules Committee, as approved by the Executive Committee: Approves, suggesting two edits of the committee note.

0069: Hubert Hamilton: "This rule is long overdue. If a case is removed to federal court, all parties should be required to immediately disclose citizenship of owners/members * * *."

0070: Charles Monnett.

0071: Ryan Skiver.

0072: Nick Duva (Certified Anti-Money Laundering Specialist): the amendment "creates a minimal, if any, burden on the parties. Banks and other financial institutions are already required under state and federal law to collect and maintain disclosure statements from their entity customers, listing with specificity the ultimate beneficial owners, citizenship, ownership percentages, and other identifying information & documentation. The ultimate beneficial ownership disclosure is required to be complete and updated on a regular basis as an important component of the bank's anti-money laundering, financial crimes, and fraud protection programs."

0073: Michael Warshauer" "[T]his is information that [the party] has readily available." "Our courts should be public. Requiring a party (whether a plaintiff or a defendant) to identify itself completely is consistent with this long held tenant [sic] of our judicial system."

0074: Bill Cremins.

0075: Matthew Sims: Often privately held entities "do not have organizational information within the public domain. Almost always, this information is known to a defendant and is easily ascertainable at little or no cost."

0076: Edward Zebersky.

0077: David Arbogast: "[A]ll too often, a defendant sued in state

court removes a case to federal court who lacks diversity of citizenship."

0078: Christine Spagnoli.

0079: Marion Munley.

0080:Ellen Relkin: Offers one example of a medical device wrongful death case removed from state court and ultimately remanded. More than three weeks after removal, and after more than 20 filings were submitted to the federal court, a codefendant revealed an ownership interest that defeated diversity. But the manufacturer defendant persisted in refusing consent to remand and continuing litigation, including two motions to dismiss that were summarily denied. More than 30 filings had been made when the court granted the plaintiff's motion to remand. Nearly three full months were wasted in federal court.

0081: Katie Nealon.

0082: Melinda Ghilardi.

Expand

0005: GianCarlo Canaparo: The rule should require every party to disclose its own citizenship. Rule 8 is not enough——some pleadings fail to allege citizenship; counsel may not be diligent to uncover true citizenship; a party may deliberately conceal citizenship. "attributable to that party" could be read to require pleading the party's own citizenship, but that is an unnatural reading. The rule text should explicitly require disclosure of a party's own citizenship. (The same views are expressed in M. Canaparo's testimony at the October 29 hearing, set out in 0010.)

0008: William Cremins: This is a good idea, but it should apply "regardless of whether the defendant is a corporation, LLC, partnership, etc." Each business structure should be reached. (This might be read as a drafting question addressed to the proposed text: "every individual or entity," and related to the examples offered in the committee note.)

0011: Joseph Sanderson: Strongly supports as "vitally important." It should apply to all forms of jurisdiction based on citizenship, including alienage, "not just diversity jurisdiction." (Alienage is included in § 1332(a) and the proposed rule. The minimal diversity statutes are not——CAFA, §1332(d); interpleader, § 1335; single accident multiparty, multiforum, § 1369.)

0018: Bruce Stern, American Association for Justice: The rule should not be expanded "to apply to *all* parties, not just entity litigants whose owners/member citizenship can be attributed to them." "[N]o concerns have been raised about properly determining citizenship, for diversity purposes, of individuals or corporate litigants."

0019, 0023: Phillip L. Willman, DRI: suggests three additions to rule text: "identifies, as specified by that statute, the citizenship of that party and every individual or entity whose citizenship is attributed to that party at the time the action is filed in district court." (1) "As specified by that statute" makes clear that the rule includes all citizenships of a corporation, and the provisions for direct actions against insurers and for legal representatives. (2) "that party and" requires a party to disclose its own citizenship——a legal representative need not disclose its own citizenship since that is not relevant to diversity jurisdiction. (3) "in district court" to make it clear that the time of filing a notice of removal from state court is what counts.

DRI also proposes an amendment to Rule 7.1(b)(1) to forestall the risk that a party may go for a long time without triggering the time to disclose: "file the disclosure statement with its first

appearance, pleading, petition, motion, response, or other request addressed to the court or within 60 days of the [sic] filing the case in district court, whichever is earlier * * * [A similar suggestion is advanced by GianCarlo Canaparo, 0010: "or within 21 days after service of the first filing in the case, whichever is earlier.] {Note that 60 days after filing often will not work—— sixty days may elapse before a defendant is served, a new party is joined, and so on. 21 days after service of the first filing in the case could work if it means after service on the party obliged to make a disclosure, but again cleaner drafting would be required.}

0027: S. Taylor Chaney: This comment assumes that the citizenship of a subsidiary of an unincorporated entity parent is attributed to the parent. The suggestion is that the rule should be made crystal clear to reflect this rule.

0031: Karl Bengtson: Undue burdens may be imposed on a party by the requirement that it disclose all attributed citizenships. Identification may be difficult when a person has an ownership interest but no active involvement with the party. Examples include a member who has left his former domicile without providing a new address, or the death of a member with an estate too small or too encumbered to justify formal administration. "Unless the court orders otherwise" is a start, but it would be better to provide explicit discretion to limit the investigation a party must make into its own citizenship.

Drafting Questions

0003: Mariko Ashley: (1) Not clear which party is responsible for filing. (2) "Whose citizenship is attributable to that party" is confusing: Must a party disclose its own citizenship? (3) What if the defendant has not yet been served? (4) Removed actions are not specifically addressed.

0007: Allison Lee: "At the time the action is filed" is confusing: it should be "filed in federal court" to eliminate confusion in removed cases.

0010: GianCarlo Canaparo: Rule 7.1(b)(1) requires that a party filing a notice of removal include the 7.1 disclosure. But the complaint in state court may not provide the plaintiff's own statement of citizenship. (Implicitly ties to the fear that a complaint initially filed in federal court may not accurately plead the parties' citizenships—the notice of removal may do no better.)

0013: Maria Diamond: Expresses concern about "potential disclosures regarding the status of non-citizens."

0018: Bruce Stern, American Association for Justice: The committee note should be revised to allow the court to protect the names of identified persons against disclosure when there are substantial interests in privacy or safety, regardless of a need to support discovery by other parties to go beyond the disclosure. This is important to protect an undocumented foreign national.

0055: Sam Cannon: Supports, but fears that on strained reading, "at the time the action is filed" could be read to refer not to citizenship at the time of filing but to the time to file the disclosure statement. No reference is made to the time-of-filing provisions in present Rule 7.1(b)(1).

0068: Douglas E. Miller, USMJ, for Federal Magistrate Judges Association Rules Committee, as approved by the Executive Committee: Approves, but suggests two edits to the committee Note:

(1) " * * * the court may limit the disclosure upon motion of a party * * *." This will ensure that the Note does not imply an independent responsibility of the court.

(2) "Or the names of identified persons might be protected against disclosure to the public, or to other parties * * *." Protection of private information against public disclosure is often important, justifying filing under seal, in circumstances that require disclosure to other parties who need to determine whether diversity exists.

0014: Anonymous Anonymous: Rule 8 requires that the plaintiff plead jurisdiction. The defendant can admit or deny. Disclosure is redundant and imposes a burden. If a party denies diversity, the court can direct discovery or other procedures. In addition, requiring disclosure by a defendant improperly makes the defendant assist in its own prosection. The amendment applies to "individuals who are not entities and are alone." Nor does the rule say who is to file the disclosure. And it does not explain when the court should "order otherwise."

0022: Frederick B. Buck for American College of Trial Lawyers: The best, but unlikely, solution is for the Supreme Court to revise its view that LLCs should be distinguished from corporations for § 1332 diversity jurisdiction, or for Congress to amend § 1332. Failing that, Rule 7.1 disclosure is a bad idea. The necessary information should be sought through discovery or at the scheduling conference.

For the most part, jurisdiction is properly pleaded, and jurisdictional issues raised by the pleadings are resolved early in the proceedings through discovery or other means. It is not common to waste judicial resources on a case that ultimately must be dismissed for lack of diversity.

Rule 7.1 was adopted to call for disclosure of financial interests that may require judicial recusal. It should not be expanded to this quite different role.

Pleading subject-matter jurisdiction is addressed by Rule 8(a)(1). If a special provision is needed for diversity jurisdiction as to LLCs, it should be added to Rule 8 as a pleading requirement.

When the citizenship of an LLC presents a complex issue, Rule 7.1 disclosure may be unworkable. The disclosure must be filed early——so early that "an LLC may be unable to identify citizenship of all its members in order to timely comply."

Disclosure raises significant confidentiality concerns. The LLC form may be chosen because of a desire for confidentiality. "Unless the court orders otherwise" is not sufficient protection.

The better course is to address citizenship questions at the Rule 26(f) conference and to include a statement of jurisdiction in the 26(f)(3) discovery plan. If needed, the court can order jurisdictional discovery.

0038: New York City Bar Committee on Federal Courts: Offers seven sets of reasons for abandoning the Rule 7.1(a)(2) proposal:

(1)Rule 7.1 should be limited to disclosing facts that bear on judicial disqualification. The vast array of facts that may be disclosed under the proposal may distract attention from the bits of information that actually bear on disqualification; may risk unnecessary disqualification; and will generate unwarranted motion